

## PANEL II: PROPERTY AND THE CONSTITUTION\*

### FORTY ACRES AND A MULE: A REPUBLICAN THEORY OF MINIMAL ENTITLEMENTS

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Let me begin by mapping out what, for this Federalist Society audience, I take to be common ground. Pure socialism is bad. A system of private property, at least up to a point, is good. A regime in which the state controlled all resources would threaten both individual liberty and true democracy. Quite literally, in such a socialist society, the citizen would have no ground of her own on which to stand, to define herself, and to resist government tyranny.

I will now move from this common ground to stake out a position that for this group may seem far less obvious. Private property is such a good thing that every citizen should have some. Indeed, a minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share. But wait—there's more. The notion of minimal entitlements is not simply constitutive, it is constitutional—not just constitutionally permissible, meaning that the government *may* distribute or redistribute to insure every citizen a minimal stake in society, but constitutionally obligatory. The government *must* do so. The Constitution does not enact Mr. Herbert Spencer's *Social Statics*,<sup>1</sup> but it does enact Mr. Thaddeus Stevens's forty acres and a mule.

Now that I have your attention, let me explain. There is a tradition deep in American constitutional law that I shall refer to as the "R/republican tradition," with both a lowercase and a capital "R." This tradition was a driving force behind a number

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1. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

of significant political movements that helped shape the American political experience. These include Abraham Lincoln's Republican party in the 1860s (and before it the Free Soil party), Thomas Jefferson's Democratic Republicans at the turn of the Nineteenth Century, and before that, the ideological platform of a group of commonwealth writers, most prominently James Harrington, in England in the Seventeenth and Eighteenth Centuries.

In this R/republican tradition, there is a recognition that for one truly to be a citizen in a democracy and to participate in the democratic process, one needs a minimum amount of independence. Economic independence is necessary if the citizen is to be able to deliberate on the common good, the *res publica*, the thing public. (Hence the word republicanism.) According to this tradition, the problem of poor people is that, in a real way, they have no wills of their own. You may give them the right to vote, but they will alienate that right. They will sell it either to rich people or to foreign tyrants. They lack some minimal stake in society sufficient to connect their own personal interests with that of the larger public interest. This lack of individual independence is one of the reasons that Thomas Jefferson was so concerned about cities and so hostile towards them. He saw cities as breeding grounds for the kind of urban proletariat that had no real stake in the common venture.

I suggest that there are two basic ways of dealing with the R/republican notion that in order for a democracy to work, people must have a stake in society. The first way is the dark side—the exclusionary side—of the R/republican vision. It is the Athenian solution, and I would suggest the original American solution. That solution is to enslave people, to ruthlessly disfranchise people who do not have property, to adopt poll taxes and property qualifications. Indeed, human slavery led to a host of economic rights provisions and property provisions in the original Constitution. We see economic protection of slavery in the two clauses about importation of slaves.<sup>2</sup> We see it in the Fugitive Slave Clause<sup>3</sup> and the three-fifths rule,<sup>4</sup> and it is lurking behind several other clauses in the Constitution.<sup>5</sup>

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2. U.S. CONST. art. I, § 9, cl. 1; *id.* at art. V.

3. *Id.* at art. IV, § 2, cl. 3.

4. *Id.* at art. I, § 2, cl. 3.

5. See generally R. COVER, *JUSTICE ACCUSED* 150-53 (1975); Diamond, *No Call To Glory*:

These clauses are dramatic evidence that economic rights and property are not necessarily a good thing. We need to ask questions about their distribution. Who has economic rights? Who has rights to property? And to how much? And for what purpose?

Edmund Morgan, in his brilliant book *American Slavery, American Freedom*,<sup>6</sup> elaborated on the seeming paradox that in Seventeenth- and Eighteenth-Century America, radical language about liberty, equality, and the rights of man coexisted in the same society that enforced a regime of human slavery. But in a way, it was not a paradox at all because it was the enslavement of many people that provided the economic well-being of the rest who constituted the polity. Ironically, slavery provided a rough equality among whites—they were all equal in being free men—and enough economic rent to allocate to poor whites to make them economically independent.

This original R/republican solution was radically modified by the Civil War and the Thirteenth Amendment.<sup>7</sup> The solution to the problem is no longer the Athenian solution of enslavement. It is now an inclusionary solution, a solution that says We the People of the United States will not allow a degraded caste of people to exist in our society. It is a solution that provides people with inalienable property rights in their own persons. Moreover, I suggest, it is a vision that, especially under section two of the Thirteenth Amendment,<sup>8</sup> provides for forty acres and a mule. It is a vision that provides a right to sustenance and shelter: minimum sustenance, minimum shelter.

I submit that the standard legal discourse has deradicalized this Thirteenth Amendment vision, this inclusionary vision. The people who adopted the Thirteenth Amendment provided for rights against the world. A martian looking at our Constitution would probably see the Thirteenth Amendment as its most radical provision.<sup>9</sup> There is no state action requirement, unlike

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*Thurgood Marshall's Theory on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93 (1989).

6. E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* (1975).

7. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

8. *Id.* at § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

9. So does at least one comparativist. See Damaska, *Reflections on American Constitutionalism*, 38 AM. J. COMP. L. — (forthcoming 1990).

just about every other provision in the Constitution. We fought a civil war over the slavery issue. The Thirteenth Amendment radically changed the social and economic structure of our society. The people who adopted it did not know that the Fourteenth and the Fifteenth Amendments were going to follow. They thought the Thirteenth Amendment was quite broad. Moreover, I submit that, if anything, we should read the Thirteenth Amendment even more broadly in the wake of the later adoption of the Fourteenth and Fifteenth Amendments.

When the Reconstruction Amendments are viewed as a whole, a radically different vision of society emerges. Precisely because the Fifteenth Amendment gave former slaves the right to vote,<sup>10</sup> and the Fourteenth Amendment made them citizens by dint of their birth,<sup>11</sup> we should interpret the Thirteenth Amendment to guarantee each American a certain minimum stake in society. Otherwise, We the People of the United States really failed to set the slaves free—free from economic dependence. Without guaranteeing independence, it would have been both futile and dangerous under R/republican principles to have extended the rights of equal citizenship and equal votes to freedmen. Thaddeus Stevens and his allies, for example, had policies of subsidized public education, of land redistribution in the South—forty acres and a mule—and of homesteading in the West—160 acres in the Homestead Act.<sup>12</sup>

The connection is clear between the educational vision of *Brown v. Board of Education*<sup>13</sup> and that of Thaddeus Stevens. Equally clear is the fact that the new economic rights under the Reconstruction Amendments are redistributive, at least in part. Land reform in the South redistributed property rights. Indeed, the Thirteenth Amendment itself effected the most massive deprivation of slaveholder property without just compensation imaginable, notwithstanding the Takings Clause.<sup>14</sup> Public education can also be seen as redistributive.

10. See U.S. CONST. amend. XV, § 1.

11. See *id.* at amend. XIV, § 1.

12. The Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (repealed 1976); see J. BLUM, E. MORGAN, W. ROSE, A. SCHLESSINGER, JR. & K. STAMPP, *THE NATIONAL EXPERIENCE* 362 (3d ed. 1973); see also *MEMORIAL ADDRESSES ON THE LIFE AND CHARACTER OF THADDEUS STEVENS* (1869).

13. 347 U.S. 483 (1954); see *id.* at 493 (education “is the very foundation of good citizenship”).

14. U.S. CONST. amend. V; see also *id.* at amend. XIV, § 3 (voiding all claims for shareholder compensation).

Wealthy people pay more school taxes than poor people, but poor children are no less entitled to public education. In the West, we did not auction off lands to the highest bidder. Behind the homesteading provisions there was a distributional vision of giving subsidized land to folks if they were going to farm their own homesteads.

What happens when there is no longer enough land left? The availability of such land, of course, was assumed by John Locke in his famous Lockean proviso.<sup>15</sup> I suggest that there is a connection between the “safety valve” of western land 100 years ago and language about the “safety net” today, language about trying to create situations in which everyone has a minimum stake in society. It is interesting to note that soon after the closing of the West around 1890, Americans adopted the Sixteenth Amendment, which provides not simply for an income tax, but a predictably progressive—that is, a *redistributive*—income tax.<sup>16</sup>

Professor Epstein has made some arguments about how the Federalist Constitution was anti-redistributive.<sup>17</sup> His argument, as I understand it, is not so much textual as structural, looking to the ideological background of the Framers of the Constitution. If one is going to engage in that level of generality in constitutional interpretation for the original Constitution, then to be consistent, to be a principled interpretivist, one has to be willing to do the same thing when looking at the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments. One then has to recognize that these amendments were motivated by a rather different vision of economics and democracy than that of the original Constitution.

Let me end with several quick caveats, lest I be understood to be making an even broader argument than I intend to. First, the notion of minimal entitlements is not a notion that everyone should have an equal amount of property. It is more a Thirteenth Amendment vision than a Fourteenth Amendment vision. It is not an argument that equal protection under the Fourteenth Amendment means equal property, but rather that freedom under the Thirteenth Amendment implies a notion of some minimal entitlement. So to the extent that many members

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15. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, § 27 (T. Peardon ed. 1952) (1st ed. London 1690).

16. See Amar, *Our Forgotten Constitution*, 97 *YALE L.J.* 281, 291-92 (1987).

17. See generally R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

of this audience find freedom a more compelling ideal than equality, they should welcome my invitation to shift our focus from the Fourteenth to the Thirteenth Amendment.

Second, this vision is not a socialist one. It celebrates the notion of private property but suggests that we have to extend the benefits of that institution to all citizens of society. This is the vision of Charles Reich in his classic article on the new property.<sup>18</sup> It might suggest some implications for the *Rodriguez* case<sup>19</sup> dealing with a right to a minimally adequate public education, or for voucher systems in employment and education—not a socialist system, in which people have equal property rights in each other's incomes.

Third, forty acres and a mule is not a dole. It is not welfare. It is much more like workfare. Forty acres and a mule do not yield a harvest without labor, and in the process of laboring, a citizen can gain self-respect and the respect of others. We must remember that our goal is to create *independent* citizens. Ironically, many current welfare programs may have moved us away from that goal by perpetuating cycles of dependency. By contrast, the kind of education and job-training programs I am advocating here are designed to promote self-sufficiency and reward hard work.

Fourth, I have not, at least here, argued that this Thirteenth Amendment vision of forty acres and a mule is judicially enforceable under section one of the Thirteenth Amendment. There may very well be a variety of institutional limitations on courts that make them unsuitable for the task.<sup>20</sup> Rather, I would like to stress the obligation—not only a moral obligation, but a legal, a *constitutional* obligation—of Congress, under section two of the Thirteenth Amendment. Congress has both a constitutional right and a constitutional duty to implement this vision.

Perhaps the legal obligation argument can be pushed even further. Unlike virtually every other constitutional provision, the Thirteenth Amendment creates rights against, and thus imposes duties on, private citizens. Even if courts for institutional

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18. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

19. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

20. See generally Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 175-77 (1976); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

reasons cannot directly and fully enforce these duties, each of us may well have an obligation as a citizen to help assure each of our fellow citizens some minimal entitlements. We might be able to discharge this obligation in any number of ways—for example, by giving our time or money to private programs and intermediate associations (churches, charities, schools, and so on) that seek to provide minimal entitlements of education and property to our co-citizens. But once again, perhaps this obligation to be “points of light” is not merely a moral one, but a legal, a *constitutional*, duty as well.

Finally, I am not rejecting, but simply modifying, the three basic procedural notions of prospectivity, generality, and non-discrimination, said by some to underlie our constitutional scheme of property protection. Prospectivity has to be complemented by a vision of substantive baselines. Prospectivity, or non-retroactivity, says that whatever existing property rights you have must be respected prospectively. But we need a theory about initial baseline entitlements—starting points. We need a theory about the birthrights of inheritance of every American citizen. That is what the Thirteenth, Fourteenth, and Fifteenth Amendments are all about: birthrights of every American citizen.

The proposition about generality must be supplemented by a vision of independence of citizens. The way to create that independence is to give every citizen a stake in society. This is good both for the individual and collective self-governance, much as freedom of speech can be derived from both an individual theory of personhood, autonomy, and self-expression, and also from a theory of democratic self-rule. So whether we begin with a vision of individual dignity and human rights, or (as I have here) stress the structural requirements of R/republican government, we are led to the idea of guaranteed minimal entitlements.

Last, the notion of nondiscrimination—which is often assimilated by people like Professor Epstein to non-redistribution—has to be qualified by the need to accommodate modest redistribution so that we can make real today the vision of forty acres and a mule for every American.