

Interested in Due Process: Why Courts Should Take Account for More than Just Takings When Deciding Prisoners' Interest Rights

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INTRODUCTION

Jane, a prisoner, must churn out license plates at the local penitentiary. In return, she receives a modest three dollars per hour. Jane places her earnings into the prison trust account, which the state department of corrections invests in a mutual fund. With Jane's and other prisoners' money, the fund earns quite a bit of interest. However, instead of giving the prisoners the interest earnings, the department keeps it for its own use. Does the department's conduct breach our Federal Constitution?

The Ninth Circuit found a breach in *Schneider v. California Department of Corrections*.¹ Three other circuits found government action permissible.² The key question is whether Jane ever had a Fifth Amendment property right to the interest, which is undoubtedly a requirement to support Jane's takings action.

But have the courts made an error by limiting the inquiry to the Takings Clause? The courts have assumed that a prisoner has only the rights given to her by specific state grant. This approach is too narrow.

In this Note, I argue the inquiry is much broader. Under the takings clause, prisoners enjoy property rights that survive even their conviction. Therefore the question is not what rights the state gives to the prisoner, but what rights it never took away. Courts should evaluate prison property rights from the ceiling rather than the floor.

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¹ *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1994).

² See *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011) (quoting *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1068–69 (11th Cir. 2004)); *Washlefske v. Winston*, 234 F.3d 179, 186 (4th Cir. 2000).

This top-down approach trips the threshold matter of procedural due process, which is the constitutional doctrine most important to this Note. I argue that Jane loses her right to the interest accrued if the conviction and sentencing provided her the required due process, i.e., if state law was clear (at the time of her conviction) that prisoners had no such right. If, however, state law was silent about Jane's right, then it remains intact. Only after surviving the gateway due process analysis can Jane have a Fifth Amendment property interest, the necessary ingredient to her takings claim.

I. PROPERTY'S DUAL DEFENDERS

Property gleans double protection from the Fifth and Fourteenth Amendments. The first protection, which the four circuits deciding this issue properly considered, is the Takings Clause. It provides: "nor shall private property be taken for public use, without just compensation."³ The other protection, which they did not consider, is due process, which prevents the government from "depriv[ing] any person of life, liberty, or property, without due process of law."⁴ Specifically, procedural due process ensures that the government's selected procedure for depriving the protected right is fair.⁵ The first question in a procedural due process claim is whether there is an interest (life, liberty, or property) protected by the Fifth and Fourteenth Amendments.⁶ Second, if the interest exists, a violation occurs if the individual had no "notice" or "opportunity for hearing" preceding (or in rare cases, following) the governmental deprivation.⁷

The first question, whether there was a protected property right, presents little difficulty here. The courts do not dispute that before the plaintiffs became prisoners, they had the right to wage interest.⁸ This comports with traditional labor theory, under which a person has a property right to labor, compensation, and all things that attach.⁹ Because interest is one of these naturally attaching rights, it gleans protection from the Fifth and Fourteenth Amendments, and it cannot be lost without

³ U.S. CONST. amend. V.

⁴ U.S. CONST. amend. XIV; *see also* U.S. CONST. amend. V.

⁵ *Daniels v. Williams*, 474 U.S. 327, 331–32 (1986).

⁶ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–71 (1972).

⁷ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

⁸ *See Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011) (quoting *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1068 (11th Cir. 2004)); *Washlefske v. Winston*, 234 F.3d 179, 184 (4th Cir. 2000).

⁹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 134–43 (Thomas I. Cook ed., Hafner Press 1947).

notice and opportunity for hearing.¹⁰ The ultimate question then, is the second due process inquiry—notice. This due process guarantee is the mechanism that either preserves or lawfully deprives a prisoner’s right to wage-interest. But it is this guarantee that the four circuits overlooked.

II. THE FIRST AND MINORITY VIEW—*SCHNEIDER V. CALIFORNIA DEPARTMENT OF CORRECTIONS*

The Ninth Circuit in *Schneider* considered eleven prisoners’ claims that California violated the Takings Clause by withholding interest on their inmate trust accounts.¹¹ Although a prisoner could use the money while in prison, the California Department of Corrections would distribute the interest on that money to a general prison fund for the benefit of all.¹²

The Ninth Circuit held that the Department of Corrections’ acquisition and distribution of the interest from the account was an unconstitutional taking.¹³ In so holding, it applied the longstanding common law rule that interest follows the principal.¹⁴ It further reasoned that the absence of a statute creating this interest right was irrelevant because, while a state statute “may indeed be a *sufficient* condition to the creation of a constitutionally cognizable property interest . . . it assuredly is not a *necessary* one.”¹⁵ The court held that, since no statutory scheme could defeat this traditional California property right, the government could not acquire the prisoners’ interests without just compensation.¹⁶

III. THE MAJORITY VIEW

After *Schneider*, the First, Fourth, and Eleventh Circuits all came to the opposite conclusion, forming the current majority position.¹⁷ Considering similar interest-bearing inmate accounts, these courts recognized that the interest generally followed the principal at common law, but saw a critical distinction between private citizens and prisoners.¹⁸ At common law, prisoners had

¹⁰ *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (quoting *Beckford v. Tobin*, (1749) 27 Eng. Rep. 1049 (Ch.) 1051; 1 Ves. Sen. 308 (recognizing that “interest shall follow the principal, as the shadow the body”)).

¹¹ *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1196 (1994).

¹² *Id.*

¹³ *Id.* at 1201.

¹⁴ *Id.*

¹⁵ *Id.* at 1199.

¹⁶ *Id.* at 1201.

¹⁷ *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011); *Givens v. Ala. Dep’t of Corr.*, 381 F.3d 1064, 1068–69 (11th Cir. 2004); *Washlefske v. Winston*, 234 F.3d 179, 186 (4th Cir. 2000).

¹⁸ *Young*, 642 F.3d at 54.

no rights—not even to the principal.¹⁹ Thus, the courts reasoned, prisoners only have rights to what the state affirmatively grants them via statute.²⁰ Because the respective state statutes did not spell out the right to interest, there could be no legitimate expectation.²¹

IV. THE CORRECT TOP-DOWN APPROACH

By consulting prisoner versus non-prisoner status, the majority view delves a layer deeper than the *Schneider* court; but it still stops short by failing to account for the method in which prisoners lose their rights—the conviction process. The majority approach strips down prisoners to zero “traditional” rights, then counts up for those enumerated by statute. But while the conviction and sentencing process “carries with it the circumscription or loss of many significant rights[,]” some constitutional rights are left intact.²²

Particularly illustrative analysis on this point comes from the Supreme Court case *Sandin v. Connor*.²³ Arising in the closely related “liberty” context, the Court held that post-conviction inmates have a continuing liberty interest in “freedom from restraint” that “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”²⁴ Under this approach, typical restraints that accompany ordinary prison conditions represent the liberty interest taken away during a valid conviction and sentencing.²⁵ But the prisoner retains a right to be free from “atypical and significant” restraints because the prison sentence failed to encompass those additional hardships.²⁶ These more extreme liberty violations are actionable because the state conviction did not (and cannot) lawfully deprive the right to be free from extraordinary hardship.

Even though *Sandin*'s context is slightly different, its top-down mechanics are clear. Due process rights (life, liberty, and property) are the starting point, and any rights not affirmatively deprived by the conviction itself remain intact.²⁷

¹⁹ *Id.* at 53–54.

²⁰ *Id.* at 54.

²¹ *Id.*

²² *Hudson v. Palmer*, 468 U.S. 517, 524 (1984).

²³ *Sandin v. Connor*, 515 U.S. 472, 484 (1995).

²⁴ *Id.*

²⁵ Kaitlin Cassel, *Due Process in Prison: Protecting Inmates' Property After Sandin v. Connor*, 112 COLUM. L. REV. 2110, 2147 (2012).

²⁶ *Id.*

²⁷ See Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 985 (1962).

Just as a state can create property rights, it can—through the conviction—divest an individual of such rights by satisfying *Mullane's* notice and hearing requirements.²⁸ A state will meet these conditions if its law clearly provides that prisoners will have no interest rights. In this sense, state law itself does not remove any rights but merely defines the scope of rights lost during the conviction. If, however, the law is unclear about the termination of a particular pre-existing right of an inmate, then that right must have necessarily survived the sentencing.

V. APPLYING THE TOP-DOWN APPROACH TO THE CIRCUIT SPLIT

If the four courts of appeals had applied this correct legal framework, three would have come to different conclusions. The Ninth Circuit in *Schneider* incorrectly concluded that since a statute could not defeat traditional property rights and the interest followed the principal at common law, the prisoners could not lose the right to their interest.²⁹ By that reasoning, prisoners would never lose any property rights. But even the *Schneider* court did not dispute that California lawfully deprived the plaintiffs of their possessory right to wages.³⁰ What it failed to realize is that the statute does not defeat property rights. The statute merely defines the scope of the rights that the conviction and sentencing constitutionally deprive. The California statute defined this scope to exclude the right to interest. As such, the prisoners no longer had a protected property interest. The Ninth Circuit should have found no constitutional violation.

Further, in *Washlefske* just like in *Schneider*, state law specifically defined the scope of prisoners' wage rights to exclude investment income.³¹ Although the Fourth Circuit employed the flawed bottom-up analysis, because Virginia law was clear at the time of conviction, the Fourth Circuit correctly concluded that no Fifth Amendment property interest existed.³²

On the other hand, both *Givens* and *Young* illustrate how the bottom-up approach can lead to unconstitutional consequences. In those cases, state laws were silent on the subject of interest, but the courts incorrectly looked for (and found no) affirmative

²⁸ While a criminal trial always provides the requisite notice, this is only for the rights actually lost. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 19 (2006). For instance, a twenty-year sentence provides notice of a twenty-year sentence, but if the state held the prisoner for twenty-one years, this would trigger a due process violation.

²⁹ *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1994).

³⁰ *Id.* at 1199.

³¹ *Washlefske v. Winston*, 234 F.3d 179, 186 (4th Cir. 2000).

³² *Id.* at 184–86.

statutory grants of interest rights.³³ By failing to consider that the conviction only strips prisoners of rights implicated by state law during sentencing, the courts ignored due process and brushed aside important constitutional rights. Each of these courts failed by ignoring the correct top-down approach made necessary by due process.

VI. POLICY IMPLICATIONS

In addition to conceptual mechanics, policy counsels in favor of the top-down approach. For one, we live in a society that is more sympathetic to a prisoner's plight. For much of western legal history, a prisoner only enjoyed protections "that the law 'in its humanity accord[ed] him.'"³⁴ But today, a prisoner enjoys all rights other than ones "taken from him by law."³⁵ In other words, to accommodate progressive views on human rights, courts that formerly counted prisoners' rights by "adding from zero" now subtract "from one hundred."³⁶

In addition, two economic principals necessitate constitutional protections. Under the well-known concept, the "time value of money," today's dollar is worth more than tomorrow's.³⁷ To illustrate, if our prisoner named Jane makes license plates today and earns nine dollars, she earns the nine dollars *today*. But if the state chooses to invest her money and then keep the interest for itself, it denies her the money's full economic value. There is no use in calling the nine dollars "hers." She receives no current benefit from it, so the nine dollars that she purportedly earned today is really only worth tomorrow's nine dollars. By keeping Jane's investment, the prison bites into Jane's purported earnings.

Further, without interest, money loses value to inflation. When currency inflates, presently earned wages lose worth.³⁸ The proverbial pie is sliced into more pieces, making each piece smaller. Interest is the natural offset against the value loss that

³³ *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1068 (11th Cir. 2004); *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011).

³⁴ Note, *supra* note 27, at 985 (citing *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)).

³⁵ *Id.* (quoting *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944)).

³⁶ A special thanks to Professor Cynthia Nicoletti for this particular phrasing.

³⁷ *Time Value of Money*, MURRAY STATE UNIV., <http://campus.murraystate.edu/academic/faculty/lguin/FIN330/Time%20Value.htm> (last visited March 7, 2014).

³⁸ *Historical Inflation Rates: 1914-2014*, USINFLATIONCALCULATOR.COM, <http://www.usinflationcalculator.com/inflation/historical-inflation-rates> (last visited March 15, 2014).

accompanies inflation.³⁹ With interest, the pie-eater has a chance to get another slice or two. Without it, eating one tiny piece results in less enjoyment of pie.⁴⁰

CONCLUSION

The top-down approach provides the proper constitutional protections for the valuable interest right. When a state denies the interest on a wage, it harms value of the wage itself. Economics illustrate why interest is principal's natural brother. Severing off the interest reduces the principal's value. In spite of our nation's severe legal attitude toward inmates, prisoners deserve Fifth and Fourteenth Amendment protections over this valuable right. And before rights are taken, process is due. Courts should keep this in mind.

³⁹ For instance, to mitigate record-setting inflation in the 1970s, the Federal Reserve raised interest rates. Kathleen E. Keest, *Consumer Financial Services Law and Policy: 1968-20?? In the Thick of the Battlefield for America's Economic Soul*, 26 GA. ST. U. L. REV. 1087, 1089 (2010).

⁴⁰ Which can never be a good thing, especially if the pie is pecan.