

REMEMBER THE THIRTEENTH

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My idea in this essay is simple, but I hope significant. It can be summed up in three words: Remember the Thirteenth. (By which I mean, of course, the Thirteenth Amendment to the United States Constitution.) My proposition is that however true generally the notion that the Constitution applies only to action of the state—the government—the Thirteenth Amendment is an important counter-example, and its significance is underappreciated in a wide range of contexts where issues of state action and private power have been problematic. I will discuss three applications today: first, the *DeShaney*¹ case involving child abuse; second, the racial hate speech and cross-burning at issue in last term's *R.A.V. v. City of St. Paul*;² and third, the notion of minimal entitlements—what I like to call 40 acres and a mule.

Let me begin with the *DeShaney* case. *DeShaney* involved, most of you will remember, a situation of brutal child abuse perpetrated by Randy DeShaney, the biological father of little Joshua DeShaney. State social workers had knowledge of the abusive situation and did nothing; and yet the Supreme Court said there was no constitutional problem here because the state didn't act, and therefore the Fourteenth Amendment Due Process Cause wasn't violated. I suggest that we should instead think about *DeShaney* as a Thirteenth Amendment case. Let me begin with a hypothetical from, let us say, 1868, implicating the very core of the Thirteenth Amendment: Former slave masters acting in violation of law round up—kidnap—former slaves and try to re-enslave them by brute force. Now, the Thirteenth Amendment clearly applies to that private action: Slavery, the Amendment commands, shall not exist. So far you might think, “okay, the Thirteenth Amendment does pro-

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1. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).
2. 112 S. Ct. 2538 (1992).

hibit certain kinds of private action," but I suggest the Amendment also and relatedly prohibits certain kinds of state *inaction*. There's a connection, as John Garvey pointed out,³ between the issue of state versus private and the issue of action versus inaction. If, in our 1868 hypothetical, the ex-slaves or persons acting on their behalf had come to court seeking a writ of habeas corpus to order the release of the blacks being held in captivity, the court would have been obliged to *act*—to act on that habeas petition. The court—the state—could not simply have closed its eyes and ears, and sat on its hands. Such willful and unjustified inaction would have been a violation of the Thirteenth Amendment, and that was easy in 1868. So the Thirteenth Amendment clearly applies to *private* action—the kidnapping club—and to state *inaction*: the state or federal judge who, when given knowledge of the situation, looks the other way. Both private action of a certain sort and state inaction of a certain sort are prohibited, because the Thirteenth Amendment commands that slavery shall not exist in the United States.

Now you might think that this has rather little to do with Joshua DeShaney—that there might seem to be some key distinctions between Joshua DeShaney and the kidnapped slaves in my 1868 hypothetical. I think all of the distinctions are illusory. Joshua DeShaney is, to be sure, a child and not an adult, but so were many slaves who were freed by the Thirteenth Amendment. Indeed, an early congressional statute implementing the Thirteenth Amendment, the so-called Padrone statute, was quintessentially about children who were brought over from Italy and put to work by masters (called padrones).⁴ The very first Thirteenth Amendment case that Chief Justice Salmon P. Chase heard after the Amendment's ratification was a circuit case involving a 10 year old girl, and he had no doubt that the Thirteenth Amendment applies to children.⁵

You might think Joshua DeShaney is different because he's white not black; but the core of section 1 of the Thirteenth Amendment clearly applies to all slaves regardless of their race. Indeed, many of the children who were imported from Italy under the Padrone statute were white. Many antebellum southern slaves in fact were white by all appearances.⁶

You might think that there's a fundamental difference because

3. John H. Garvey, *Private Power and the Constitution*, 10 Const. Comm. 313 (1993).

4. Act of June 23, 1874, 18 Stat. 251, ch. 464. The statute is discussed in *United States v. Kozminski*, 487 U.S. 931, 947-48 (1988), a Thirteenth Amendment case decided less than a year before *DeShaney*.

5. *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

6. Kenneth M. Stampp, *The Peculiar Institution* 194 (Vintage Books, 1956).

Randy DeShaney is the biological father of Joshua, and that slavery is about oppression of the Other and not about family. I would remind you that many slaves were the biological offspring of their masters. Frederick Douglass may well have been the biological son of his master, as he made very clear in his autobiography.⁷ The first case that Salmon P. Chase brought as an abolitionist lawyer in the 1830s involved a woman named Matilda Lawrence who was widely rumored to be the biological daughter of her white master.⁸ These were paradigmatic, quintessential slaves in 1865, who were clearly understood to be covered by the core of the Thirteenth Amendment. So biology is in no way inconsistent with oppression, as Fran Olsen has reminded us quite powerfully.⁹

You might think that slavery is irrelevant because Joshua was not being put to work, but many slaves were in fact the victims of sadism and torture rather than being put in the fields. Madame Lalaurie from New Orleans was an infamous sadist who simply tortured her slaves for her personal amusement,¹⁰ and yet they were surely covered by the core of the Thirteenth Amendment.

And you might think, well, no single one of the above-mentioned factors is a necessary feature of slavery but four out of five have to be present, or something like that. Under this view, slavery doesn't have to be public rather than private oppression, it does not have to involve an adult rather than a child, or a black rather than a white, or biologically unrelated persons, or work rather than simple sadism—but it does have to involve some of these elements. I would suggest that this view reflects deep error about the true essence of slavery. At its core, slavery is a system of domination, degradation and subordination, in which some people are allowed in effect to treat other persons—other human beings with God-given rights—as property rather than persons. It's a system of domination and subordination, and in today's world Joshua DeShaney embodies that core idea of slavery about as well as could be imagined.¹¹

Now what is gained by thinking about the *DeShaney* case from

7. Frederick Douglass, *Narrative of the Life of Frederick Douglass: An American Slave* 49 (Houston A. Baker Jr., ed., Penguin Books, 1982).

8. William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* 191 (Cornell U. Press, 1977).

9. Frances Olsen, *Constitutional Law: Feminist Critique and the Public/Private Distinction*, 10 Const. Comm. 321 (1993).

10. Stamp, *The Peculiar Institution* at 182 (cited in note 6)

11. Far better than, for example, the pop singer James Taylor. If you look up the Thirteenth Amendment in LEXIS, you'll find all sorts of cases of Hollywood actors and singers trying to get out of personal service contracts; if they can receive protection from the Thirteenth Amendment vision, surely little Joshua should.

a Thirteenth Amendment rather than a Fourteenth Amendment perspective? For one thing, substantive due process is held in low esteem by several of the Justices, and so in order to avoid even playing the substantive due process game, they try to cut off the inquiry at the beginning in a variety of contexts by saying “no liberty interest,” “no property interest,” “no state,” “no action,” “no state action,” and so on. So there may be some strategic benefits from a Thirteenth Amendment reconceptualization, because the Amendment has a stronger textual basis and a less tainted doctrinal pedigree than substantive due process. There is also an analytic benefit to a Thirteenth Amendment approach—and here we see the radical thrust of a Thirteenth Amendment conception of the *DeShaney* case. It focuses on an aspect of the state action that even Justice Brennan ignores, an aspect that both Mike Seidman¹² and David Strauss¹³ see and talk about. Even *before* it set up a department of social services, the state *acted* quite powerfully when it gave Randy DeShaney custody—control over this human being, Joshua DeShaney. You need a license to drive a car, but they let you walk out of the hospital with a human being and have vast control over that human being. And make no mistake, it is the *state acting*—making custody decisions. Custody decisions are not merely God-given and natural—as again Fran Olsen has reminded us.¹⁴ Biology is not destiny. As we know from the “conservative” case of *Michael H.*,¹⁵ a biological father doesn’t always have legal rights of custody to the offspring that he sires. *Michael H.* was the case where the biological father had an affair with a woman who was legally married to another man; and in *law* the biological father was not considered someone with legal rights of custody. The Thirteenth Amendment reminds us that the *state* gave Randy custody over Joshua (just as it gave masters custody over antebellum slaves) and enforced that custody through child runaway laws (just as fugitive slave laws enforced slavery).¹⁶

Now let’s move to hate speech. The *R.A.V.* case last term involved a white teenaged skinhead who burned a cross on the lawn

12. Louis Michael Seidman, *The State Action Paradox*, 10 Const. Comm. 381 (1993).

13. David A. Strauss, *Due Process, Government Inaction and Private Wrongs*, 1989 S. Ct. Rev. 53, 65-66.

14. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

15. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

16. Lest there be any misunderstanding, I am emphatically *not* equating “family” with “slavery.” (This issue is discussed in depth in Amar and Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney* at 1373-78 (cited in note *).) I am merely identifying the presence of *state action* in both twentieth century family law and nineteenth century slavery law.

of a black family in the dead of night in St. Paul. The Supreme Court had to decide the constitutionality of St. Paul's hate speech ordinance, and it analyzed the issue purely as a matter of First Amendment doctrine. I suggest that rather than just focus on this event as "freedom of speech," we must also ask whether it might make as much or more sense to see this burning cross in the dead of the night as a "badge of servitude" that may be lawfully prohibited under section 2 of the Thirteenth Amendment. (Clearly Congress is empowered under section 2 but perhaps even states may act to prohibit badges of servitude. Section 2 is there in order to provide enumerated federal power, but states don't generally need such enumeration in order to act.)

It might at first seem a bit odd to think about *R.A.V.* as a Thirteenth Amendment case, but if we're talking about abuse of private power, the Thirteenth Amendment may help us see some interesting things. It will remind us, for example, that when private economic power is used in racially perverse ways—refusing to sell someone your home because of his race, refusing to hire someone because of her race—these things may be prohibited, and have been, under section 2 of the Thirteenth Amendment; that's what the *Jones v. Alfred H. Mayer Co.*¹⁷ case was all about. In some contexts, the use of private power in racially oppressive ways can be proscribed under section 2 of the Thirteenth Amendment, and that is so even when that private oppression takes the form of words, as in the words "for whites only" on a for sale sign, or the words "blacks need not apply" in the office of a personnel manager.

So I suggest that the Court missed an opportunity to analyze the extent to which the Thirteenth Amendment as well as the First Amendment was deeply relevant to the facts of the *R.A.V.* case. The court has now granted certiorari in a case from Wisconsin involving enhancement of punishment for crimes involving race bias,¹⁸ and I hope the Justices will now be forced to focus on the Thirteenth and Fourteenth Amendments in a way that they did not in *R.A.V.*

Finally, and this is my concluding example, we come to the issue of minimal entitlements. Ed Baker has written about the relationship between capitalism and democracy, between "private" property and public self-government.¹⁹ The global problem is that malapportionment of "private" economic power may be corrupting

17. 392 U.S. 409 (1968).

18. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992).

19. See, e.g., C. Edwin Baker, *Advertising and A Democratic Press*, 140 U. Pa. L. Rev. 2097 (1992); C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 Const. Comm. 425 (1993).

the public democratic ideal. In one context, the problem is how people can be full and equal citizens, able to participate in the political process, if they own nothing (other than perhaps their own selves), and have no intellectual capital, no education, no housing, and don't even own the clothes on their backs. This was, of course, the plight of the newly freed slaves in 1865. The basic idea was that in order to make them full and free citizens in the public realm, we had to address the issue of private property and power by giving them 40 acres and a mule. This was the Freedman's Bureau vision. This was Thaddeus Stevens's vision—subsidized land and public education.

And I suggest, once again, that the Thirteenth Amendment approach here has some advantages over other welfare rights conceptualizations, most prominently due process and equal protection, that have been proposed by others. "Due process" sounds (at least at first blush) more in process than substance, and seems more focused on protecting what one already has than on guaranteeing what one needs. "Equal protection" seems to conjure up a right to equal property shares, rather than a minimal grubstake.

My three examples today—child abuse, cross burning and minimal entitlements—do not begin to exhaust the possible applications of the Thirteenth Amendment to critical and difficult issues today (especially where knotty questions of private power and state action are involved). Spouse abuse, prostitution, pornography, labor law, personal service contracts, abortion and immigration are just a few areas where, I believe, a Thirteenth Amendment lens could usefully focus some of the constitutional values at stake.²⁰ We ignore this great Amendment at our peril. And so I say to you once more: Remember the Thirteenth.

20. For examples of recent legal scholarship beginning to apply the Thirteenth Amendment to some of these and other issues, see Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1 (1990) ("private" and governmental peremptory challenges); Neal K. Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 Yale L.J. — (1993) (prostitution); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480 (1990) (abortion); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 Yale J.L. & Feminism 207 (1992) (battered women, prostitution and spouse abuse); Lea S. Vander Velde, *The Labor Vision of the Thirteenth Amendment*, 138 U. Pa. L. Rev. 437 (1989) (labor law); Lea S. Vander Velde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 Yale L.J. 775 (1992) (personal service contracts); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. Va. L. Rev. 111, 138-50 (1991) (battered women, spouse abuse, child abuse, minimal entitlements and abortion). Cf. Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 Yale L.J. 1401, 1428-30 (1993) (suggesting possible relevance of Thirteenth Amendment to immigration issues).

Though I may not necessarily agree with everything said by these authors, I applaud their efforts to breathe new life into one of our greatest constitutional provisions.