OUR BIPARTISAN DUE PROCESS CLAUSE

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I. INTRODUCTION

Interpreting the Fourteenth Amendment is, of course, as important as its interpretation has been controversial. We obviously need to know the meaning historically expressed by its text, if only to understand subsequent American and world history. A properly originalist constitutional theory raises the stakes still further, because historically expressed meaning supplies the criterion by which we must judge the Supreme Court's work product,[1] a criterion better than whether particular applications "spark joy."[2] But where can the most reliable and voluminous explanations of that meaning be found? An understandable instinct would be to look to Republicans in 1866. That was the time that Congress adopted the key language, and the Republicans were the ones who adopted it.[3] Moreover, we properly discount Democratic opponents of Reconstruction, because "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."[4]

Elsewhere, I have explained at enormous length how 1871 Republican evidence about the Equal Protection Clause and 1872 Republican evidence about the Privileges or Immunities Clause dwarfs the 1866 evidence about the meaning of both of those clauses.[5] In both cases, Democrats opposing the Civil Rights Acts of 1871 and 1875 offered implausibly narrow constructions of these clauses of the Fourteenth Amendment, just as they had offered

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[1] *See* Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 523–25 (2018) [hereinafter Green, *Constitutional Truthmakers*]; Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1674 (2009).

[2] *See* MARIE KONDO, THE LIFE-CHANGING MAGIC OF TIDYING UP: THE JAPANESE ART OF DECLUTTERING AND ORGANIZING 39 (2014).

[3] *See* Allen Pusey, *The 14th Amendment Is Ratified*, 102 A.B.A. J. 72 (2016).

[4] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951).

[5] While Republicans had an incentive to offer broader post-enactment interpretations in 1871 or 1872 than would have been plausible in 1866, I explain in detail why I think that they did not succumb. *See* CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 63–64, 164–211 (2015); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 224–54 (2009).

implausibly broad readings, at least of the Privileges or Immunities Clause, in 1866.[6]

This Article shows, however, why the parties' usual incentives were very different in the case of the Fourteenth Amendment's Due Process Clause. Both parties had explained the meaning expressd by the text of the Fifth Amendment's Due Process Clause at great length just four years earlier, in discussing the constitutionality of the Second Confiscation Act. Because Democrats made perfectly clear in 1862 that they were very big fans of due process, they were in no position to abandon or even disparage those principles in 1866. For their part, the Republicans of 1862 had disagreed with Democrats about the principles' applications, but not with the principles themselves, which they proved by expanding these principles' reach to cover states in 1866. In an era of near-universal partisan disagreement, due process was a small island of consensus. Both parties agreed that "process of law" meant judicial process, and that what process was "due" was determined by tradition and limited by a public-safety exception. During the Civil War and Reconstruction, due process was emphatically bipartisan.

Section II considers the 1866 due-process evidence—particularly why we should not overread it to suggest particularly great confusion or disagreement over the clause. Section III considers a preliminary dispute over due process and the wartime suspension of habeas corpus during 1861; this discussion established the public-safety exception as relatively uncontroversial. Section IV turns to the much broader discussion of 1862, explaining the context of the Second Confiscation Act. Section V explains the many players from the 1862 debate—about a hundred members of Congress—and provides a map between their roles in 1862 and 1866 as well as a canvass of the approximately million words of discussion in the Congressional Globe. Section VI dissects this debate and demonstrates the very broad and very deep bipartisan consensus on the meaning of due process. Sixteen members of Congress gave explicit definitions, and fourteen of them (six who also gave definitions, plus eight others) made clear that the excessiveness of a forfeiture was distinct from the violation of due process. Section VII concludes.

II. FEBRUARY 1866: "I ONLY WISH TO KNOW WHAT YOU MEAN BY 'DUE PROCESS OF LAW.'"

On Saturday, April 21, 1866, the Joint Committee on Reconstruction accepted Representative John Bingham's proposal of the three critical clauses of the Fourteenth Amendment.[7] Bingham was undoubtedly an

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6 *See* GREEN, *supra* note 5, at 98.

7 For the three most important clauses of Section One, the text that Bingham proposed on April 21 matches the final version. *Compare* BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF

important part of the story of the Fourteenth Amendment, and others knew it; he was sometimes headlined as its "Author."[8] In the most important sense, however—the sense in which the Fourteenth Amendment is "Part of this Constitution," [9] and thus office-holders "shall be bound by Oath or Affirmation, to support" it [10]—the American people were its author. Americans spoke through a collection of two-house state ratifying legislatures and a two-house Congress, which in turn delegated to the Joint Committee the task of composing the initial version of the Amendment. The Joint Committee followed Bingham's lead—in fits and spurts and with considerable dissent—when he suggested particular words.[11] The critical

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FIFTEEN ON RECONSTRUCTION 87 (1914), *with* U.S. CONST. amend. XIV § 1. The committee had fifteen members, but only twelve were present when Bingham proposed the language. Other than Bingham himself and Elihu Washburne (and co-chairman Fessenden, who was sick and missed the votes), all of the other members voted against Bingham's language at least once, but it eventually got a majority of the committee and, of course, relevant supermajorities in Congress and the states, though not without some complications. The committee's votes are below. *See infra* note 11. For the history of disputes over the legitimacy of proposal by a former Confederate—excluding Congress and Southern ratification under duress, see generally Christopher R. Green, *The History of the Loyal Denominator*, 79 LA. L. REV. 47 (2018).

8 The Cincinnati Commercial, for instance, published a speech by Bingham with the headline "The Constitutional Amendment: Discussed by Its Author." John A. Bingham, Member of the U.S. House of Representatives, The Constitutional Amendment: Discussed by Its Author (Aug. 24, 1866), *in* CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY 19 (1866). Fellow framer Henry Wilson said in 1871, "I concur entirely in the construction put upon that provision of the fourteenth amendment by Mr. Bingham, of Ohio, by whom it was drawn." CONG. GLOBE, 42d Cong., 1st Sess. app. at 256 (1871).

9 U.S. CONST. art. V.

10 U.S. CONST. art. VI cl. 3.

11 After its adoption on April 21 by a 10–2 vote (alongside a separate section banning on racial discrimination in civil rights), it was taken out by a mixed 7–5 vote on Wednesday, April 25. KENDRICK, *supra* note 7, at 87, 98. It was rejected the same day as a separate proposition 8–4. *Id.* at 99. Finally, it was reinserted 10–3 in the place of the racial-discrimination-in-civil-rights provision on Saturday, April 28. *Id.* at 106. Some of these votes appear to have been strategic; Democrats like Andrew Jackson Rogers were steadfastly opposed to civil rights for the freedmen, but voted three times for Bingham's language. Only Washburne (absent on the 25th) and Bingham himself supported Bingham's language consistently. Here were the tallies for the four votes:

		4/21	4/25	4/25	4/28
Bingham	GOP	Y	Y	Y	Y
Washburne	GOP	Y			Y
Blow	GOP	Y	Y	N	Y
Stevens	GOP	Y	Y	N	Y
Johnson	Dem	Y	N	Y	Y
Rogers	Dem	N	Y	Y	Y
Boutwell	GOP	Y	N	N	Y
Williams	GOP	Y	N	N	Y
Grider	Dem	N	N	Y	Y
Conkling	GOP		N	N	Y

question is not what Bingham thought when he proposed the words—or what the Joint Committee, or the House and Senate, or the state ratifiers thought when they went along—but *the principle expressed by the text of the Fourteenth Amendment* during Reconstruction. What principle would a reasonably informed reader, using the linguistic conventions of the time, have understood "No State shall deprive any person of life, liberty, or property without due process of law" to express? This principle is what the Fourteenth Amendment *is*.[12]

Bingham's own understanding of the language he selected, of course, if knowable, would offer important *evidence* of what that language expressed. Given the disputes that the Fourteenth Amendment has engendered in our day,[13] it would be quite useful to ask him (and everyone else during Reconstruction!) "I only wish to know what you mean by 'due process of law.'"[14] If the other members of the Joint Committee had asked Bingham this question on April 21, we do not know quite what he would have said. Bingham *was* asked this question, however, two months earlier. Andrew Jackson Rogers asked the question on the House floor in the midst of Bingham's defense of an earlier proposed constitutional amendment.[15] Rogers was one of the three Democrats on the Joint Committee, and a fellow

Morrill	GOP	Y	Y	N	N
Grimes	GOP	Y		N	N
Howard	GOP	Y	N	N	N
Harris	GOP		N		
Fessenden	GOP				

Id. at 87–88, 98–99, 106–07. Bingham's precise language had been formulated a very short time before the April 21 meeting of the Joint Committee, demonstrated by the fact that the Chicago Tribune reported language that was slightly different in several details in its Washington dispatch from eight days before, on Friday, April 13:

> Among the most prominent propositions under consideration by the Committee on Reconstruction is one presented by Hon. John A. Bingham. It is in the form of an amendment to the Constitution, and is as follows: "No state shall pass or enforce any law which shall impair or deny any of the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor take property for private use, without just compensation; nor deny the equal protection of the laws to all persons therein. And the Congress shall have power to pass all laws which shall be necessary and proper to carry into execution this provision."

From Washington, CHI. TRIB., Apr. 16, 1866, at 1. Note that the Fourteenth Amendment's Due Process Clause is the same as the draft, but "pass" in the draft becomes "make," "impair or deny any of" in the draft becomes "abridge," the takings clause in the draft is deleted, and "to all persons therein" in the draft becomes "to any person within its jurisdiction" and is moved earlier in the equal protection clause. *Compare* U.S. CONST. amend. XIV, § 1, *with id.*

12 *See* Green, *Constitutional Truthmakers*, *supra* note 1, at 518–19.

13 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (distinguishing, or perhaps overruling, the tradition-based approach to substantive due process in *Washington v. Glucksberg*, 521 U.S. 702 (1997)); Burnham v. Superior Court, 495 U.S. 604, 622–24 (1990) (dispute between two four-justice groups on tradition- versus fairness-based procedural due process).

14 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (Feb. 28).

15 *Id.*

member with Bingham and George Boutwell on the subcommittee that had considered the very proposal in in January.[16] It was, importantly, *not a question about the meaning of Bingham's proposal*. Indeed, unlike the situation if we were to ask such a question today seeking clarity about the meaning of the Fourteenth Amendment, *Rogers' question was not a reflection of his lack of understanding of the phrase "due process of law."* Indeed, Bingham's February proposal did not use such language.

Rogers asked the question because he was incredulous about Bingham's assertion about the relationship between the Fifth Amendment and his proposal. As Bingham reported it from the Joint Committee to the House, the language went this way:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[17]

Toward the end of several days of debate in the House, which Bingham lost when his proposal was tabled, Bingham accused his opponents of lack of enthusiasm for the Constitution's provisions in Article IV and the Fifth Amendment, from which some (but not all!) of his language had been taken. Bingham said,

> Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject.[18]

Bingham's taste for rhetorical excess had gotten the best of him here, not for the first or last time.[19] Rogers then asked—*seeking to pin down Bingham*

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16 *See* KENDRICK, *supra* note 7, at 55–56 (subcommittee appointed Jan. 22, reporting back through Bingham Jan. 27).

17 *Id.* at 1033–34 (Feb. 26). There were many, many tweaks to this language when the Joint Committee considered it. *See* KENDRICK, *supra* note 7, at 46, 51, 54–56, 61 (five versions of the language, all different from what Bingham presented to the House).

18 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (Feb. 28).

19 *See, e.g.*, *id.* at 3635 (July 6) (Bingham taunting Stevens for not knowing about the "McMillan's Lessees" case, Bingham's misrecollection of Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); *cf. infra* note 221 (1862 discussions of *Murray's Lessee*)); *see also, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 1796 (1862) (Apr. 23) (Cox: "The gentleman from Ohio, upon the Judiciary Committee, [Mr. Bingham,] denied that authority very truculently, and in that tone in which he denies almost every legal proposition, assuming to be the Moses and lawgiver of the House, and disputing almost everything which does not agree with his own ideas." (alteration in original)); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV.

about the meaning of the Fifth Amendment—"I only wish to know what you mean by 'due process of law.'"[20] Bingham's response: "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions."[21]

Considered in isolation, the exchange between Bingham and Rogers might suggest (a) that "due process of law" was seen as obscure, or (b) that it had become a holistic judicial term of art, unmoored from the meanings of its constituent parts. But neither of these conclusions would be correct.

First, there are several compelling reasons from 1866 to think Democrats like Rogers were quite confident that they knew what "due process of law" *actually* meant:

* Rogers spoke quite confidently indeed about the matter a few weeks later, discussing a modification of Congress's suspension of habeas corpus from 1863.[22]

* Even Bingham treated the issue as "settled . . . long ago,"[23] not one subject to controversy or changing over time.

* In June, another Republican-Democrat exchange between two more of the Joint Committee members, chairman William Pitt Fessenden and Reverdy Johnson, likewise shows the existence of bipartisan enthusiasm for "due process of law." Johnson, though a steadfast opponent of civic equality for the freedmen as embodied in the Civil Rights Act of 1866, said, "I am decidedly in favor of the first part of the section which defines what citizenship shall be, *and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law*, but I think it is quite objectionable to provide that 'no State

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131, 164–65 n.169 (1950) (after reading "substantially all of Bingham's Congressional utterances between 1860 and the termination of his service in Congress in 1873," calling him "an able congressman with a strong egocentricity and a touch of the windbag," and "not in the same class with the top notch minds of his time, such as Reverdy Johnson, Lyman Trumbull, Matt Carpenter or George Edmunds in the Senate, or George Hoar in the House"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1404 n.61 (1992) (Bingham was "exasperating" and "undoubtedly a gasbag.").

20 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (Feb. 28).

21 *Id.*

22 *See id*. at 1524 (Mar. 20) ("[T]here are certain fundamental principles laid down in the Constitution, one of which is that no man shall be deprived of life, liberty, and property without due process of law, which forbid the passage of this bill. Due process of law means judicial process; that there shall be an affidavit filed against the defendant; a warrant issued setting up the cause and accusation, and an indictment by the grand jury; a trial by a petit jury of his own district or neighborhood; the privilege of calling witnesses and cross-examining those that are brought against him; and the privilege of counsel for his defense. These are the great principles which constitute due process of law, as laid down in the Constitution of the United States.").

23 *See supra* text accompanying note 21.

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' simply because, I do not understand what will be the effect of that." [24] Fessenden replied enigmatically, "We have agreed to that."[25] Johnson added, "I understand not."[26] His amendment to delete the Privileges or Immunities Clause failed without a vote tally.[27]

∗ While Reverdy Johnson was the best legal mind in the Democratic party, the most prominent Democrat was another Johnson: President Andrew. Despite his fierce opposition to freedman's equality,[28] the president celebrated "due process of law." In July, he vetoed the Freedman's Bureau as unnecessary because "ample protection will be afforded him [the freedman] *by due process of law without resort to the dangerous expedient of 'military tribunals,'* now that the war has been brought to a close."[29]

∗ In the fall, in a widely reprinted letter "generally taken as the official statement of the Administration's position," [30] Interior Secretary O.H. Browning—as we will see later in this Article, one of the leaders of the due-process-based attack on 1862 confiscation efforts [31]—criticized the Due Process Clause of the proposed Fourteenth Amendment, not because "due process of law" was a bad thing, but on (tediously repetitive) federalism grounds.[32]

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24 CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (June 8) (emphasis added).

25 *Id.*

26 *Id.*

27 *Id.* The Amendment received final passage in the Senate a page later. *Id.* at 3042.

28 For instance, Johnson asked in his veto of the Civil Rights Act, "Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?" *Id.* at 1679 (Mar. 27). The Republican veto override on April 9 and Bingham's April 21 proposal of the Privileges or Immunities Clause were of course an emphatic "yes" to Johnson's rhetorical question. *Id.* at 1861, 2079.

29 *Id.* at 3838 (emphasis added) (July 16) (veto message read in Senate); *see also id.* at 3849 (veto message read in House).

30 ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 469 (1960).

31 *See infra* note 122.

32 O.H. Browning, *Secretary Browning's Letter*, CHI. TRIB., Oct. 26, 1866, at 1 (After quoting the Fifth Amendment: "This is identically the same, except that is a restraint upon the powers of the General Government alone, and has no reference or application to State Governments. And most of the State Constitutions, I believe all of them, contain a similar provision as a limitation upon the powers of the States respectively. Now when in the Federal Constitution there is this guarantee against arbitrary and oppressive invasions of the rights of the citizen by Federal authority, and a similar guarantee in the State Constitutions against like oppressive action by the State Governments, why insert in the Federal Constitution a new provision which has no reference to the powers of the General Government and imposes no restraints upon it, but is simply a repetition of a limitation upon the powers of State Constitutions? The object and purposes are manifest. It is to subordinate the State judiciaries in all things

Second—and this will largely be the burden of the remainder of this paper—it was quite clear from the discussions of 1861 and 1862 that both Democrats and Republicans understood the meaning of the Fifth Amendment's text in terms of the meanings of its linguistic constituents, not as a holistic term of art. Congressmen asked and answered Rogers-style questions repeatedly and with detail. While these congressmen were quite aware of cases decided under the Fifth Amendment and state-constitutional analogues, they quite obviously did not treat "deprived of life, liberty, or property without due process of law" as a clump of words cut loose in a judicial sea. "Process of law" meant judicial proceedings applying law that existed before it was violated by the one facing deprivation. The paradigmatic due-process violation happened when Congress acted against life, liberty, or property directly, eliminating the judicial middleman. "Due" referred to tradition, with a tacit public-safety exception—with, to be sure, lots of *sturm and drang* about the exact scope. "Deprive" partook—for most—of an implicit tradition-based baseline, though some argued that people were born free.

How relevant is this 1862 evidence for the Fourteenth Amendment, which was proposed in 1866? Because the *words* were identical, the relevance of early Civil War evidence will depend on how similar we deem the two *contexts*. The context-sensitivity of language is, of course, one of its most obvious features.[33] As Frege put it, only in the context of a sentence does a word really have meaning—though I will leave his German for a

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to Federal supervision and control; to totally annihilate the independence and sovereignty of State judiciaries in the administration of State laws, and the authority and control of the States over matters of purely domestic and local concern. If the State judiciaries are subordinated, the departments of the State Governments will be equally subordinated, for all State laws, let them relate to what department of Government they may, or to what domestic or local interest, will be equally open to criticism, interpretation, and adjudication by the Federal tribunals, whose judgments and decrees will be supreme, and will override the decisions of the State Courts and leave them utterly powerless. The Federal Judiciary has jurisdiction of all questions arising under the Constitution and laws of the United States, and by virtue of this new provision, if adopted, every matter of judicial investigation, civil or criminal, however insignificant, may be drawn into the vortex of the Federal judiciary. In a controversy between two neighbors about the ownership of a pig, the unsuccessful party may allege that state tribunals have deprived him of his property without due process of law, and take the case before the Federal tribunals for revision. So if a man be indicted for larceny or other crime, convicted and sentenced upon allegation of deprivation of liberty with[out] due process of law, we may bring the case before the Federal tribunals for revision and reversal. So, too, if a murderer be arrested, tried, convicted, and sentenced to be hung, he may claim the protection of the new constitutional provision, allege that a state is about to deprive him of life without the due process of law, and arrest all further proceedings until the Federal Government shall have inquired whether a State has a right to punish its own citizens for an infraction of its own laws, and have granted permission to the State tribunals to proceed. Under such a system the liberties of the people could not long be maintained. As already remarked, free governments can be preserved only by keeping the power near the people, to be exercised through local agencies.").

[33] For some theoretical considerations of context, see Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL'Y 167, 171–74 (2017).

footnote.[34] Or as David Kaplan puts it, a word by itself only fixes a function from contexts to contents, and we must then plug a particular context into that function to derive the textually expressed principle.[35]

The careful use of corpus linguistics can tell us the range of ways in which people spoke of "due process of law" in various contexts. The mere sequence of words is not, however, the only relevant thing to know about context—the same sequence, in the mouths of different authors, can obviously use different tacit exceptions, or use tacit implications that go without saying for some, but not others. Similarity of author is a critical component of context to which corpus-linguistic analysis may not always be sensitive. We need to know which uses of "due process of law" would have been conventional and which idiosyncratic. Would, for instance, Justice Story's usage in his Commentaries, first published in 1833,[36] have been seen as conventional in 1866? Would Alvan Stewart's 1837 due-process attack on the constitutionality of slavery?[37] Would both?[38]

The conviction underlying this study is that the discussions of the Fifth Amendment Due Process Clause during the Thirty-Seventh Congress are very, very close to the context of the imposition of such a principle on states during the Thirty-Ninth. Many of the members of each Congress were the same.[39] There was even more overlap when we consider the members of the Joint Committee on Reconstruction, who were among the most skilled and experienced members of the body.[40] Moreover, unlike 1871 Equal Protection Clause evidence and 1872 Privileges or Immunities Clause evidence, which I have elsewhere canvassed in great detail,[41] no one can accuse those in the Thirty-Seventh Congress in 1862 of manipulating Fourteenth Amendment history after the fact. We are looking both for quantity and quality of linguistic data. The highest *quality* data would be those honestly and dispassionately describing the Fourteenth Amendment's meaning at the very instant it was adopted. That time was not, of course, 1862, or 1871, or 1872. But the *quantity* of evidence that the Thirty Seventh Congress left behind on due process—and which the Forty-Second Congress left behind on both equal protection of the laws and the privileges of American citizens—is

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34 GOTTLOB FREGE, DIE GRUNDLAGEN DER ARITHMETIK § 62, at 73 (1884) ("Nur im Zusammenhange eines Satzes bedeuten die Wörter etwas.").

35 *See* David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics, and Epistemology of Demonstratives and Other Indexicals*, *in* THEMES FROM KAPLAN 481, 494 (Joseph Almog et al. eds., 1977).

36 *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1782, at 660 (1833).

37 *See* Alvan Stewart, A Constitutional Argument on the Subject of Slavery, Address Before the N.Y. State Anti-Slavery Convention (Sept. 20, 1837), *in* FRIEND OF MAN (Utica), Oct. 18, 1837, at 1.

38 In fact, Story's and Stewart's readings have important elements in common; they would diverge most importantly on the word "deprive" rather than "due process of law." See *infra* note 224.

39 *Compare* H.R. DOC. NO. 108–222, at 162–65 (2005), *with id.* at 170–73.

40 *See* KENDRICK, *supra* note 7, at 38–39.

41 *See supra* note 5.

orders of magnitude greater than the relatively few clues left behind in the 1866 Congressional Globe by the Thirty-Ninth. Those who spend their Fourteenth Amendment energies digging solely in 1866 are thus—like those depending on the guy in *Raiders of the Lost Ark* with the burned hand, single-sided medallion copy, and too-tall staff of Ra—"digging in the wrong place."[42] Those looking for a genuine gusher of evidence about due process need to dig into 1862 instead.

III. 1861: "WITHOUT RESORT TO THE ORDINARY PROCESSES AND FORMS OF LAW"

The first dispute over due process happened very early in the war, when Lincoln's subordinates suspended habeas corpus rights for detainees like John Merryman. On the Fourth of July, 1861, as the specially summoned Thirty-Seventh Congress met in its first session, Lincoln explained the arrest in terms that sound a bit like the repudiation of due-process rights:

> Soon after the first call for militia, it was considered a duty to authorize the commanding general in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*, or, in other words, to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety.[43]

"The ordinary processes and forms of law" that Lincoln found dispensable in cases of public danger sound like a near-synonym of the "due process of law" that the Fifth Amendment requires. Was Lincoln admitting that he was violating the Fifth Amendment? Textually, the word "due" offers an escape. In battle—or indeed, even in standard cases of the use of defensive force against a criminal—lives and liberty can obviously be taken away by executive officials acting without a court (i.e., without using the processes and writs of the law). Republicans would make this point ad nauseam in 1862.[44] An uncomfortably fuzzy boundary line divided situations when direct action was allowed and those in which the "processes and forms of law" must be employed—and which of them, if so. But everyone acknowledged that sometimes, the "process of law" was dispensable.[45]

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42 RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

43 CONG. GLOBE, 37th Cong., 1st Sess. app. at 2 (1861) (July 4).

44 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 507 (1862) (Trumbull on Jan. 28); *id.* at 1558 (Trumbull on Apr. 7); *id.* at 1719 (Howard on Apr. 18); *id.* at 1783 (Sherman on Apr. 23); *id.* at 1875 (Wilmot on Apr. 30); *id.* at 2195 (Sumner on May 19); *id.* at 2235 (Eliot on May 20); *id.* app. at 169 (Sheffield on May 23); *id.* app. at 273 (Maynard on May 23); *id.* app. at 200 (Hutchins on May 24); *id.* at 2964 (Sumner on June 27); *id.* at 3382 (Sumner on July 16); *see also* Norris v. Doniphan, 61 Ky. (4 Met.) 385, 399–400 (1863).

45 *See infra* Section VII.

The tension between Lincoln's description of suspension with the Fifth Amendment will be especially apparent when we consider how many other people also described "due process of law" precisely in such terms—"the ordinary processes and forms of law."[46] Yet, those in Congress in 1861 did not make an argument that habeas rights could *never* be suspended. Such suspension was obviously contemplated in Article I, section 9, clause 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[47] The only issue was whether such suspension was properly executive or legislative. Democrats like Chief Justice Taney (and many in Congress) thought it was legislative,[48] but Reverdy Johnson (not yet back in the Senate[49]) defended Lincoln's view.[50] No one suggested at the time—though a few would (implausibly) do so later[51]—that the Fifth Amendment had repealed the entire idea of suspension. Emergency powers for the President, acting when judicial proceedings alone cannot restore order, have a long pedigree. The Militia Acts of 1792 and 1795 were triggered when there were "combinations too powerful to be suppressed by the ordinary course of judicial proceedings," a phrase Lincoln used in his April 15 summoning of troops for the war.[52] In deferring to elected federal authorities' decisions about when to intervene militarily to support one of the competing Rhode Island governments during the Dorr Rebellion, *Luther v. Borden*[53] likewise

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46 *See* CONG. GLOBE, 37th Cong., 1st Sess. app. at 2 (1861) (July 4).

47 U.S. CONST. art. I, § 9, cl. 2.

48 *Ex parte* Merryman, 17 F. Cas. 144, 151–152 (C.C.D. Md. 1861) (No. 9487).

49 Johnson had been in the Senate long before, as a Whig from 1845 to 1849, when he left to become Zachary Taylor's Attorney General. A leader—probably *the* leader—of the Supreme Court bar, he led the team that won *Dred Scott* (without, alas, writing a brief that might tell us his perspective, if any, on the due-process issue in the case). Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

50 *See* Reverdy Johnson, *Power of the President to Suspend the Habeas Corpus Writ*, *in* 2 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 185, 188 (Frank Moore ed., 1862).

51 As Professor Amanda Tyler notes, these arguments cropped up in 1863 and in the Confederacy, championed by its vice-president Alexander Stephens, in 1864, but were quite weak. *See* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 377–78 n.45 (2017) [hereinafter TYLER, HABEAS CORPUS IN WARTIME] (discussing minority report of Confederate Judiciary Committee and the March 16, 1864 speech of Vice President Alexander H. Stephens, taking similar position); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1367 (2010) ("[T]he Due Process Clause trumps the Suspension Clause . . . ."); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 644 n.211 (2009) (discussing the 1863 arguments of Senators Carlile, Bayard, and Powell that seem to say that "no one other than possibly a prisoner of war could ever be arrested without being afforded judicial process, even during a suspension," (citing CONG. GLOBE, 37th Cong., 3d Sess. 1093, 1193, 1195, 1475 (1863))). Tyler comments, "This position is exceedingly difficult to reconcile with the Founding-era and early Republic debates, all of which assumed the opposite, as well as the dominant understanding of suspension that controlled in both the Union and Confederacy during the Civil War." TYLER, HABEAS CORPUS IN WARTIME, *supra*, at 378 n.45.

52 President Abraham Lincoln, Proclamation Calling for a Militia of 75,000 (Apr. 15, 1861).

53 48 U.S. (7 How.) 1 (1849).

sanctioned—and held unreviewable—the president's decision that "[t]he ordinary course of proceedings in courts of justice would be utterly unfit for the crisis."[54]

Due process itself was not the focus in 1861. Habeas discussions that year, while intense, focused on the separation of powers, rather than the limits that suspension itself read into the word "due."[55] Congress passed a resolution approving in general terms Lincoln's actions in resisting the rebellion.[56] Congress only specifically authorized habeas, however—confronting some relatively minor due process objections in doing so—in March 1863.[57]

IV. 1862: THE SECOND CONFISCATION ACT

The 1861 discussions and intellectual skirmishes over habeas rights were just forerunners of the much more protracted disputes over the Second Confiscation Act of 1862. If the habeas-suspension intellectual battle was like First Bull Run, the due-process fight of 1862 resembled Shiloh and Antietam. Like those battles, the due-process fight did not produce a dramatic winner or loser. Intellectually, however, the months-long detailed back-and-forth of argument made clear just how narrow the difference was—and how broad the consensus—between Democratic and Republican understandings of due process. In presenting these arguments, and responding to them, congressmen made very, very clear how "nor be deprived of life, liberty, or property, without due process of law"[58] was understood at the time.

Why has this argumentative material never been canvassed in significant detail before? Professor Daniel Hamilton has surveyed the *politics* of the Second Confiscation Act in some detail,[59] but he glossed over the argumentative nitty-gritty. For instance, he described the scene in April:

> For three weeks all three approaches to confiscation collided, and the result was near chaos. . . . Within the Republican Party, the debate became more and more technical, as Trumbull, Collamer, John P. Hale, and others fought for hour after hour, parsing Blackstone and other legal texts in ever-finer detail. It was an odd and arresting scene: Members of the majority party battling one another over increasingly fine legal questions about the legitimacy of seizing the property of the enemy in the midst of war. The battle of visions had deadlocked. What remained were the lawyers arguing their case as though in a courtroom.[60]

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54 *Id.* at 44.

55 *See, e.g.*, CONG. GLOBE, 37th Cong., 1st Sess. app. at 15 (1861) (July 19).

56 Act of July 29, 1861, ch. 25, 12 Stat. 281, 281–82.

57 Habeas Corpus Suspension Act, ch. 81, 12 Stat. 755, 755 (1863).

58 U.S. CONST. amend. V.

59 *See generally* DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR (2007).

60 *Id.* at 64.

The sheer mass and detail of the argument defies the faint-hearted. The whole debate covers about 500 Congressional Globe pages, or about a million words.[61] In January, Cowan urged that any law should be "so well considered as to at least keep us . . . clearly within the limits of the Constitution."[62] It was well-considered indeed. Senator Timothy Howe noted at the beginning of May, "I have a large volume of speeches nicely packed up at home, which, if fortune favors me, I propose to examine as soon as I can; and I have no doubt that when I have read them all, I shall be very intelligent upon the subject of confiscation."[63] A few days later Senator John Hale counted up the Congressional Globe columns himself, complaining that "the longer we delay, the more confused our counsels will be."[64] John Sherman complained in late June, "I am sick and tired of this debate," saying it could have been completed in a month but had instead lasted the entire session.[65] Beaman noted that the constitutional discussion had been "thorough, minute, and exhaustive." [66] Harris called the debate a "very protracted and full discussion."[67]

The First Confiscation Act of August 6, 1861 liberated slaves directly used in fighting the rebellion, such as those who dug trenches for confederate troops.[68] Taking prisoners among the Confederate troops and seizing their implements of war entailed, simply as a military matter, taking any enslaved people that the Confederates had brought along to the battle.[69] Congress decided in the First Confiscation Act, reasonably and with relatively little controversy, to free such men.[70]

By December 1861, when the Second Session met, Republicans were thinking much more ambitiously. They targeted property away from the front.[71] The most immediately available of such property was confederate-owned property in the North (or the West, where some rebels were said to be engaged in significant land speculation).[72] But as initially conceived, Republicans also sought a law to say what would happen to Confederate

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61 *See, e.g.*, *infra* notes 62–67.

62 CONG. GLOBE, 37th Cong., 2d Sess. 516 (1862) (Jan. 28).

63 *Id.* at 1900 (May 1).

64 *Id.* at 1955 (May 6). He counted twenty speeches and 173 Congressional Globe columns just in the Senate. *Id.* This was before the very extensive debates of late May.

65 *Id.* at 2999 (June 28).

66 *Id.* app. at 203 (May 24).

67 *Id.* at 3375 (July 16).

68 Confiscation Act of 1861, ch. 60, 12 Stat. 319, 319.

69 *Id.*

70 *Id.* (requiring the President to confiscate property "used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws" and providing that enslaved people required "to work or to be employed in or upon any fort, navy yard, dock, armory, ship, entrenchment, or in any military or naval service whatsoever, against the Government and lawful authority of the United States" would be free from purported owners' claims).

71 *See* Confiscation Act of 1862, ch. 195, 12 Stat. 589, 590 (authorizing seizure of Confederate-owned property in the North).

72 *See id.*; *see also* CONG. GLOBE, 37th Cong., 2d Sess. 3374 (1862) (July 16).

property in the South; they wanted something like a reconstruction measure.[73] Especially before the bloodshed of Shiloh in April 1862, but even after it, congressmen still expected a quick victory and thought Reconstruction was nigh.[74] Charles Sumner stirred a great deal of controversy when he asserted in February 1862 that by seceding, southern states had committed suicide, returning their land and people to a territorial status subject to complete federal control.[75] The initial forms of the confiscation act were akin to a junior-varsity version of the territorial theory. Any property owned by rebels who were currently outside the process of Union courts would, as soon as the Union armies got there, be seized by the federal government and sold to pay for the war effort.[76] The confiscation measure in the final bill, however, was only an in rem measure dealing with rebel-owned property in the North, and was in the control of its courts.[77] The bill also provided for measures besides confiscation, including several measures for treason prosecutions.[78] The opponents of broader confiscation, led by Senator Daniel Clark of New Hampshire, generally proposed treason prosecutions as an alternative, and at one point proposed (subject to especially vigorous due-process criticism by Jacob Howard) a quasi-confiscatory mechanism for inducing treason defendants to attend their criminal trials.[79]

It is important to distinguish four classes of arguments against confiscation measures. Indeed, one of the distinctions between these arguments, that *excessive* or *disproportionate* deprivations of property can still count as deprivations with "due process of law," was fully recognized by the participants in the debate, and undergirds this paper's most important conclusion.

The first set of arguments concerned the law of war. Was the confiscation of property still allowed during war? Both sides agreed on the basic history: confiscation had long been allowed as a matter of the law of nations, but was increasingly frowned upon in the name of "civilization and Christianity."[80] Belligerents still claimed the *right* to confiscate, but *exercising* that right might go against the norms of the nation-state system of the eighteenth- and nineteenth-century world. Congressmen disagreed about whether those usages had yet ripened into law, and whether they applied—or whether the traditional right of confiscation itself applied—to a civil war.

Second were the due-process arguments of most interpretive relevance today. Even if international law allowed confiscation, our own constitution

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73 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 18–19 (1861) (Dec. 5).

74 *Id.* at 19 ("[P]rosecute the war with vigor, and it will soon be brought to a successful issue. . . . [The Union cannot] be overborne by less than one fourth their number fighting for the overthrow of free government . . . .").

75 *See id.* at 737 (1862) (Feb. 11).

76 *See id.* at 2964 (June 27).

77 *See* Confiscation Act of 1862, ch. 195, 12 Stat. 589, 591 (July 17).

78 *See id.* §§ 1–4, at 589–90.

79 *See* CONG. GLOBE, 37th Cong., 2d Sess. app. at 303–07 (1862) (June 24).

80 *Id.* at 130 (1861) (Dec. 18); *see also id.* at 934–35, 943 (1862) (Feb. 25).

might not. As the debate moved on, it eventually resolved into a very particular dispute: whether the in rem procedural rules traditionally allowed for *sea* captures, and to property *directly* used in war—both which were authorized in 1861 in the blockade of July 13th and First Confiscation Act in August[81]—could be applied to other property on *land*, and only *indirectly* supporting the war effort.[82] Getting to this point in the legislative and intellectual struggle took a *very* long time. While exhausting and exasperating to the participants, for today's purposes, this is a very good thing, because it allowed so very many congressmen to take part, and made so clear that they agreed about so much.

Third, there were a range of other constitutional arguments. The law of nations point was sometimes expressed as an issue of congressional power; the power to "make Rules concerning Captures on Land and Water"[83] and "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"[84] was only the power to authorize war according to certain recognized rules. Sometimes confiscation was labeled a bill of attainder, which was frequently defined in ways strongly akin to contemporary definitions of due process.[85] Critics complained of violations of all of the provisions of the Fifth, Sixth, and Seventh Amendments[86] (and occasionally the Excessive Fines Clause of the Eighth[87]) alongside the Due Process Clause. The issue of presidential versus congressional power also appeared again, the flip side of the habeas arguments of 1861. While critics of habeas suspension claimed in 1861 that only Congress, not the President, could suspend, many critics of confiscation measures claimed in 1862 that only the President, not Congress, could claim the right to confiscate belligerents' property.[88] Also in this basket are Article III, section 3, clause 2 issues about whether confiscation of land was limited to a life estate, or could extend to a fee simple.[89] At the last hour, Lincoln eventually required Congress to limit the law to life estates.[90]

Fourth, there were a range of policy arguments, most prominently the argument that the confiscation policy did not properly distinguish "ringleaders" from the rank and file.[91] No matter where the line was drawn, there would be congressmen who either thought it was too lenient or too

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81 *See* Act of July 13, 1861, ch. 3, 12 Stat. 255, 257; Confiscation Act of 1861, ch. 60, 12 Stat. 319, 319 (Aug. 6).

82 For a summary of this particular aspect of the debate, see *infra* notes 284–309 and accompanying text.

83 U.S. CONST. art. I, § 8, cl. 11.

84 *Id.* cl. 15.

85 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. app. at 64 (1862) (Mar. 3).

86 *See, e.g.*, *id.* at 1574 (Apr. 8).

87 *See infra* note 329 and accompanying text.

88 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. app. at 265 (1862) (May 24).

89 *See, e.g.*, *id*. at 3374 (July 16).

90 *Id.*

91 *See, e.g.*, *id.* at 1819 (Apr. 24).

harsh, and the issue was fought over with vigor. This debate is fully discussed in Section VI.F. At many times in the debate, however, congressmen made clear that this consideration was distinct from the due-process issue. Sometimes a congressman would take the position that confiscation was constitutional in light of the due-process issue, but excessive because it covered too many minor rebels. At other times critics would say that a confiscation measure was unconstitutional, but independently, too harsh. Harshness and excessiveness were discussed at great length, and so was due process; they were never equated, and frequently distinguished.

As finally enacted, the Second Confiscation Act was procedurally murky. It authorized in rem proceedings regarding seized property, "which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases."[92] Courts ruled on the constitutionality of these procedures in three cases. In 1863, the Kentucky Court of Appeals held the act unconstitutional as a violation of due process in *Norris v. Doniphan*.[93] Professor Hamilton says the argument "reads like a speech made by a conservative Democrat in the Senate in opposition to confiscation,"[94] and indeed one of the separate opinions of the court quoted the congressional speeches of Thomas at some length.[95] The Court, however, also rejected after considerable consideration a law-of-nations argument against confiscation rooted in the harshness of the law.[96] This split decision on the two attacks on confiscation, one based on harshness and the other rooted in due process, confirmed that a ban on excessiveness is not baked into the principle expressed by "due process of law." In 1871, the Supreme Court considered two procedural challenges to the Confiscation Act, unanimously upholding one challenge in *McVeigh v. United States*,[97] in which the lower court had decided the issue of loyalty too summarily,[98] and rebuffing the other

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92 Confiscation Act of 1862, ch. 195, 12 Stat. 589, 591 (July 17).

93 61 Ky. (4 Met.) 385, 439 (1863).

94 HAMILTON, *supra* note 59, at 149.

95 *Norris*, 61 Ky. (4 Met.) at 437–38 (separate opinion of Williams, J.).

96 *Id.* at 391–92 (majority opinion) (noting that although *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86 (1833), had held that "the modern usage of nations . . . has become law," this language was governed by *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814), which held, "[t]his usage . . . is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.").

97 78 U.S. (11 Wall.) 259 (1870).

98 *Id.* at 267. The Court explained that that an order that "denied the respondent a hearing" would "be contrary to the first principles of the social compact and of the right administration of justice," and noted that "[a] different result would be a blot upon our jurisprudence and civilization." *Id.* Even an alien enemy is able to be sued and is entitled to proper process when that happens: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." *Id.* (footnote omitted). The Court quoted Bacon's Abridgement: "For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery," and remanding so that the district court would "proceed . . . in conformity to law." *Id.* at 267–68.

challenge 7–2 in *Miller v. United States*,[99] based on the processes required in civil versus criminal settings.[100]

A few other disputes considered by Congress in 1862 concerned due process. The issue of executive detention continued to crop up regularly, and was discussed in terms of due process.[101] In April, Congress banned slavery in the District of Columbia, with compensation only for loyal owners.[102] Due process touched on several of the issues here: how loyalty was determined, the amount of compensation, the procedure for compensation (commissioners rather than a court and jury), and whether compensation was properly required at all.[103] Finally, the confinement of prisoners in D.C. jails, many of them fugitives from slavery, repeatedly raised issues of due process.[104]

V. THE PLAYERS AND THE DEBATES

The participants in the 1862 debates overlapped significantly with the players behind the Fourteenth Amendment. Of the fifteen members of the Joint Committee on Reconstruction, nine—Bingham, Conkling, Fessenden, Howard, Harris, Justin Morrill, Grider, Grimes, and Stevens—played significant roles in the 1862 debates. What of the other six? As explained above, two—Reverdy Johnson and Andrew Jackson Rogers—explained their general views of due process in 1866. Elihu Washburne was in Congress in 1862, but relatively quiet. The other three—Blow, Boutwell, and Williams—were not yet in Congress.

The participants below are listed in rough order of importance and notes at the end of the section show where they discussed due process and kindred issues in 1862. It was a massive debate. As will be seen later in the Article, two groups of congressmen—the sixteen congressmen who offered

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99 78 U.S. (11 Wall.) 268 (1870).

100 *Id.* at 307 (Second Confiscation Act was sufficiently analogous to the blockade allowed in the *Prize Cases* and *The Amy Warwick*). *But see id.* at 323 (Field, J., dissenting) ("[I]t would sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman, or the murderer were authorized, not as a consequence of their conviction upon regular criminal proceedings, but without such conviction, upon *ex parte* proof of their guilt, or upon the assumption of their guilt from their failure to appear to a citation, published in the vicinage of the property, or posted upon the doors of the adjoining court-house, and which they may never have seen. It seems to me that the reasoning, which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone, or that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offence be inflicted.").

101 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 95 (1861) (Dec. 16).

102 District of Columbia Compensated Emancipation Act, ch. 54, 12 Stat. 376, 376 (1862).

103 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 1011 (1862) (Feb. 28); *id.* at 1335–36 (Mar. 24); *id.* at 1449 (Mar. 31); *id.* at 1473 (Apr. 1); *id.* app. at 101 (Apr. 11).

104 *See, e.g.*, *id.* at 10 (1861) (Dec. 4); *id.* at 26 (Dec. 9); *id.* at 316 (1862) (Jan. 14).

definitions of due process and the fourteen congressmen who distinguished due-process attacks from complaints about excessiveness—are particularly important to highlight (indicated by the shaded cells).

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Bingham[105]	Confiscation sponsor; leader in Judiciary Committee			Joint Committee member; sponsored key Fourteenth Amendment language
Howard[106]	Confiscation supporter; critic of alternative proposal			Joint Committee member; presented Fourteenth Amendment to Senate
William Pitt Fessenden[107]	Confiscation supporter			Joint Committee co-chair
Stevens[108]	Confiscation supporter			Joint Committee co-chair
Harris[109]	Confiscation sponsor; member of confiscation & conference committees			Joint Committee member
Conkling[110]	Confiscation supporter			Joint Committee member

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Justin Morrill[111]	Confiscation sponsor; due-process critic of alternative procedure			Joint Committee member
Grider[112]	Confiscation opponent			Joint Committee member
Grimes[113]	Confiscation supporter			Joint Committee member
Ashley[114]	Confiscation supporter			Fourteenth Amendment supporter
Colfax[115]	Confiscation supporter			Fourteenth Amendment supporter; Speaker of House; important speaker in campaign
Beaman[116]	Confiscation committee; confiscation supporter			Fourteenth Amendment supporter
Eliot[117]	Member of confiscation committee; reports proposal; member of conference committee			Fourteenth Amendment supporter

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Clark[118]	Sponsors treason-trial substitute; chair of confiscation committee; member of conference committee; messenger from Lincoln about non-veto conditions			Fourteenth Amendment supporter
Browning[119]	Confiscation opponent			Led attack on Fourteenth Amendment
Cowan[120]	Confiscation critic; member of confiscation committee			Fourteenth Amendment opponent
Henderson[121]	Confiscation opponent; member of confiscation committee			Fourteenth Amendment supporter
Henry Wilson[122]	Confiscation sponsor; member of confiscation committee			Fourteenth Amendment supporter
James Falconer Wilson[123]	Confiscation supporter; member of conference committee			Chairman of House Judiciary Committee; in charge of Civil Rights Act of 1866

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Trumbull[124]	Chairman of Senate Judiciary Committee; led confiscation push			Chairman of Senate Judiciary Committee; in charge of Civil Rights Act of 1866
Sumner[125]	Confiscation supporter			Fourteenth Amendment supporter
Davis[126]	Confiscation opponent			Fourteenth Amendment opponent
Foster[127]	Confiscation supporter			Fourteenth Amendment supporter
Doolittle[128]	Confiscation opponent			Fourteenth Amendment opponent
Harding[129]	Confiscation opponent			Fourteenth Amendment opponent
Howe[130]	Confiscation opponent			Fourteenth Amendment supporter
Julian[131]	Confiscation supporter			Fourteenth Amendment supporter
Kelley[132]	Confiscation supporter			Fourteenth Amendment supporter
Lane[133]	Confiscation supporter			Fourteenth Amendment supporter

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
McDougall[134]	Confiscation opponent			Fourteenth Amendment opponent
Sherman[135]	Confiscation sponsor; member of confiscation committee			Fourteenth Amendment supporter; important speaker on campaign
Willey[136]	Confiscation opponent; member of confiscation committee			Fourteenth Amendment supporter
Wade[137]	Confiscation sponsor			Fourteenth Amendment supporter
Saulsbury[138]	Confiscation opponent			Fourteenth Amendment opponent
Rollins[139]	Confiscation supporter			Not voting on Fourteenth Amendment
Dixon[140]	Confiscation opponent			Not voting on Fourteenth Amendment
Noell[141]	Confiscation sponsor; member of confiscation committee			

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Hutchins[142]	Confiscation supporter; member of confiscation committee			
Collamer[143]	Confiscation-alternative sponsor; member of confiscation committee			
Sedgwick[144]	Confiscation sponsor; member of confiscation committee			
Harlan[145]	Member of confiscation committee			
Mallory[146]	Confiscation opponent; member of confiscation committee			
Walton[147]	Confiscation-alternative supporter			
Powell[148]	Confiscation opponent			
Crisfield[149]	Confiscation opponent			
Crittenden[150]	Confiscation opponent			
Sheffield[151]	Confiscation opponent			

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Wadsworth[152]	Confiscation opponent			
Kellogg[153]	Confiscation supporter			
Wilmot[154]	Confiscation supporter			
Samuel Blair[155]	Confiscation supporter			
Porter[156]	Confiscation sponsor			
Wallace[157]	Confiscation supporter			
Wright[158]	Confiscation-alternative supporter			
Thomas[159]	Confiscation opponent			
Holman[160]	Confiscation opponent			
Arnold[161]	Confiscation sponsor			
Campbell[162]	Confiscation sponsor			
Gurley[163]	Confiscation sponsor			
Lovejoy[164]	Confiscation sponsor			
Shanks[165]	Confiscation sponsor			

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Shellabarger[166]	Confiscation sponsor			
Upton[167]	Confiscation sponsor			
Patton[168]	Confiscation supporter			
Rice[169]	Confiscation supporter			
Spaulding[170]	Confiscation supporter			
Sargent[171]	Confiscation supporter			
Babbitt[172]	Confiscation supporter			
Francis Blair[173]	Confiscation supporter			
Cutler[174]	Confiscation supporter			
Duell[175]	Confiscation supporter			
Dunn[176]	Confiscation supporter			
Ely[177]	Confiscation supporter			
Samuel C. Fessenden[178]	Confiscation supporter			
Hale[179]	Confiscation supporter			
Hanchett[180]	Confiscation supporter			

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
King[181]	Confiscation supporter			
Lansing[182]	Confiscation supporter			
Loomis[183]	Confiscation supporter			
Lot Morrill[184]	Confiscation supporter			
Wilkinson[185]	Confiscation supporter			
Olin[186]	Confiscation opponent; confiscation committee member (briefly)			
Allen[187]	Confiscation opponent			
Maynard[188]	Confiscation opponent			
Biddle[189]	Confiscation opponent			
Carlile[190]	Confiscation opponent			
Clements[191]	Confiscation opponent			
Conway[192]	Confiscation opponent			
Cox[193]	Confiscation opponent			

Congressmen	1862 Roles	Due-Process Definitions	Excessiveness v. Due Process	1866 Roles
Diven[194]	Confiscation opponent			
Dunlap[195]	Confiscation opponent			
Hickman[196]	Confiscation opponent			
Law[197]	Confiscation opponent			
Menzies[198]	Confiscation opponent			
Norton[199]	Confiscation opponent			
Nugen[200]	Confiscation opponent			
Pendleton[201]	Confiscation opponent			
Price[202]	Confiscation opponent			
Richardson[203]	Confiscation opponent			
Train[204]	Confiscation opponent			
Wickliffe[205]	Confiscation opponent			

105 *See* CONG. GLOBE, 37th Cong., 2d Sess. 7 (1861) (Dec. 2) (proposing bill); *id.* at 56 (Dec. 11) (proposing bill); *id.* at 346–48 (1862) (Jan. 15) (defending view that due process is merely the law of the land); *id.* at 462, 467 (Jan. 23) (Van Horn endorsing Bingham's defense); *id.* at 956–57 (Feb. 25) (insisting on due-process rights of purported fugitive slaves); *id.* at 1202–05 (Mar. 12) (defending confiscation); *id.* at 1303 (Mar. 20) (giving minority report of Judiciary Committee in favor of confiscation); *id.* at 1321 (Mar. 21) (printing substitute confiscation act); *id.* at 1638–40 (Apr. 11) (suggesting the Fifth Amendment

prohibits slavery in the District of Columbia because of the shift from "freeman" to "person"); *id.* at 1682 (Apr. 16) (submitting amendment to confiscation bill); *id.* at 1767 (Apr. 22) (proposing substitute); *id.* at 1768 (Apr. 22) (suggesting even retrospective confiscation might be acceptable); *id.* at 1771 (Apr. 22) (proposal approved by House); *id.* at 1788 (Apr. 23) (proposal tabled by House); *id.* at 2052 (May 9) (noting there had been no compensation for rebel owners when D.C. slavery was abolished); *id.* at 2066 (May 12) (objecting to introduction of a resolution making due-process objection to "wholesale" confiscation); *id.* app. at 154 (May 21) (engaging with Mallory on whether "forfeiture" in Article III applies to personalty); *id.* app. at 187 (May 24) (Harding listing Bingham among leaders on confiscation); *id.* at 2359 (May 26) (absent during confiscation vote, but paired with confiscation opponent).

106 *See id.* at 375 (Jan. 17) (arrives in Senate for first time); *id.* app. at 100 (Apr. 11) (interrupting to clarify that seizure isn't essential to confiscation); *id.* at 1714–20 (Apr. 18) (distinguishing cruelty from unconstitutionality and defending confiscation on many fronts); *id.* at 1787 (Apr. 23) (correcting Doolittle on timing of chattel forfeiture); *id.* at 1883 (Apr. 30) (seeking instruction to committee to limit confiscation to leaders); *id.* app. at 145 (May 5) (Howe saying that Howard's speech demanded more attention than any other); *id.* at 2164 (May 16) (dispute with Henderson about what counts as a confiscation measure); *id.* at 2170 (May 16) (worries that Trumbull's approach to "forfeiture" is evasion of Article III); *id.* at 2172 (May 16) (marking "clear distinction which ever exists in all human societies between a state of war and a state of peace"); *id.* at 2223 (May 20) (correcting Davis on where Booth was from: Wisconsin, not Minnesota); *id.* at 2229 (May 20) (explaining the procedure for seizure of property without arrest of person); *id.* app. at 303–07 (June 24) (criticizing at length Clark's substitute, using confiscation as a means of compelling attendance at treason trials, quoting *Greene* at length); *id.* at 2931 (June 25) (correcting misinterpretation by Dixon); *id.* at 2966–69 (June 27) (discussing limits on presidential power); *id.* at 2991 (June 28) (Wilkinson commending Howard on presidential power).

107 *See id.* at 97 (1861) (Dec. 16) (defending detention in "times like these"); *id.* app. at 66 (1862) (Mar. 3) (McDougall paying tribute to Fessenden's thoroughness); *id.* at 1473 (Apr. 1) ("common consent" and "custom" establish baseline for compensation of D.C. emancipation, which cannot be disregarded, even if not constitutionally obligatory); *id.* at 1739 (Apr. 21) (concern about military versus civil jurisdiction); *id.* at 1963 (May 6) (taken aback when Trumbull says he was opposed to confiscation); *id.* at 1964 (May 6) (Trumbull reading transcript of exchange with Fessenden); *id.* at 2039 (May 9) (hoping that constitutional issues with confiscation-resembling tax bill would be "thoroughly and well considered").

108 *See id.* at 439–40 (Jan. 22) (defending emancipation as a war measure, not limited to rebels because of fraud, but with compensation for loss of loyal citizens); *id.* at 462 (Jan. 23) (Van Horn endorsing Stevens on confiscation); *id.* at 1199 (Mar. 12) (refusing to give up confiscatory emancipation unless persuaded); *id.* at 1645 (Apr. 11) (defending lack of jury for equivalent of suits in chancery); *id.* at 2130 (May 14) (Crisfield responding to Stevens).

109 *See id.* at 861 (Feb. 18) (proposing outlawing traitors); *id.* app. at 63 (Mar. 3) (pestering McDougall on seizing rebels' property in New York); *id.* at 1627 (Apr. 11) (Collamer noting that Harris has amendments to propose); *id.* at 1652–55 (Apr. 14) (confiscation substitute limited to Article VI-oath-denying rebels, but forfeiting all constitutional rights, pioneering in rem provisions); *id.* at 1991 (May 7) (appointed to confiscation committee); *id.* at 2191 (May 19) (Sumner defending Harris on in rem proceedings); *id.* at 2235 (May 20) (Eliot commending how learned Harris is); *id.* at 3166 (July 8) (appointed to conference committee); *id.* at 3267 (July 11) (report back from conference committee); *id.* at 3375 (July 16) (calling the debate "a very protracted and full discussion").

110 *See id.* at 1514 (Apr. 2) (urging discussion of compensated emancipation); *id.* at 1819 (Apr. 24) (noting need for speed on confiscation because it could not be retrospective, and wanting a limit to "ringleaders").

111 *See* CONG. GLOBE, 37th Cong., 2d Sess. 49–50 (1861) (Dec. 11) (introducing bill); *id.* at 2233 (1862) (May 20) (proposing substitute for emancipation of the rebel-enslaved); *id.* app at 187 (May 24)

(Harding complaining of inconsistency in earlier opposing congressional emancipation power); *id.* at 2360 (May 26) (substitute voted down).

[112] *See id.* app. at 162–66 (quoting Washington's Farewell Address at length, claiming not to be a "learned jurist," repeating that confiscation is "against the spirit of the age," claiming that authorities like Grotius are "dug up from the tombs of antiquity," deferring to "gentlemen who have examined the subject, and are of high legal attainments, having consulted the authorities," and who think confiscation is unconstitutional, calls his long speech "desultory, off-hand remarks").

[113] *See id.* at 2039 (1862) (May 9) (urging that confiscation be sent to committee); *id.* at 2306 (May 23) (claiming that because D.C. committee isn't a committee of lawyers, judiciary committee should consider D.C. issues involving difficult legal questions).

[114] *See id.* app. at 101 (Apr. 11) (defending D.C. emancipation); *id.* app. at 224–25 (May 23) (supporting confiscation, quoting historical materials and defending concept of state treason).

[115] *See id.* at 1789–90 (Apr. 23) (stressing lack of retroactivity in bill, not trusting the court that gave us *Dred Scott*); *id.* at 2623 (June 9) (proposing the inclusion of a jury trial in the Fugitive Slave Act).

[116] *See id.* at 1553 (Apr. 4) (saying rebels had forfeited rights); *id.* app. at 203 (May 24) (supporting confiscation).

[117] *See* CONG. GLOBE, 37th Cong., 2d Sess. 79–80 (1861) (Dec. 12) (defending confiscation); *id.* at 1846 (1862) (Apr. 28) (appointed to confiscation committee); *id.* at 2128 (May 14) (reports confiscation bill); *id.* at 2232–37 (May 20) (discusses bill limited to most important rebels, defending in rem procedure at length); *id.* app. at 225 (May 23) (Ashley endorsing Eliot's speech); *id.* app. at 187 (May 24) (Harding complaining about Eliot previously denying congressional emancipation power); *id.* at 2356–57 (May 26) (concluding debate, explaining amendments, and distinguishing severity from unconstitutionality); *id.* at 2764 (June 17) (reporting back again); *id.* at 3178 (July 8) (appointed to conference committee); *id.* at 3266–67 (July 11) (presents conference report, adopted 82–42).

[118] *See id.* at 26 (1861) (Dec. 9) (complaining that no "law or regulation" justifies detentions in D.C. jails); *id.* at 817 (1862) (Feb. 14) (proposing requirement for "precept by which said prisoner was committed"); *id.* at 1011 (Feb. 28) (proposing ban on D.C. slavery); *id.* at 1958 (May 6) (noting some good things in various proposals); *id.* at 1991 (May 7) (appointed chair of special confiscation committee); *id.* at 2163 (May 16) (hoping bill can be adopted quickly); *id.* at 2166 (expecting attack from those who want confiscation "without any trial"); *id.* at 2199 (May 19) (managing proposals on floor); *id.* at 2825 (June 20) (dispute about what bill to take up); *id.* at 2916 (June 25) (wanting to take up confiscation); *id.* at 2970 (June 27) (declining to take part in debate so that bill can be passed soon); *id.* at 2989 (June 28) (text of substitute); *id.* at 2996 (amendment approved 21–17); *id.* at 3006 (bill passed 28–13); *id.* at 3166 (July 8) (appointed to conference committee); *id.* at 3274–76 (July 12) (conference report, adopted 27–12); *id.* at 3374 (July 16) (bringing message from president on limiting confiscation of land to life estate); *id.* at 3383 (passing his amendment to clarificatory joint resolution).

[119] *See id.* at 97 (1861) (Dec. 16) (criticizing detention of Buchanan-administration ambassador "without having passed through the ordinary forms required by municipal law"); *id.* at 961 (1862) (Feb. 26) (worrying at length about loyal property owners behind Confederate lines); *id.* at 1136–40 (March 10) (claiming lack of denial the confiscation is bill of attainder and saying President can exercise war power of confiscation); *id.* at 1856–60 (Apr. 29) (claiming exclusive presidential power over confiscation, attacking in rem procedure under due process); *id.* at 2171 (May 16) (complaining his position has been misrepresented in debate); *id.* at 2917–23 (June 25) (responding to Sumner's "novel and extraordinary" claims, invoking Excessive Fines Clause, complaining about in rem procedure); *id.* at 2965–66 (June 27) (responding to Sumner on Third Amendment); *id.* at 2970 (June 27) (responding to Howard).

[120] *See id.* at 129 (1861) (Dec. 18) (distinguishing confiscation from emancipation); *id.* at 517–18 (1862) (Jan. 28) (urging full consideration of difficult constitutional issues); *id.* at 1049–53 (Mar. 4) (proclaiming consensus on a due-process definition, distinguishing *Brown* and other authorities); *id.* at 1558 (Apr. 7) (Trumbull responding to Cowan); *id.* at 1654 (Apr. 14) (Harris expressing agreement about how to define most-important rebels); *id.* at 1718 (Apr. 18) (Howard replies to Cowan); *id.* at 1832 (Apr.

25) (asks for special committee); *id.* at 1846 (asks for special committee again); *id.* at 1878–79 (Apr. 30) (notes consensus that there are at least "grave questions of policy and of constitutional law," proposes confiscation as penalty for treason, adding outlawry process to it); *id.* at 1881 (Apr. 30) (urging special committee); *id.* at 1991 (May 7) (appointed to confiscation committee); *id.* app. at 243 (June 3) (Cox relies on Cowan); *id.* at 2959–62 (June 27) (praising Clark substitute, disliking in rem procedure, harping on *Percheman*); *id.* at 2967 (June 27) (Howard replying to Cowan).

121 *See id.* at 1569–74 (Apr. 8) (opposing confiscation); *id.* at 1991 (May 7) (appointed to confiscation committee); *id.* at 2164 (May 16) (distinguishing confiscation from increased penalty for treason); *id.* at 2199 (May 19) (offering several proposals, which Clark says have been voted down before); *id.* at 2200 (May 19) (amendment voted down 25–12).

122 *See id.* at 185 (Jan. 6) (petition on arrest without rationale); *id.* at 917 (Feb. 24) (proposal to ban D.C. slavery); *id.* at 1048 (Mar. 4) (bill to ban military from re-enslaving fugitives); *id.* at 1350 (Mar. 25) (history of slavery in D.C.); *id.* at 1523 (Apr. 3) (disputing lack of compensation for D.C. emancipation); *id.* at 1556 (Apr. 7) (gives list of confiscation measures to be postponed); *id.* at 1785 (Apr. 23) (disputing with Sherman about which rebels are important enough); *id.* at 1895 (May 1) (distinguishing "leaders" from "masses"); *id.* at 1854 (proposing amendment of First Confiscation Act); *id.* at 1921 (May 2) (proposing confiscation scheme); *id.* at 1955 (May 6) (confessing lack of legal expertise, a nice "I am not a lawyer" ode to others); *id.* at 1991 (May 7) (member of confiscation committee).

123 *See* CONG. GLOBE, 37th Cong., 2d Sess. 3178 (1862) (July 8) (appointed to conference committee); *id.* at 3267 (July 11) (conference committee reports back).

124 *See id.* at 1 (1861) (Dec. 2) (proposing bill); *id.* at 18–19 (Dec. 5) (initial speech on confiscation); *id.* at 90–91, 94 (Dec. 16) (raising due-process issues about detention); *id.* at 153 (Dec. 20) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 334 (1862) (Jan. 15) (reporting back confiscation bill); *id.* at 375 (Jan. 17) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 507, 510, 517, 518 (Jan. 28) (discussing due-process objections to court-martial provisions in railroad bill); *id.* at 719 (Feb. 10) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 739 (Feb. 11) (seeking to begin confiscation discussion); *id.* at 849 (Feb. 17) (seeking to begin confiscation discussion); *id.* at 941–44 (Feb. 25) (defending confiscation); *id.* app. at 63 (Mar. 3) (assuring McDougall that bill is prospective); *id.* at 1158 (Mar. 11) (explaining how bill evades life-estate-forfeiture-only issue); *id.* at 1332 (Mar. 24) (discussing compensated emancipation); *id.* at 1371 (Mar. 26) (discussing compensated emancipation); *id.* at 1557–60 (Apr. 7) (clarifying procedures in bill, making prospectivity clear, responding to Cowan and Browning, explaining in rem procedures); *id.* at 1571 (Apr. 8) (explaining difference between judicial and administrative proceedings in bill); *id.* app. at 100 (Apr. 11) (clarifying reach of bill in response to Doolittle); *id.* at 1627 (Apr. 11) (upset with the Senate for considering so slowly); *id.* at 1813 (Apr. 24) (explaining relationship of proposals); *id.* at 1883 (Apr. 30) (participating in Senate-procedures issues); *id.* at 1940 (May 5) (Foster endorsing Trumbull's explanations of his bill); *id.* at 1959 (May 6) (explaining distinction between proposals); *id.* at 1960 (May 6) (acknowledging distinction in covered rebels might be too harsh); *id.* at 1964 (May 6) (dispute with Fessenden about who supported which proposals); *id.* at 2165–66 (May 16) (Trumbull saying treason-penalty bill wasn't confiscation, defending confiscation against due-process attack); *id.* at 2170 (May 16) (proposing amendment); *id.* at 2226 (May 20) (accusing due-process foes of confiscation of acting on behalf of rebels); *id.* at 2776 (June 18) (noting another bill coming soon); *id.* at 2842 (June 20) (estimating numbers of votes for different proposals); *id.* at 2902 (June 24) (distinguishing support for bills); *id.* at 2916 (discussing timing of discussion); *id.* at 2961 (June 27) (distinguishing power to confiscate from policy); *id.* at 2971–72 (June 27) (discussing distinctions between bills); *id.* at 3000 (discussing what vote meant).

125 *See id.* at 16 (1861) (Dec. 5) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 25 (Dec. 9) (same); *id.* at 88 (Dec. 16) (same); *id.* at 109 (Dec. 17) (same); *id.* at 142 (Dec. 19) (same); *id.* at 221 (1862) (Jan. 8) (same); *id.* at 286 (Jan. 13) (same); *id.* at 736 (Feb. 11) (state-suicide resolutions); *id.* at 911 (Feb. 22) (presenting petition for compensated

emancipation for loyal owners, uncompensated for rebels); *id.* at 1449 (Mar. 31) (claims D.C. slavery violates due process); *id.* at 1738 (Apr. 21) (proposing military-necessity exception to right to face accusers); *id.* at 1855 (Apr. 29) (proposing giving President option to tell Congress that revealing details of rationale for detention would not be in public interest); *id.* at 1957 (May 6) (disagreeing with Wade and Hale on constitutional issue); *id.* at 2056 (Hale recalling Sumner's position on administrative adjudication in fugitive-slave setting); *id.* at 2113 (May 14) (motion to add if-in-public-interest limit to demand for information on detentions); *id.* at 2188–96 (May 19) (discussing "forfeiture," defending in rem procedure at length, noting that rights can be "harsh and repulsive"); *id.* at 2842 (June 20) (supporting House bill); *id.* at 2963–65 (June 27) (noting that Third Amendment quartering allows confiscation without due process of law, but the judicial proceedings in the bill satisfy due process); *id.* at 2991 (June 28) (Wilkinson endorsing Sumner in exchange with Browning); *id.* at 2998 (June 28) (proposing adopting House bill on emancipation of rebels' slaves); *id.* at 3382 (July 16) (noting that armies take life without due process).

126 *See id.* at 176 (1861) (Dec. 26) (proposing very limited confiscation); *id.* at 178 (Dec. 30) (proposing very limited confiscation); *id.* at 509 (1862) (Jan. 28) (stringent limits on trials outside civil law); *id.* at 785 (Feb. 13) (resolution against retroactivity); *id.* at 986 (Feb. 27) (moving substitute); *id.* at 1191 (Mar. 12) (insisting that a test of constitutionality be submitted to courts); *id.* at 1334–36 (Mar. 24) (discussing *Antelope* at length, complaining about the amount of compensation for slaves in D.C.); *id.* at 1446 (Mar. 31) (interacting with Sumner on whether slaves are property); *id.* at 1498–99 (Apr. 2) (discussing *Antelope* and other cases and when law-of-nations usage ripens into law); *id.* at 1720 (Apr. 18) (wanting to reply to Howard); *id.* at 1757–62 (Apr. 22) (attacking confiscation, distinguishing many cases, noting uncertainty of in rem jurisdiction); *id.* at 1776–82 (Apr. 23) (quoting Wendell Phillips's reply to Lysander Spooner at length, discussing *Prigg v. Pennsylvania* and *Somerset's Case* at length); *id.* at 1785 (Apr. 23) (engaging on "forfeiture" Article III issue); *id.* at 2167–68 (May 16) (arguing about "forfeiture," old English statutes, and treason cases); *id.* at 2169 (May 16) (amendment to take emancipation out of the treason penalty enhancement substitute voted down 31–7); *id.* at 2197 (May 19) (discussing possible denaturalization of rebels); *id.* at 2218–23 (May 20) (defense of slavery, misrecollection that *Booth* happened in Minnesota corrected by Howard); *id.* app. at 218 (May 24) (Kellogg praises speech); *id.* at 2961 (June 27) (distinguishing *Brown*).

127 *See id.* at 579 (Jan. 31) ("satisfactory evidence" requirement for administrative adjudication is implicit); *id.* at 1940 (May 5) (endorsing Trumbull's explanations of his bill); *id.* at 1942 (preferring Collamer's proposal); *id.* at 1960 (May 6) (participating in discussion about who supported referral to committee).

128 *See id.* at 124 (1861) (Dec. 18) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 125 (Dec. 18) (presenting bill to tax the South); *id.* at 505 (1862) (Jan. 28) (presenting a petition for compensated emancipation for loyal owners, and uncompensated for rebels); *id.* app. at 94–100 (Apr. 11) (criticizing confiscation, promoting voluntary colonization, and interacting with Trumbull and Howard on the scope of the bill and how confiscation works); *id.* at 1785–87 (Apr. 23) (controversy on whether Article III forfeiture only applies to land titles already partitioned into a series of life estates); *id.* at 1813 (Apr. 24) (Trumbull agreeing with Doolittle on the broad scope of Article III forfeiture); *id.* app. at 137–40 (May 2) (harping on law-of-nations limits on what can give good title after war and proposing tax on South as alternative); *id.* at 2039 (May 9) (reporting back a tax-on-South bill deemed too similar to confiscation to be discussed separately).

129 *See* CONG. GLOBE, 37th Cong., 2d Sess. app. at 28 (1861) (Dec.17) (condemning emancipation on several grounds and distinguishing constitutional concerns from policy); *id.* app. at 186–87 (1862) (May 24) (claiming that "an attempt to justify any one of these measures on constitutional grounds would be actually laughed at, if men were not blinded by passion," and complaining that many advocates of confiscation and emancipation said in January 1861 that Congress had no power to emancipate); *id.* app. at 200 (May 24) (Hutchins saying that Harding misinterpreted the vote).

[130] *See id.* at 177–78 (1861) (Dec. 26) (summarizing procedural complaints about Fugitive Slave Act of 1850); *id.* at 1900 (1862) (May 1) (noting mass of speeches on confiscation to read); *id.* app. at 142–46 (May 5) (deploring Saulsbury's racism and interpreting Howard's proposal to be absurd).

[131] *See id.* at 327–31 (Jan. 14) (speech on emancipation, inserted into debate on London exhibition); *id.* app. at 184 (May 23) (demanding "due process of war"); *see generally* Nathan S. Chapman, *Due Process of War*, 94 NOTRE DAME L. REV. 639 (2018).

[132] *See* CONG. GLOBE, 37th Cong., 2d Sess. 596 (1862) (Jan. 31) (expressing joy at the expression of support for confiscation); *id.* at 1770 (Apr. 22) (worrying about jury nullification in the South).

[133] *See id.* at 88 (1861) (Dec. 16) (proposing a prohibition on rebel debt collection); *id.* at 3379 (July 16) (discussing the usefulness of confiscating life estates).

[134] *See id.* at 1021 (Feb. 28) (urging the Senate to take up confiscation); *id.* app. at 60–66 (Mar. 3) (speech against confiscation focused on law of nations and attainder charge, but appreciating Trumbull's ode to the rule of law); *id.* app. at 66 (Mar. 4) (finishing speech from the day before, focusing on the administration's promise to continue to return fugitive slaves).

[135] *See id.* at 32 (1861) (Dec. 9) (enthusiastically advocating confiscation in general terms); *id.* at 316 (1862) (Jan. 14) (noting general agreement on due-process principles for D.C. jail detention); *id.* at 516 (Jan. 28) (the military shouldn't wait for "slow process of the laws of Pennsylvania" to deal with Northern saboteurs); *id.* app. at 66 (Mar. 3) (McDougall praises Sherman's amount of attention to financial details); *id.* at 1180 (Mar. 12) (introducing bill); *id.* at 1495–96 (Apr. 2) (advocating "the most rigid law of confiscation," but tempered by "forbearance" and "moderation" via an amnesty provision); *id.* at 1604 (Apr. 10) (proposing elaborate amendment); *id.* at 1719 (Apr. 18) (Howard endorsing Sherman's approach on ringleaders versus rank and file); *id.* at 1783–85 (Apr. 23) (distinguishing "measure and extent of confiscation" from "the right," and willing to give jury trial, although not constitutionally compelled for in rem proceeding, and noting his willingness to support harsher confiscation if moderate one cannot pass); *id.* at 1807 (Apr. 24) (discussion of substitute proposal); *id.* at 1808 (proposing amendment); *id.* at 1814 (proposal adopted 26–11); *id.* at 1874 (Apr. 30) (Wilmot praising Sherman's approach); *id.* at 1883 (opposing instructions for committee); *id.* at 2235 (May 20) (learning praised by Eliot); *id.* at 2902 (June 24) (supporting House bill); *id.* at 2992 (June 28) (exasperation at length of debate); *id.* at 2999 ("I am sick and tired of this debate," saying it was exhausted in first month, describing complicated lay of the land about who wants what); *id.* at 3374 (July 16) (demanding that Clark make Lincoln's veto threat explicit).

[136] *See id.* app. at 33 (1861) (Dec. 19) (complaining about going beyond the limits of the First Confiscation Act); *id.* at 1300 (1862) (Mar. 20) (arguing that D.C. emancipation is constitutional but a breach of faith with Maryland).

[137] *See id.* at 1917 (May 2) (responding to Browning on executive power); *id.* at 1957 (May 6) (worrying about jury nullification in the South); *id.* at 1961 (May 6) (reflecting on the extent of disagreement on constitutional issues); *id.* at 2139 (presenting a petition for rigorous confiscation bill); *id.* at 2170 (May 16) (limiting Article III "forfeiture" to land already prepartitioned into life-estate temporal chunks); *id.* at 2203 (May 19) (noting the inconsistency of other senators in mocking in rem proceedings in one context but incorporating them into their own proposals); *id.* app. at 225 (May 23) (Ashley quoting Wade); *id.* at 2929 (June 25) (aghast at talk of exclusive executive power).

[138] *See* CONG. GLOBE, 37th Cong., 2d Sess. 1923 (May 2) (racist stuff); *id.* app. at 142 (May 5) (Howe repudiating Saulsbury's racism: "There were sentiments dropped in that speech, the like of which I never listened to before, the like of which I hope never to listen to again."); *id.* at 2898–2902 (June 24) (racist defense of slavery, summary claim that confiscation is "flagrantly unconstitutional").

[139] *See id.* at 2301–03 (May 22) (professing relative ignorance of "nice technicalities with which it is attempted to bewilder and obstruct our steps to a just and merited retribution upon treason," quoting poetry but reminding the audience that he is not a lawyer); *id.* app. at 146 (May 22) (Menzies says Rollins speech produced "pleasure, not unmingled with pain").

[140] *See id.* at 2924 (June 25) (opposing Sumner's theories of union); *id.* at 2973 (June 27) (opposing Trumbull on presidential power).

[141] *See id.* at 33 (1861) (Dec. 9) (introducing confiscation joint resolution); *id.* at 1846 (1862) (Apr. 28) (member of House confiscation committee); *id.* at 2237–40 (May 20) (discussing "forfeiture," giving elegant extended defense of in rem procedure and the context sensitivity of due process, quoting *Murray's Lessee* at length); *id*. app at 147 (May 22) (correcting Menzies on reading case); *id.* app at 177 (May 23) (Sargent quoting and endorsing Noell's defense of confiscation); *id.* app at 218 (May 24) (Kellogg praising Noell's speech); *id.* app at 193 (May 26) (noting the ubiquity of collateral consequences from governmental action).

[142] *See id.* app. at 103–04 (Apr. 11) (denying legal existence of slavery in D.C.); *id.* at 1846 (Apr. 28) (appointment to confiscation committee); *id.* at 2066 (May 12) (objecting to Wickliffe's introduction of anti-"wholesale" confiscation resolution, "emphatically"); *id.* app. at 187 (May 24) (Harding complains about Hutchins earlier disclaiming congressional emancipation power); *id.* app. at 200–02 (May 24) (rebutting Harding's characterization of resolution, analogizing confiscation bill to blockade and First Confiscation Act, exchange with Thomas).

[143] *See id.* at 319–20 (Jan. 14) (demanding "legal process" for confinement in jail, no matter the color); *id.* app. at 64 (Mar. 3) (correcting McDougall on what *Brown* held); *id.* at 1759–60 (Apr. 22) (correcting Davis on what *Brown* held); *id.* at 1768 (Walton praising Collamer's proposal); *id.* at 1783 (19–19 vote on substituting his amendment for Sherman's); *id.* at 1785 (Apr. 23) (engaging on "forfeiture" issue); *id*. at 1808–12 (Apr. 24) (responding to use of *Palmyra* to defend in rem jurisdiction without juries, but expressing support for requiring fugitive reenslavers to prove loyalty); *id.* at 1814 (Apr. 24) (proposal read); *id.* at 1881 (Apr. 30) (Cowan proposes Collamer as committee chair); *id.* at 1895 (May 1) (motion to replace confiscation with alternative); *id.* at 1920 (May 2) (noting that all proposals would require reestablishment of government in the South, "not a perfect lawlessness"); *id.* at 1942 (May 5) (Foster preferring Collamer's scheme); *id.* at 1959 (May 6) (Trumbull noting Collamer's effective humor in mocking in rem scheme); *id.* at 1961–62 (criticizing Revolutionary precedents, noting prospectivity of current proposals, and discussing the difference between temporary seizure and permanent disposition of title); *id.* app. at 243 (June 3) (Cox relying on Collamer's arguments).

[144] *See* CONG. GLOBE, 37th Cong., 2d Sess. (Apr. 29) (selected for confiscation committee in place of Olin); *id.* at 2323–24 (May 23) (proposing emancipating slaves who will fight, with compensation for loyal owners, quoting Thomas on "direst extremity," which Sedgwick says exists, though Thomas immediately disagrees); *id.* app. at 225 (May 23) (Ashley endorsing Sedgwick); *id.* app. at 187 (May 24) (Harding complaining about earlier disavowal of congressional emancipation power).

[145] *See id.* at 1991 (May 7) (appointment to confiscation committee in place of Trumbull, who begs off).

[146] *See id.* at 1846 (Apr. 28) (appointed to confiscation committee); *id.* app. at 153–56 (May 21) (attacking in rem procedure, disputing about what early 1861 resolutions meant, and accusations that the North banned black migration, corrected by Bingham).

[147] *See id.* app. at 265–66 (May 24) (defends in rem procedure attached to treason trial and limitation to "most mischievous and most responsible" rebels).

[148] *See id.* at 1523 (Apr. 3) (due-process argument against D.C. emancipation); *id.* at 1680 (Apr. 16) ("nearly three hours" on confiscation); *id.* app. at 105–14 (Apr. 16) (due-process attack on confiscation).

[149] *See id.* app. at 49 (Feb. 5) (criticizing confiscation); *id.* at 2129–32 (May 14) (distinguishing humanity from due-process constitutionality).

[150] *See* CONG. GLOBE, 37th Cong., 2d Sess. 1635–38 (1862) (Apr. 11) (criticizing confiscation, but dubitante, interacting with Shellabarger, and taking Madison's side on the spending-power dispute with Hamilton); *id.* at 1803 (Apr. 23) (calling in rem proceeding "some sort of legal trick"); *id.* app. at 271 (May 26) (Law endorsing arguments).

[151] *See id.* at 501–02 (Jan. 27) (responding to Bingham with definition taken from *Greene*); *id.* at 598 (Jan. 31) (Dunlap endorsing Sheffield's response to Bingham, calling it "invulnerable and

invincible"); *id.* app. at 147 (May 22) (correcting Menzies on holding of case); *id.* app. at 168–71 (May 23) (giving definition of due process and condemning in rem procedure); *id.* app. at 208 (May 26) (Rice agreeing with Sheffield's definition of attainder).

[152] *See id.* at 354 (Jan. 15) (responding to Bingham, claiming under his proposals Congress exercises judicial powers); *id.* at 402 (Jan. 20) (Samuel Fessenden agrees with Bingham, not Wadsworth); *id.* at 462 (Jan. 23) (Van Horn agrees with Bingham and Stevens, not Wadsworth); *id.* at 1199 (Mar. 12) (challenging Stevens, Bingham, and Samuel Fessenden to abandon emancipation); *id.* at 1202 (Mar. 12) (taunted by Bingham on whether federally subsidized emancipation would be legitimate); *id.* at 1644 (Apr. 11) (constitutional objection to confiscation); *id.* app. at 199 (May 23) (Shanks responds to Wadsworth).

[153] *See id.* app. at 215–18 (May 24) (defending confiscation but agreeing with critics' definition of due process, and praising some points of confiscation critics).

[154] *See id.* at 1873–76 (Apr. 30) (defending confiscation, preferring to limit to leaders, and defending the use of executive commissioners because courts cannot operate).

[155] *See id.* at 2298–2301 (May 22) (defending confiscation, analogizing the First and Second Confiscation Acts, and celebrating the Northwest Ordinance, noting that the blockade fell on loyal & disloyal alike).

[156] *See* CONG. GLOBE, 37th Cong., 2d Sess. 1767–68 (1862) (Apr. 22) (proposing a bill much like Sherman's, but preferring a too-severe bill to none at all); *id.* at 1770, 1772 (Apr. 22) (involvement in agenda-setting about which bills considered).

[157] *See id.* at 2292–94 (May 22) (defending confiscation, distinguishing the need for mercy from due-process concerns).

[158] *See id.* at 1468 (Apr. 1) (urging discussion of confiscation); *id.* at 1769 (Apr. 22) (urging proper discrimination between "leaders and instigators" versus those compelled to serve rebellion); *id.* at 1876–77 (Apr. 30) (best to take before tribunal and allow for amnesty).

[159] *See id.* at 1614–18 (Apr. 10) (attacking confiscation on various grounds); *id.* at 1769 (Apr. 22) (distinguishing prize from confiscatory forfeiture, confusion about what different proposals provide for); *id.* at 1770 (Biddle has nothing to add to Thomas's arguments); *id.* at 2052 (May 9) (Takings Clause questions about D.C. abolition compensation, interaction with Bingham, who denies that it is compensation); *id.* app. at 202 (May 24) (responding to Hutchins's analogy to the in rem features of the blockade by appealing to differences between land and sea in the law of nations); *id.* app. at 218–21 (May 24) (attacking confiscation on various grounds, distinguishing harshness from due-process complaints); *id.* app. at 261 (May 26) (Wickliffe arguing that anyone unconvinced by Thomas wouldn't be convinced by someone rising from the dead); *id.* app. at 271 (May 26) (Law endorsing Thomas's arguments).

[160] *See id.* app. at 151 (May 23) (distinguishing magnanimity from constitutional concerns).

[161] *See id.* at 229 (Jan. 8) (proposing confiscation bill); *id.* at 400 (Jan. 20) (proposing voiding transfers of property by rebels); *id.* at 858–59 (Feb. 17) (arguing that an attack on slavery is an attack on its strength); *id.* app. at 182–84 (May 23) (responding to Grider, arguing that the Union had been too kind to rebels, discussing several cases and treatises).

[162] *See* CONG. GLOBE, 37th Cong., 2d Sess. 6 (1861) (Dec. 6); *id.* at 345 (1862) (Jan. 15) (pestering Bingham about why the Judiciary Committee hadn't reported on confiscation).

[163] *See id.* app. at 187 (1862) (May 24) (singled out for supposed inconsistency by Harding for agreeing earlier on lack of congressional emancipation power); *id.* app. at 234 (May 26) (defense of confiscation).

[164] *See id.* at 158 (1861) (Dec. 20) (proposing instructing the Judiciary Committee to report confiscation bill, but failing narrowly); *id.* at 229 (1862) (Jan. 8) (proposing sequestration bill); *id.* at 1413 (Mar. 27) (suggesting that anti-confiscation Browne, complaining about money, was in favor of confiscation); *id.* at 1645 (Apr. 11) (asking what process of law has enslaved those in D.C.); *id.* at 1815–17 (Apr. 24) (replying to Crittenden, complaining about the perversion of the Constitution, and an ode to the privileges of American citizenship); *id.* at 2030 (May 8) (reporting bill for prohibition on slavery in federally controlled areas); *id.* at 2042 (May 9) (House refuses 65–50 to table Lovejoy's bill); *id.* at 2077

(Diven replies to Lovejoy by complaining about Illinois racial restriction on migration); *id.* app. at 187 (May 24) (Harding complaining that Lovejoy once disavowed congressional emancipation power).

165 *See id.* at 1682 (Apr. 16) (House considers proposal associated with Shanks); *id.* app. at 196–99 (May 23) (defending confiscation, responding to Dunlap and Wadsworth).

166 *See id.* at 935–36 (Feb. 24) (defending in rem confiscation in light of *Murray's Lessee*); *id.* at 1636 (Apr. 11) (asking Crittenden if lowering the age of emancipation for those who haven't reached it yet is a deprivation of property—a bit like regulatory-takings issue); *id.* at 1682 (Apr. 16) (House begins considering his proposal); *id.* at 2069–74 (May 12) (defending Lincoln on habeas).

167 *See id.* at 36 (Dec. 9) (introducing bill).

168 *See* CONG. GLOBE, 37th Cong., 2d Sess. 1800 (1862) (Apr. 23) (stressing prospectivity).

169 *See id.* app. at 205–08 (May 24) (those on the battlefield are subject to the "laws of war," which are a *kind* of "punishment by due process of law").

170 *See id.* app. at 174–75 (May 23) (wartime suspension of "ordinary forms of judicial proceedings").

171 *See id.* app. at 175–77 (May 23) (endorsing Noell's defense of confiscation, insisting that executive detention procedures are responsive to facts).

172 *See id.* app. at 166–68 (May 22) (defending confiscation, worrying about jury nullification in the South).

173 *See id.* app. at 171 (May 23) (discussing whether international law applied to confiscation).

174 *See* CONG. GLOBE, 37th Cong., 2d Sess. app. 114–15 (1862) (Apr. 23) (arguing about "blessings of liberty" in the Preamble, arguing that *partus sequitur ventrem* works corruption of blood, and complaining about the lack of juries under the Fugitive Slave Act).

175 *See id*. at 99 (1861) (Dec. 16) (proposing taking away rebels' pensions); *id.* at 1797–98 (1862) (Apr. 23) (Democrats complain everything is unconstitutional).

176 *See id.* at 1790–91 (Apr. 23) (desiring discrimination between leaders and victims, and wanting to include pro-Confederate newspapers and pastors).

177 *See id.* app. at 193–95 (May 26) (war is grim and harsh, but we should distinguish "leaders and master spirits" from "less guilty masses").

178 *See id.* at 402 (Jan. 20) (expressing agreement with Bingham); *id.* at 1199–1200 (Mar. 12) (accused by Wadsworth of harboring emancipation schemes, sort of admits it "if it can be constitutionally effected"); *id.* app. at 148–50 (May 22) (notes that some people "whose opinion is deserving of great weight" think confiscation is constitutional, quoting Burke, says even a retrospective law would "meet the claims of justice," ode to being man of one idea, calls men "thinking bayonets").

179 *See id.* at 92 (1861) (Dec. 16) (applauding Trumbull's speech on due-process limits on executive detention); *id.* at 941 (1862) (Feb. 25) (urging haste on confiscation); *id.* at 961 (Feb. 26) (noting that loyal owners might own part of confiscated vessels); *id.* at 1785–86 (Apr. 23) (offering tentative thoughts on scope of "forfeiture" in Article III); *id.* at 1955 (May 6) (complaining about the length of debate); *id.* (Henry Wilson noting that Hale is one "to whom we all pay so much deference, and justly too"); *id.* at 1956 (May 6) (noting that legal study sometimes produces "legal nonsense and judicial quackery"); *id.* at 2055–56 (May 12) (complaining about administrative adjudication, as others like Sumner had complained about the fugitive-slave law); *id.* at 2928 (June 25) (discussing "forfeiture").

180 *See* CONG. GLOBE, 37th Cong., 2d Sess. app. at 208–12 (1862) (May 26) (defending Lincoln on habeas, saying there is no need to limit confiscation to slaves *directly* employed in war service; indirect employment is enough; suggesting *Missouri v. Holland*–style abolition through a treaty).

181 *See id.* at 175 (1861) (Dec. 24) (should use "ordinary tribunals of justice" at the "earliest practicable period"); *id.* at 1814 (1862) (Apr. 24) (should distinguish between loyal people in the South and even minor rebels).

182 *See id.* at 2272–73 (May 21) (defending confiscation against Article III attack; complaining about the lack of free speech in the South).

183 *See id.* app 179–81 (May 23) (defending confiscation under the law of nations).

[184] *See id.* at 314–15 (Jan. 14) (discussing bill to discharge detainees held without due process); *id.* at 816–17 (Feb. 14) (discussing detention "on a process"); *id.* at 1054 (Mar. 4) (desire to discuss confiscation); *id.* at 1074–76 (Mar. 5) (defends confiscation under the law of nations); *id.* at 1191 (Mar. 12) (begining D.C. emancipation process); *id.* at 1336 (Mar. 24) (defending lack of compensation for D.C. emancipation because it is not "property" in constitutional sense).

[185] *See id.* at 2990–91 (June 28) (defending confiscation, preferring Sumner to Browning, and agreeing with Howard).

[186] *See* CONG. GLOBE, 37th Cong., 2d Sess. 180 (1861) (Dec. 30) (raising port-preference objection to blockade); *id.* at 1170–71 (1862) (Mar. 11) (wanting to distinguish important from minor rebels); *id.* at 1788 (Apr. 23) (constitutional issues key for vote); *id.* at 1820 (Apr. 24) (proposing sending to select committee, which the House does).

[187] *See id.* app. at 119–21 (Apr. 24) (Article III arguments about "forfeiture," distinguishing emancipation from confiscation).

[188] *See id.* app. at 273–75 (May 23) (responding to a no-process-of-law-on-battlefield hypothetical and commending the public-relations value of jury verdicts over in rem proceedings).

[189] *See id.* at 1770 (Apr. 22) (opposing confiscation, following Thomas, and criticizing emancipation).

[190] *See id.* at 1157–61 (Mar. 11) (insisting on the right to examine constitutional issues, distinguishing Trumbull's authorities, and urging restraint for rank and file).

[191] *See id.* app. at 191–92 (May 24) (urging general clemency for "deluded followers").

[192] *See* CONG. GLOBE, 37th Cong., 2d Sess. at 82–83 (1861) (Dec. 12) (criticizing confiscation on law-of-nations grounds); *id.* at 679 (1862) (Feb. 6) (attempting to offer resolution asking who has been arrested "without a legal process"); *id.* at 1157 (Mar. 11) (Carlile quoting Conway).

[193] *See id.* at 1796 (Apr. 23) (describing state–federal procedural interaction); *id.* app. at 242–45 (June 3) (criticizing confiscation, opposing black citizenship).

[194] *See id.* at 2074–77 (May 12) (arguing that legislation is not required and that confiscation is limited to public property but would allow abandoned property to be treated as public, and predicting Stevens will make fun of him).

[195] *See id.* at 598 (Jan. 31) (calling Sheffield's response to Bingham "invulnerable and invincible"); *id.* app. at 189–90 (May 24) (condemning lack of hearing, trial, or jury).

[196] *See id*. at 1303 (Mar. 20) (reporting back confiscation proposals, recommending they not pass); *id.* at 1769 (Apr. 22) (Walton saying he wants the same proposal as Hickman: territorial emancipation after time to surrender, a la Emancipation Proclamation).

[197] *See id.* app. at 271–72 (May 26) (endorsing arguments of Crittenden and Thomas).

[198] *See* CONG. GLOBE, 37th Cong., 2d Sess. 495 (1862) (Jan. 27) (attacking Stevens for changing the Constitution); *id.* app. at 146–47 (May 22) (responding to Rollins, drawing distinctions among those in the South, and asserting immunity of property not used in war).

[199] *See id.* at 1828 (Apr. 24) (unconstitutionality of confiscation "is seen at a glance," and shouldn't set confiscated slaves free).

[200] *See id.* app. at 239–42 (May 26) (attacking confiscation and expressing possible support for the idea that the Constitution does not have enough emergency powers to sustain itself).

[201] See *id.* at 41–44 (1861) (Dec. 10) (associating habeas rights with the right to due process); *id.* at 1682 (1862) (Apr. 16) (agreeing to table all confiscation bills); *id.* at 1698 (Apr. 17) (motion to table to be discussed soon); *id.* at 1766 (Apr. 22) (motion to table voted down 66–38).

[202] *See id.* app. at 215 (May 26) (seeking "discriminating measure" that would allow "deluded followers" to be pardoned).

[203] *See id.* at 2206 (May 19) (expressing racism in terms of hostility to "rights of American citizenship" for enslaved people); *id.* app. at 189 (May 24) (quoting Douglas's last speech and warning about unconstitutional acts making the innocent suffer).

204 *See* CONG. GLOBE, 37th Cong., 2d Sess. 1645 (1862) (Apr. 11) (objecting to lack of juries on Fifth and Seventh Amendment grounds); *id.* app. at 222–24 (May 24) (objecting to confiscation).

205 *See id.* app. at 68–69 (Mar. 11) (taking Madison's side on dispute over spending power); *id.* at 1320 (Mar. 21) (arguing that the British paid compensation for freeing slaves); *id.* at 1514 (Apr. 2) (objecting to talking about compensated emancipation); *id.* at 2030 (May 8) (arguing about conditions in land cessions to federal government); *id.* at 2043 (May 9) (reading at length from *Prigg*); *id.* at 2065–66 (May 12) (introducing a due-process-based resolution against "wholesale" confiscation); *id.* at 2232 (May 20) (defending racial bar on testimony); *id.* app. at 162 (May 22) (urging abandonment of "unconstitutional projects" like "confiscation without trial," quoting Joel Parker); *id.* app. at 259–64 (May 26) (attacking confiscation, relying on Thomas, and expressing preference for the younger John Quincy Adams—"in his best days"—over the older version).

VI. ELEMENTS OF THE 1862 DEBATE

A. *Definitions*

Many members offered explicit definitions or restatements of what due process meant of the sort that Rogers seemed to be seeking in 1866. If we "only wish to know what [they] mean by 'due process of law,'"[206] they told us, over and over and over: traditional judicial proceedings. At least sixteen congressmen—Browning, Cowan, Crisfield, Crittenden, Davis, Henderson, Howard, Hutchins, Kellogg, Noell, Powell, Sheffield, Sumner, Wadsworth, Walton, and Wilmot—gave such definitions, and without contradiction. I will first present the aspects of definitions that equate "due" with tradition, then those that equate "process of law" with judicial proceedings, and finally mention two particular side issues: the sensitivity of the due-process inquiry to changes in context, and the lack of complete congressional discretion on what process to afford.

1. Tradition

As Professor Ryan Williams has noted, early commentators like Tucker, Kent, Rawle, and Story "were remarkably uniform in attributing to the Due Process Clause an exclusively procedural meaning." [207] Traditional "proceedings of the common law" were to remain in place. Story explained in his Commentaries in 1833:

> The other part of the clause is but an enlargement of the language of magna charta, "*nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vet per legem terrae*," neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that these latter words, per legem terrae (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.[208]

This passage was well-known to congressmen in 1862. Powell quoted it in April,[209] Walton in May,[210] Howard in June,[211] and it was paraphrased by many others.

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206 See *supra* text accompanying notes 13–16.

207 Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 452 (2010).

208 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1783 (1833) (footnote omitted).

209 *See* CONG. GLOBE, 37th Cong., 2d Sess. app. at 106 (1862) (Apr. 16).

210 *Id.* app. at 266 (May 24).

211 *Id.* app. at 306 (June 24).

Sheffield said in January,

> As I understand, "due process of law" is the process of law embracing the opportunity for defense with the incidents of trial which were in force at the time of the adoption of the Constitution, subject, however, to such modifications as may from time to time be made by law, but which do not impair the right as it then existed.[212]

Cowan said in March,

> "[B]y due process of law," . . . all commentators and all lawyers agree, means proceedings according to the course of the common law.[213]

Wilmot said in April,

> "No person shall be deprived of life, liberty, or property, without due process of law;" that is, without proceedings according to the course of the common law.[214]

Sheffield said in May,

> What is due process of law, within the meaning of our Constitution? It is the process which was in force at the time of the adoption of the Constitution, which may be modified in form, but not in substance.[215]

Crisfield said in May,

> [D]ue process of law . . . means trial according to the course of the common law.[216]

Walton concisely summarized the issues:

> Coke defines "due process of law" to mean "due presentment and indictment, and being brought in to answer thereto by due process of the common law;" and Judge Story adds, "so that this clause [of the Constitution] in effect affirms the right of trial according to the process and proceedings of the common law." That is, it secures indictment, arraignment, and proof in open court, and trial by jury. There were exceptions to this rule in England, and always have been in this country. Prize cases, and cases of forfeiture for violation of the revenue laws, if on navigable waters, are the exceptions. These belong to admiralty courts,

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212 *Id.* at 501 (Jan. 27) (citing Greene v. Briggs, 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5764)).

213 *Id.* at 1050 (March 4). Trumbull quoted this language from Cowan in April without disagreeing with the definition of "due process of law," but arguing that it was tacitly limited in times and situations of war. *Id.* at 1558 (Apr. 7).

214 *Id.* at 1875 (Apr. 30).

215 *See* CONG. GLOBE, 37th Cong., 2d Sess. 171 (1862) (May 23) (quoting Fisher v. McGirr, 67 Mass. (1 Gray) 1, 27 (1854)).

216 *Id.* at 2131 (May 14).

> where there is no trial by jury. Captures on land, however, are tried on the common law side of the court, and cases *in rem* seem not to be an exception there.[217]

A tradition-based approach to due process was, of course, prominently featured in Justice Curtis's opinion for the Supreme Court in *Murray's Lessee v. Hoboken Land and Improvement Co.*[218] in 1856, holding that due process of law was to be evaluated by considering the Constitution's own procedures.[219] To that end, "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[220] Several congressman cited and quoted *Murray's Lessee* in 1862.[221]

2. Judicial proceedings

Professors Nathan Chapman and Michael McConnell have offered a reinterpretation (and supplementation) of Williams's evidence in terms of the separation of powers.[222] Legislatures violated due process if they acted directly to divest property rights, eliminating the judicial middleman. A great deal of 1862 evidence supports this reading.

Davis said in March,

> What is that due process of law? It is this: just as a citizen's property of any other class or description is taken from him for any purpose of the Government, so is the negro to be taken from his owner, even conceding that Congress has the power to liberate him. You must take that slave and you must have him appraised judicially, and by a mode that is quasi judicial; you must have a court to act in the matter; you must have a court to summon a jury; you must have a court to appoint commissioners, and under the supervision and sanction of this court, this matter of valuing the property in slaves is to proceed, as it does in relation to any other property of a citizen that may be taken by the exercise of the power of Congress or of the General Government over him.[223]

Sumner said in March, echoing Alvan Stewart's 1837 attack on the constitutionality of slavery,

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217 *Id.* app. at 266 (May 24) (alteration in original).

218 59 U.S. (18 How.) 272 (1856).

219 *Id.* at 276–77.

220 *Id.* at 277.

221 *See* CONG. GLOBE, 37th Cong., 2d Sess. app. at 306 (1862) (June 24) (Howard); *id.* at 936 (Feb. 24) (Shellabarger); *id.* at 2239 (May 20) (Noell).

222 *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

223 CONG. GLOBE, 37th Cong., 2d Sess. 1336 (1862) (Mar. 24).

> Congress, in undertaking to support slavery at the national capital, has enacted that persons may be deprived of liberty there without any presentment, indictment, or other judicial proceedings. Therefore, every person, now detained as a slave in the national capital is detained in violation of the Constitution.[224]

Powell said in April,

> What is the due process of law? We all know that that has been adjudged time and again, not only in this country but in England, to be judicial process, judicial investigation.[225]

Henderson said in April,

> [The Fifth Amendment provides] "nor shall any person be deprived of life, liberty, or property without due process of law;" which provision, by all commentators on the law, from the days of Lord Coke to the present time, as well as by the decisions of every American court of record, State and national, where the question has been brought under review, has been construed to mean that none shall be deprived of life, liberty or property by mere legislative action, or without regular judicial investigation, according to the course of the common law. The party to be affected is entitled to his day in court, has a right to know the allegations against him and present his defense; to hear his accusers and to have process to show the falsehood of charges against him, and to have his rights adjudged by an impartial tribunal, separate and distinct from the executive or legislative departments of the Government.[226]

Crittenden said in April,

> Now what is "process of law?" What is the "judgment of his peers?" We all know what these expressions are. They are legal terms. The "peers" there alluded to are jurymen. The

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224 *Id.* at 1449 (Mar. 31) (emphasis removed); *cf.* Stewart, *supra* note 37 (The "true and only meaning" of "due process of law" was "an indictment or presentment by a grand jury, of not less than twelve . . . and a judgment pronounced on the finding of that jury, by a court."). The key issue here for Stewart's constitutional argument against slavery was not "due process of law," but "deprive," particularly whether the children of slaves could themselves be enslaved simply because of their parents' status. *Id.* Democrats considering this argument said that such children *had* no liberty in the first place, or, stated differently, that the baseline against which "deprive" was to be measured was a state of enslavement, which fit with the traditional *partus sequitur ventrem* rule enslaving children of enslaved mothers. *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 1644 (1862) (Apr. 11) (Wadsworth) ("This is the first time I ever heard that the slave had liberty or had property to be deprived of."). Bayard rebutted the argument that slaves were not property by using Stewart's argument as a reductio: "If it be true that slaves are not property by law, and cannot be property, why not leave it to the courts—where is the necessity for this bill? If they are not legally property, they can be discharged on *habeas corpus*. If there is no right to hold them, no right of the owner to property in his slave, no legislation is required for the purpose of abolishing slavery." *Id.* at 1525 (Apr. 3).

225 *Id.* at 1523 (Apr. 3).

226 *Id.* at 1572 (Apr. 8). Henderson associated this requirement with the law of nations, following *Jecker v. Montgomery* from 1852: "[T]he law of nations . . . in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property." 54 U.S. (13 How.) 498, 516 (1852).

> process of law alluded to is, as defined by Coke and every other jurist, a judicial trial. That is the process of law by which a man's property can be taken from him.[227]

Hutchins agreed with Crittenden the same day, again echoing Stewart:

> What is due process of law? I will allow the gentleman from Kentucky [Mr. Crittenden] to define it. He says, "the process of law alluded to is, as defined by Coke and every other jurist, a judicial trial." I know the gentleman quoted this to show that a slaveholder could not be deprived of property in his slaves by a law of Congress. No law of Congress can give property in man, and when it is shown that the slave's *liberty* was taken from him by a law, and not by a judicial trial, the gentleman's argument falls; but his definition of the words of the Constitution "due process of law" shows conclusively that, the law of Congress continuing in force, the law of Maryland making certain persons slaves is unconstitutional, null, and void. Slaves in this District could and should be released from their servitude by the judgment of a court of competent jurisdiction.[228]

Wadsworth agreed the same day, noting the unanimity:

> [T]he expression "due process of law," will be understood by every one to mean trial and conviction in a court of justice.[229]

Sumner said in May,

> No person shall be deprived of life, liberty, or property without due process of law; which means, without presentment or other judicial proceeding.[230]

Kellogg said in May,

> The term "due process of law" is well understood to mean a proceeding in the judicial tribunals of the country. This, it is assumed, no one will deny.[231]

Howard said in June,

> [T]he trial is what the Constitution denominates "due process of law" in all criminal cases.[232]

Browning said in June,

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227 CONG. GLOBE, 37th Cong., 2d Sess. 1635 (1862) (Apr. 11). While Crittenden noted the general unanimity on the definition of "process of law," he noted an element of uncertainty: "I may not be correct in my application of this great principle to this bill." *Id.*

228 *Id.* app. at 104 (Apr. 11).

229 *Id.* at 1644 (Apr. 11).

230 *Id.* at 2190 (May 19).

231 *Id.* app. at 217 (May 24).

232 *Id.* app. at 305 (June 24).

> "[W]ithout due process of law" . . . means without presentment or other judicial proceeding.[233]

Sumner said in June,

> There is no attainder of treason, no *ex post facto* law, and no taking of property without due process of law; for the judicial proceedings which these bills institute are competent for the purpose.[234]

Giving additional support to this sort of definition, Trumbull in January agreed with the general principle that Congress should only confiscate property through judicial tribunals, but held, echoing Lincoln's invocation of the Militia Act, that it was inapplicable when judicial tribunals were inoperative:

> [T]he Constitution of the United States, which guaranties a jury trial, and which declares that no man shall be deprived of life, liberty, or property without due process of law, has no application whatever to a district of country where the judicial tribunals are utterly overthrown, and where the military power is called in for the purpose of putting down an insurrection, just because the judicial authorities are overthrown.[235]

One important impact of removing the judicial middleman was to avoid judicial investigation of constitutional issues. Carlile complained in March that removing courts from the process removed "the right to test the constitutionality of any congressional enactment before the Supreme Court."[236]

3. Contextualism and Lack of Complete Congressional Discretion

Two side issues related to the definition of due process are worth noting, in addition to the tradition- and judicial-proceedings-based definitions above. In May, Noell gave an extended explanation of the idea that applying "due process of law" would require sensitivity to context. Here is a taste of his lengthy discussion:

> What is meant by "due process of law?" That is the inquiry. If a man is called upon to answer in a case where his life or his liberty is involved, "due process of law" is, in my judgment, that which appropriately fits such a case. The individual cannot be deprived of his life or his liberty without being personally present in court, and without having accorded to him a trial pursuant to the course of common law, because a deprivation of the life and the liberty of the citizen is a personal punishment. It acts upon the person, and he must be personally present whenever any proceedings are inaugurated or carried out affecting his

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233 CONG. GLOBE, 37th Cong., 2d Sess. 2923 (1862) (June 25).

234 *Id.* at 2963 (June 27).

235 *Id.* at 507 (Jan. 28).

236 *Id.* at 1157 (Mar. 11).

> person. But when we undertake to deprive a citizen of his property, in my judgment the same principle does not apply.
>
> . . . When we undertake to reach the thing, and not the person, we may do it with that kind of process which is appropriate to that particular purpose.[237]

In June, Howard rebutted the idea that Congress had complete control over the content of due process. Ryan Williams and Justice Thomas have suggested that the Fifth Amendment embodied that conception,[238] but Howard emphatically disagreed:

> [I]f Congress may define what is due process of law, then it is clear that their power over the trial of crimes is perfectly boundless and illimitable. I repeat, that if you give to this clause such a construction as may enable Congress by legislation to define what is meant by "due process of law" you open the door entirely; you throw down every barrier which the framers of the Constitution supposed they were erecting against this same power of Congress over the prosecution of crimes. You must, therefore, give up the idea that Congress has any right to define what is "due process of law." Congress has no power to define it. It stands there in the Constitution to mean what the framers intended by it; and we members of Congress are just as much bound by that meaning, whatever it is, as we are by the meaning of any other clause. We have no power whatever to alter it. It means what they intended it to mean, and we cannot by legislation change its meaning.[239]

B. *The Text and Its Constituents*

1. "Process of Law"

Congressmen repeatedly explained "nor be deprived of life, liberty, or property without due process of law" in terms of its constituent bits of language. Keith Jurow's classic 1975 article explains in detail how the word "process" has, since the fourteenth century, referred to judicial writs.[240] The 1862 evidence shows that usage's continued vitality. In December, Conway equated a due-process violation with the lack of "civil process for trial and judgment."[241] Lot Morrill in January complained of the unconstitutionality of

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237 *Id.* at 2239 (May 20).

238 *See* Sessions v. Dimaya, 138 S.Ct. 1204, 1242–43 (2018) (Thomas, J., dissenting); Williams, *supra* note 207, at 452–53.

239 CONG. GLOBE, 37th Cong., 2d Sess. app. at 305 (1862) (June 24).

240 Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 272 (1975). He elaborated,

> Assuredly there may have been disagreement about what process was "due" in a particular circumstance, but the word "process" itself meant writs. To be more precise, it referred to those writs which summoned parties to appear in court, as well as those by which execution of judgments was carried out.
>
> There are numerous examples that this very specific use of the term "process" continued without change long after the fourteenth century.

Id.

241 CONG. GLOBE, 37th Cong., 2d Sess. 82 (1861) (Dec. 12).

detention while having "no process pending."[242] Powell complained in April, "By this bill, you deprive the people of the District of Columbia of their property without process of law; you do it by legislative enactment."[243] He insisted that "you cannot deprive the citizen of his property except by process of law."[244] Crittenden in April explained the Due Process Clause in terms of the meaning of "process of law," leaving off "due."[245]

Lovejoy likewise put his argument in April for the unconstitutionality of slavery itself in terms of "process of law": "I am tired of this miserable *twaddle* about due process of law for the master when everybody knows that every slave in the District of Columbia and in the United States has been robbed of his freedom without process of law."[246] Powell paraphrased the amendment in April without "due" ("the clause of the Constitution which I have read, which declares that no man shall be deprived of his life, liberty, or property without process of law"), then asked, "What do you mean, sir, by process of law? We are not left in the dark as to what is meant by it."[247]

Collamer complained in April about emancipation "without any process of law."[248] Diven complained in May about taking property "without trial, without process of law, without just compensation for property taken for public use."[249] Noell described in May the context sensitivity of due process in terms of variation in the sort of process that is due: "[T]he due process of law by which a man can be deprived of his property is not necessarily the same kind of process by which lie maybe deprived of his life or liberty; that what is meant by 'due process of law' in the Constitution is such process as is requisite and appropriate to accomplish the desired end."[250]

Sheffield spoke in May of "process of law" in isolation: "A single person who resists the execution of a single process of the law may be shot down by the officer . . . ."[251] Howard said in June, "Congress cannot of its own will make any process of law due process of law."[252] Sumner said in June that it was constitutional to kill on the battlefield "without trial by jury or any process of law or judicial proceedings of any kind."[253]

Quotations and paraphrases of the Due Process Clause that left off "due" undermine the idea that "due process" can only be interpreted holistically. Congressmen in 1862 did not swallow the phrase whole and interpret it only as a unit; they chewed its linguistic components and gave each of the

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242 *Id.* at 314 (1862) (Jan. 14).
243 *Id.* at 1523 (Apr. 3).
244 *Id.*
245 *Id.* at 1635 (Apr. 11). See *infra* text accompanying notes 264–283 for the content of the definition.
246 *Id.* at 1645 (1862) (Apr. 11).
247 CONG. GLOBE, 37th Cong., 2d Sess. app. at 106 (Apr. 16).
248 *Id.* at 1811 (Apr. 24).
249 *Id.* at 2075 (May 12).
250 *Id.* at 2239 (May 20).
251 *Id.* app. at 169 (May 23).
252 *Id.* app. at 306 (1862) (June 24).
253 CONG. GLOBE, 37th Cong., 2d Sess. 2963 (June 27).

constituent parts their conventional meaning. To suggest that the entire phrase had become a term of art, as, for instance, Justice Stevens does dissenting in *McDonald v. City of Chicago*,[254] belies consistent, reiterated usage of language in Congress.

2. "Legal Process" and "Judicial Process"

Another indication that "process of law" is not a term of art is the frequent use of "legal process" as a synonym, which makes sense if the words express something on their own, and can thus be rearranged from prepositional to adjectival form. Collamer complained in January that "no man should be confined in a prison of a State or of the United States without legal process."[255] Conway offered a resolution in February asking who had been detained "without a legal process."[256] Fessenden proclaimed in April his "jealousy upon every infringement of the ordinary course of judicial proceeding."[257] Shellabarger in May paraphrased Taney's conclusion in *Merryman*: "'in no emergency shall you arrest any citizen except in aid of judicial process,' and that although the only power who has jurisdiction to issue the process is at the head of the rebellion!"[258] Shellabarger stressed the lack of "judicial process" in suppressing the rebellion in *Luther*.[259] Wade summarized the position of critics: "[W]e had to do everything by judicial process."[260] Holman insisted in May, "I would confiscate the rebel's property, but I would confiscate it by legal process."[261] Dunlap complained in May that confiscation "deprives the citizen of his property, simply by its own enactment, without judicial process."[262] Sumner complained in June that the due-process objection would "resolve our present proceedings into the process of a criminal court, guarded at each step by the technicalities of jurisprudence."[263]

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254 561 U.S. 742, 862 (2010) (Stevens, J., dissenting) ("[T]he historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase 'due process of law' had acquired substantive content as a term of art within the legal community.").

255 CONG. GLOBE, 37th Cong., 2d Sess. 319 (1862) (Jan. 14).

256 *Id.* at 679 (Feb. 6).

257 *Id.* at 1739 (Apr. 21).

258 *Id.* at 2073 (May 12).

259 *Id.* at 2074.

260 *Id.* at 2203 (May 19).

261 CONG. GLOBE, 37th Cong., 2d Sess. app. at 151 (1862) (May 23).

262 *Id.* app. at 190 (May 24).

263 *Id.* at 2963 (June 27).

3. "Process"

Even if there were not such explicit evidence, the sheer amount of regular use of the simple word "process" alongside due-process discussions with no indication of a holistically determined meaning in "due process" strongly suggests that we should understand "due process" in terms of its verbal constituents. Hale complained in December regarding a D.C. jail detainee and the inability to find the "process by which he was held."[264] Trumbull's bill referred in December to property "within the reach of the process of law in its ordinary forms."[265] Latham spoke in January of the opportunity for a slave-owner to "sue out . . . his process."[266] Collamer distinguished in January those "confined by process of the commissioner appointed by the court; by legal process" from those "confined . . . without any process whatever,"[267] as well as "different forms of process in different States."[268] Bingham spoke in January of those required to pay taxes "not by the process of your courts."[269] Sherman asked in January whether waiting for the "slow process of the laws of Pennsylvania" would be enough in case of emergency.[270] Lot Morrill said in February that the marshal "commits [the prisoner] on a process, and never without."[271] Trumbull in February noted the limitation of his bill to occasions when "the ordinary process of law cannot be served upon them."[272] He referred to "beyond the reach of civil process in the ordinary course of judicial proceedings by reason of [the] rebellion."[273]

The discussion of bills of attainder was likewise frequently put in terms of the lack of judicial process: Acting "without the instrumentality or the aid of judicial process," said Powell in April.[274] Sherman's amendment in April authorized power to "issue all process, whether mesne or final . . . as in cases of foreign attachment."[275] Trumbull's proposal was limited (though many did not understand the point until he reexplained it a few times in April) to rebels who "cannot be reached by judicial process."[276] Sherman insisted in April on the right to "seize the property of a public enemy without going through the ordinary process of law."[277] He distinguished in rem proceedings from

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264 *Id.* at 10 (1861) (Dec. 4).
265 *Id.* at 18 (Dec. 5).
266 *Id.* at 318 (1862) (Jan. 14).
267 CONG. GLOBE, 37th Cong., 2d Sess. 319 (1862) (Jan. 14).
268 *Id.* at 320.
269 *Id.* at 346 (Jan. 15).
270 *Id.* at 516 (Jan. 28).
271 *Id.* at 817 (Feb. 15).
272 *Id.* at 942 (Feb. 25).
273 CONG. GLOBE, 37th Cong., 2d Sess. 942 (1862) (Feb. 25).
274 *Id.* app. at 105 (Apr. 16).
275 *Id.* at 1604 (Apr. 10).
276 *Id.* app. at 100 (Apr. 11); *id.* at 1813 (Apr. 24).
277 *Id.* at 1783 (Apr. 23).

"ordinary civil process." [278] Collamer complained in April about emancipation "without process, without law."[279] Howard asked in May in the context of fugitive slaves about the use of "regular process from a commissioner or a court."[280] Sheffield spoke in May of those who "resist[] the execution of a single process of the law" and of a combination who "conspire together to resist all processes of the law." [281] Hanchett distinguished in May the three branches of government: "The executive power acts promptly, the legislative deliberately, the judicial slowly and by regular process."[282] Howard noted in June that a treasury-officer warrant was "process in very general use in England at the date of our Constitution."[283]

C. *Applying the Bipartisan Consensus in 1862: Permissible Scope of In Rem Jurisdiction*

There was, then, general agreement between the two parties in 1862 about the principle expressed by the words of the Due Process Clause. Nevertheless, disagreement persisted over whether particular proposals satisfied that principle. An examination of how the two sides applied these principles to the particular proposals illuminates particularly starkly just how close their interpretations were. As explained above, the due-process debate over confiscation began in very general terms but eventually focused on a very narrow question: whether Congress might use in rem judicial proceedings to confiscate Rebel-owned property that was both (a) on land and (b) away from the front. Congress had enacted two confiscation measures in 1861 that involved property with each of these characteristics, but not together: The naval blockade seized property at sea, away from active combat, while the First Confiscation Act seized property on land, slaves included, being used at the front. [284] But the Second Confiscation Act combined both features together. [285] Both of the two sides interpreted due process in terms of tradition, but they disagreed about whether the combination of features would require more than an in rem procedure (i.e., in personam proceedings against individual rebels within the power of a court). [286]

The use of in rem procedures had the best pedigree in admiralty cases. Advocates of confiscation relied critically on the use of in rem procedures in

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278 *Id.* at 1784.
279 CONG. GLOBE, 37th Cong., 2d Sess. 1812 (1862) (Apr. 24).
280 *Id.* at 1902 (May 1).
281 *Id.* app. at 169 (May 23).
282 *Id.* app. at 210 (May 26).
283 *Id.* app. at 306 (June 24).
284 Confiscation Act of 1861, ch. 60, 12 Stat. 319.
285 Confiscation Act of 1862, ch 195, 12 Stat. 589.
286 CONG. GLOBE, 37th Cong., 2d Sess. 1784 (1862) (Apr. 23).

The Palmyra[287] in 1827.[288] The fuzziness in the Court's procedural demands there reflects the uncertain nature of in rem proceedings in general, and this uncertainty persisted in 1862. Justice Story wrote in that case,

> [I]t must be admitted, that the libel is drawn in an inartificial, inaccurate, and loose manner. The strict rules of the common law as to criminal prosecutions, have never been supposed by this Court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to be civil proceedings *in rem*. Even on indictments at the common law, it is often sufficient to state the offense in the very terms of the prohibitory statute; and the cases cited by the Attorney General are directly in point. In informations in the Exchequer for seizures, general allegations bringing the case within the words of the statute, have been often held sufficient. And in this Court it has been repeatedly held, that in libels *in rem*, less certainty than what belongs to proceedings at the common law will sustain a decree of condemnation, if the words of the statute are pursued, and the allegations point out the facts, so as to give reasonable notice to the party to enable him to shape his defence.[289]

Many congressmen cited *The Palmyra* in 1862.[290] Other cases considering due-process issues with in rem procedures in detail were *Greene v. Briggs*,[291] from Justice Curtis on circuit in 1852,[292] *Fisher v. McGirr*,[293] from Massachusetts in 1854,[294] and the trial court prize case by Judge Sprague, *The Amy Warwick*,[295] decided in the midst of the debate in the spring of 1862.[296] The two sides of the debate showed that they were well aware of the relevant cases, and they did not take sharply different views of the nature of the due-process inquiry.

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287 25 U.S. (12 Wheat.) 1 (1827).

288 *Id.* at 7–8.

289 *Id.* at 12–13.

290 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 1559 (1862) (April 7) (Trumbull); *id.* at 1654 (Apr. 14) (Harris); *id.* at 1809 (Apr. 24) (Collamer); *id.* at 1875 (Apr. 30) (Wilmot); *id.* at 2132 (May 14) (Crisfield); *id*. at 2191 (May 19) (Sumner); *id.* at 2235 (May 20) (Eliot); *id.* at 2294 (May 22) (Wallace); *id.* app. at 267 (May 24) (Walton).

291 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5764).

292 *Id.* at 1141. For discussion, see CONG. GLOBE, 37th Cong., 2d Sess. 501 (1862) (Jan. 27) (Sheffield); *id.* at 1524 (Apr. 3) (Bayard); *id.* at 2053 (May 9) (Thomas); *id.* app. at 306 (June 24) (Howard).

293 67 Mass. (1 Gray) (1854).

294 *See* CONG. GLOBE, 37th Cong. 2d Sess., app. at 171 (1862) (May 23) (Sheffield).

295 1 F. Cas 799 (D. Mass. 1862) (No. 341).

296 *Id.* at 811 ("Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt."). For discussion, see CONG. GLOBE, 37th Cong., 2d Sess. 943 (1862) (Feb. 25) (Trumbull); *id.* app. at 65 (Mar. 3) (McDougall); *id.* at 1875 (Apr. 30) (Wilmot); *id.* at 2189 (May 19) (Sumner); *id.* at 2237 (May 20) (Eliot); *id.* app. at 178 (May 23) (Sargent); *id.* app. at 180 (May 23) (Loomis); *id*. app. at 225 (May 23) (Ashley); *id.* app. at 267 (May 24) (Walton); *id.* at 2358 (May 26) (Eliot); *id.* at 2921 (June 25) (Browning). The first three *Amy Warwick* cases are dated in the Federal Cases reporter as April 1862, the fourth as May 1862. *See* 1 F. Cas. at 799, 808, 811, 815. Trumbull, however, quoted from the first decision at length in February, saying it "was pronounced but a few days ago." CONG. GLOBE, 37th Cong., 2d Sess. 943 (1862) (Feb. 25).

An in rem procedure was well-established in prize cases related to naval blockades, like those upheld at the Supreme Court in *The Prize Cases*[297] in 1863 (where the in rem procedure was not even challenged, only the legitimacy of seizures before congressional action),[298] and for situations like the First Confiscation Act, which allowed enslaved persons directly deployed at an active military front to be seized and emancipated.[299] The Second Confiscation Act extended these precedents by applying them to property on land and to property only indirectly supporting the rebellion.[300] Ultimately the Court of Appeals of Kentucky in *Norris* and Justices Field and Clifford in *Miller* found this too great an extension of traditional procedures,[301] while the majority of the Supreme Court in *Miller* found it was not.[302] But both sides evaluated the question by drawing analogies to traditional forms of proceedings.[303]

Sherman argued in April that a jury trial was not required for in rem proceedings, but he would be happy to allow one in the statute:

> I am perfectly willing, in order to avoid a constitutional argument, to invest these courts with the power of giving a jury trial, so as to enable any person who denies that lie is one of those named in the first section, to have that question tried by a jury. I see no objection to that, although I believe it is not required by the Constitution. This being a military remedy, not an ordinary civil process, being a military seizure of the property of an enemy, I think the proceedings may be *in rem*, disposing of the property and not affecting the person, so that in my view there is no constitutional difficulty in the way.[304]

Browning mocked in rem jurisdiction in April:

> Does not this newly-invented, India-rubber, *in rem* proceeding for the punishment of offenses committed by the person, and in which the property was not implicated, stretch itself over the entire category of crimes, and cover them all? . . . After blundering blindly and stupidly along for three quarters of a century, in the belief that these previsions were limitations upon the powers of the Government, and guarantees of individual right which we could not disregard, the scales have now suddenly fallen from our eyes, and we perceive that they were intended to apply only in the event of the arrest of the offender; but that when he has fled from justice, nothing is easier than to proceed to punish him without indictment, without trial, without due process of law, simply by arresting his horse and cow, instead of himself, and proceeding against them *in rem* by some newly-invented military machinery.[305]

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297 67 U.S. (2 Black) 635 (1862).

298 *Id.* at 665.

299 Confiscation Act of 1861, ch. 60, 12 Stat. 319.

300 Confiscation Act of 1862, ch 195, 12 Stat. 589.

301 Norris v. Doniphan, 61 Ky. (4 Met.) 385, 441 (1863); Miller v. United States, 78 U.S. (11 Wall.) 268, 323 (1870) (Field, J., dissenting).

302 *Miller*, 78 U.S. at 313–14.

303 *Compare id.* at 312, *with id.* at 323 (Field, J, dissenting).

304 CONG. GLOBE, 37th Cong., 2d Sess. 1784 (1862) (Apr. 23).

305 *Id.* at 1859–60 (Apr. 29).

Sumner defended in rem procedure in May according to a tradition-based test:

> If, therefore, it be constitutional to direct the forfeiture of rebel property, it is also constitutional to authorize proceedings *in rem* against it, according to established practice. Such proceedings constitute "due process of law," well known in our courts, familiar to the English Exchequer, and having the sanction of the ancient Roman jurisprudence.[306]

Noell gave an elaborate explanation the next day why in rem procedure might differ from that required in other circumstances:

> [T]here are known in our courts what are called proceedings *in rem*, because the revenue laws are violated, and violated in many instances by persons beyond the jurisdiction of the United States, and by persons not citizens of the United States. The public necessity and the public convenience have therefore demanded that some process of law should be devised or framed by which this class of cases may be reached. The principle upon which the use of this process is justified is, that some proceedings must be devised adequate to the purpose, and a proceeding *in rem* is the only proceeding that would be effective; and such proceedings in such cases are "due process of law." By due process of law you may capture, seize, carry into port, and condemn property that is being used to evade the revenue laws or defraud the Government on the high seas. But the due process of law by which you may accomplish that object is not the due process of law by which you may undertake to deprive an individual of his life or his liberty, or which is applicable to his own individual person.[307]

Cowan mocked the procedure in June:

> I am inclined to think that the person who drew this bill had some kind of glimmering notion running through his brain that it was necessary to make it a mongrel before it would work—a kind of cross between Mars and Minerva, a hybrid, half belligerent and half municipal . . . .[308]

We see, then, the terms in which the due-process debate was conducted by the end of the session. Democrats disparaged the procedure as "newly invented," while Republicans defended it as "established."[309] The central command of the Due Process Clause was to stick to the methods of confiscation with track records. Analogies to traditional procedures were thus the common coin of the due-process realm for both sides.

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306 *Id.* at 2191 (May 19). He said of in rem proceedings, "these proceedings constitute 'due process of law.'" *Id.* at 2193 (May 19).

307 *Id.* at 2239 (May 20).

308 *Id.* at 2962 (June 27).

309 *Id.* at 1859 (Apr. 29); *id.* at 2191 (May 19).

D. *Interpretation*

1. Textualism

Whenever the issue came up, all sides in the 1862 debate preferred the meaning expressed in the constitutional or statutory text to any unstated purposes or intentions its author might have. At times congressmen distinguished the principle expressed in a text from its applications. Crittenden conceded in April that despite the unanimity on the principle expressed by the Due Process Clause, "I may not be correct in my application of this great principle to this bill."[310] Howard noted in April,

> We must not be misled by the absurd idea that the framers of the Constitution assumed to foresee every particular emergency in the vast future of its history; for we know from the language they have used in it, and the powers it grants in terms, that their visions of the coming years of the Republic did not rest upon the soft and sunny horizon of peace . . . .[311]

Hale said in April, "I look . . . to the meaning of this clause as it is written." [312] Trumbull, disagreeing with Collamer's explanation of his substitute proposal in May, was met with a protest: "I prefer to speak for myself, if you will let me."[313] Trumbull's riposte: "I would rather let the bill speak. I know the gentleman's speech and his bill were not in exact harmony."[314]

Noell noted in May that as the facts about war and peace change, the unchanging Constitution could have changing applications:

> The Constitution is the same to-day it was the day it was adopted. It is the same in war that it is in peace. But while I say this, I do maintain that there are powers in the Constitution that slumber in time of peace, but which are appropriate to be exercised in time of war . . . .
>
> [A]lthough the Constitution of the United States is the same in time of peace that it is in time of war, yet it has slumbering powers, when waked up by the approach of danger, which, in the attempt at self-preservation, are competent for every emergency, and they are developed as occasions present themselves.[315]

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310 CONG. GLOBE, 37th Cong., 2d Sess. 1635 (1862) (Apr. 11).

311 *Id.* at 1718 (Apr. 18).

312 *Id.* at 1785 (Apr. 23).

313 *Id.* at 1959 (May 6).

314 *Id.* at 1959 (May 6).

315 *Id.* at 2240 (May 20). On the general idea of the consistency of changing applications with unchanging textually expressed meaning, see *Wisconsin Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018) ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world."), *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand

White noted the fact-dependence of constitutional applications in May:

> The Constitution could not in terms define these emergencies, but must grow with the growing wants of the nation—inviolate and identical the while—as the shield which once covered three millions of freemen is the same shield when recast to cover thirty millions.[316]

2. Originalism

In addition to their textualism (preferring textually expressed meaning to unexpressed intentions or purposes), participants in the 1862 debate also clearly displayed their originalism (preferring meaning expressed at the time of adoption to meaning expressed at the later time of interpretation). Lovejoy complained in April about slaveholders' "perversion of the original Constitution."[317]

Davis said in April,

> The meaning of these terms was fixed by their adoption in the Constitution, and the meaning of each is just the same now that it was when the Constitution was formed. Congress has no power to change that meaning, for that would be to change, *pro tanto*, the Constitution.[318]

Browning said in May,

> [I]t is not for us to review at this day the reasons upon which it was inserted, and remodel the Constitution. It is our business to find out what the meaning of the Constitution was, and when we have found it we ought to obey it.[319]

Joint Committee member Grider noted in May that the Constitution was binding, even if our politics today were different than those that informed its adopters:

> Some men seem to suppose that a thing is constitutional if it concurs with their views of politics. But we have got to look at the whole Constitution and do what it directs, whether it is pleasant or unpleasant.[320]

Babbitt argued in May,

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or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted not to the *meaning*, but to the *application* of constitutional principles . . . ."), Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559 (2006).

316 CONG. GLOBE, 37th Cong., 2d Sess. app. at 237 (1862) (May 26).

317 *Id.* at 1816 (Apr. 24).

318 *Id.* at 1762 (Apr. 22).

319 *Id.* at 2429 (May 29).

320 *Id.* app. at 163 (May 22).

> I, Mr. Speaker, stand by the Constitution in its letter and its spirit, just as our fathers made it and understood it. I have sworn to support it, and will vote for no act, whatever the supposed necessity, violative of its provisions. We sit here, sir, and perform valid acts of legislation solely by virtue of the Constitution. It is our warrant of attorney to act for and in behalf of our constituents. Beyond it and without it we have no more power than any other congregation of citizens convened of their own motion; and our acts would be of no more binding obligation than would those of such voluntary congregation . . . .[321]

Law said in May,

> [T]he only sure test of our action and its wisdom is best manifested by our adherence to those rules which our fathers laid down for our government in the richest legacy they ever bestowed on their children.[322]

Nugen said in May,

> If the Constitution has not made ample provision for emergencies like the present, it is no part of our duty, *sworn as we are to support the present Constitution*, to undertake to make a new one.[323]

Howard said in June,

> The meaning and intention must be ascertained from the use of the word and what it implied at the time the Constitution was framed. This is a rule of interpretation too well settled to be denied. Without it, no Constitution, no statute, indeed no private instrument can be understood or applied. A court of justice always inquires what was meant by the legislature or by the parties by the particular language at the time it was used and in the place or country where it was used. If it be capable of more meanings than one, owing to changes of time and place, they ever refer to the time and place of the transaction in getting at the intention. This rule of interpretation is fundamental and universal. No Constitution, no statute, no private instrument could be understood or applied without a resort to it.[324]

E. *Vested Rights and Prospectitivity*

Professor Williams's survey of the antebellum prevalence of vested-rights readings of due process receives significant support from the 1862 material.[325] In his threatened veto message, Lincoln singled out prospectivity

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321 *Id.* app. at 167 (May 22).

322 CONG. GLOBE, 37th Cong., 2d Sess. app. at 271 (1862) (May 26).

323 *Id.* app. at 242 (May 26).

324 *Id.* at 2967 (June 27).

325 I have elsewhere noted support for a limit on retroactivity in Blackstone's comments on harsh penalties and Lincoln's comments on *Dred Scott*. *See* Christopher R. Green, *Twelve Problems for Substantive Due Process*, 16 GEO. J.L. & PUB. POL'Y 397, 408–09 n.54 (2018). This goes beyond Williams, who argues that such antiretroactivity readings arose only between the Fifth and Fourteenth Amendments. *See* Williams, *supra* note 207, at 462–64; *see also* Chapman & McConnell, *supra* note 222, at 1779–80 (putting vested-rights readings in the context of a larger concern with the separation of powers).

as a virtue, and many congressmen talked about prospectivity on the apparent assumption that due process required it.[326] Only two congressmen appear to suggest that retrospective confiscation would be constitutional. One was Bingham, and even he recognized that most others disagreed:

> I am free to say that my own convictions would justify other and different legislation. I framed this provision of the act in deference to the opinion of other gentlemen, who thought a retroactive character would be given to my substitute in violation of that clause of the Constitution which declares that Congress shall pass no *ex post facto* laws. It is purely prospective . . . .[327]

The other was Samuel Fessenden: "[I]f the bill was not limited in its application to those who continue in rebellion, and was retrospective in its action, it would no more than meet the claims of justice."[328] He did not, however, speak in detail of due process, but only of justice.

F. *Excessiveness and Due-Process Attacks Distinguished*

Many advocates of a relatively merciful confiscation scheme—and thus, those who thought that a harsher confiscation plan was excessive—nonetheless answered due-process critics in a way that made clear that a scheme could be both harsh and constitutional. Likewise, many critics of confiscation (or of particular confiscation proposals) distinguished between their categorical due-process objections and more nuanced complaints about excessiveness. *Excessive* deprivations of property could nonetheless be accomplished with due process of law.[329] Evidence from at least fourteen congressmen—Samuel Blair, Browning, Crisfield, Eliot, Harris, Holman,

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326 CONG. GLOBE, 37th Cong., 2d Sess. app. at 63 (1862) (Mar. 3) (Trumbull); *id.* at 1557 (Apr. 7) (Trumbull); *id.* at 1761 (April 22) (Davis); *id.* at 1860 (Apr. 29) (Browning); *id.* at 1875 (Apr. 30) (Wilmot); *id.* at 1962 (May 6) (Collamer); *id.* at 3370 (July 15) (Maynard); *id.* at 3406 (July 17) (Lincoln's draft veto).

327 *Id.* at 1768 (Apr. 22).

328 *Id.* app. at 149 (May 22).

329 This evidence is particularly relevant to *Timbs v. Indiana*, in which the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment is incorporated via the Due Process Clause of the Fourteenth Amendment. 139 S. Ct. 682, 686–87 (2019). As a matter of the meaning of the Due Process Clause, this is incorrect. Only Justices Thomas and Gorsuch considered the question of original meaning in *Timbs*, and both preferred (or at least suggested, in the case of Gorsuch) the Privileges or Immunities Clause as the basis for incorporation. *See id.* at 691 (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."); *id.* at 691–92 (Thomas, J., concurring) ("[T]he oxymoronic 'substantive' 'due process' doctrine has no basis in the Constitution . . . ."). A couple of congressmen made passing references to the Excessive Fines Clause in their complaints about confiscation proposals in 1862. *See* CONG. GLOBE, 37th Cong., 2d Sess. 2435 (1862) (May 29) (Woodruff); *id.* at 2920 (June 25) (Browning). The additional premises required to see confiscation as a "fine," however, would support a more direct argument under the provisions of the Fifth and Sixth Amendments, and without a need to show excessiveness.

Howard, Porter, Powell, Sumner, Thomas, Wallace, Walton, and Wright—supports this distinction.

1. Defenses of Confiscation Against Due Process, but Not Excessiveness

Future Joint Committee member Harris rejected the due-process challenge categorically in April, but expressed sympathy for an excessiveness charge:

> Having thus, as I think, met the constitutional objections which have been made against the measure under consideration, and shown that it is competent for Congress, if it sees fit so to do, to declare the property of rebels forfeited, the next question which presents itself is, whether such a law is expedient, or if expedient at all, to what extent it is expedient.[330]

Harris sought to limit the proposal to leaders akin to the way section 3 of the Fourteenth Amendment is limited to those rebels who broke Article VI oaths.[331] The issue of "the extent to which it is expedient to go"[332] was, for Harris, plainly distinguished from the constitutional issue. He distinguished "undue *punishment*"[333] from lack of due *process*.

In April, future Fourteenth Amendment leader Howard likewise noted that "[t]he leading objection, *aside from unconstitutionality*, to the principle of confiscation" was that under the law of nations it was "too antiquated and harsh to receive recognition in modern wars."[334] He noted that he was "compelled to say that I desire to make discriminations among the rebels," distinguishing the "multitudes" of "the terrified, the seduced, the misled, the weak, and even the wayward . . . from the firm, the intelligent, the malicious, the deliberate, and the powerful" with "full knowledge of their wrong."[335]

Walton said in April that he was satisfied with Collamer's proposal because "[t]he property will pass on conviction, and it will therefore be forfeited 'in due process of law,' after trial by jury."[336] Excessiveness concerns about the distinction between "the masses" who did not deserve confiscation and "comparatively a few leaders" who did would be handled, not by due-process principles, but through a presidential-amnesty provision.[337]

Porter in April preferred a less severe measure, but was clear that he did not think an excessive measure was unconstitutional: "[I]f I shall, in the end,

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330 CONG. GLOBE, 37th Cong., 2d Sess. 1654 (1862) (Apr. 14).
331 *Id.*
332 *Id.*
333 *Id.* (emphasis added).
334 *Id.* at 1714 (Apr. 18) (emphasis added).
335 *Id.* at 1719 (Apr. 18).
336 CONG. GLOBE, 37th Cong., 2d Sess. 1768 (1862) (Apr. 22).
337 *Id.* at 1768–69.

be driven to choose between a confiscation measure more severe or none at all, I should not hesitate to choose the more severe one."[338]

Wallace clearly distinguished in May the Union's wartime rights from its obligation not to be excessive:

> Congress, the *sovereign* legislative power of the nation, has the right to seize and confiscate the last dollar, and manumit every slave of the rebels now in arms against our Government. I hold they are completely at the mercy of the Government to deal with them as their crimes deserve. But I am not in favor of wholesale sweeping confiscation acts. . . . [T]he national Government, in its hour of victory and triumph, should act generously and magnanimously towards a prostrate enemy, and grant a general amnesty to the rank and file who have, by the force of circumstances, been compelled to take part in this unholy war.[339]

Samuel Blair in May called confiscation a "terrible weapon," which if used in a "general and sweeping" way would be "viewed with some aversion by nations governed by public law," but insisted that to "deny the *power* of Congress" was inconsistent with approving the First Confiscation Act.[340]

When Eliot listed arguments against the bill in May, he listed constitutional objections separately from the objection that it was "too severe" and would "affect men who are not criminal, but who are the dupes of others."[341] Earlier, Eliot had himself promoted a bill limited only to the most important rebels.[342]

Sumner noted in June,

> You may condemn confiscation and liberation as impolitic, but you cannot condemn them as unconstitutional unless, in the same breath, you condemn all other agencies of war, and resolve our present proceedings into the process of a criminal court, guarded at each step by the technicalities of jurisprudence.[343]

2. Due Process and Excessiveness Challenges to Confiscation Distinguished

Browning distinguished in March the "inexpediency" in imposing confiscation on the "great masses" from the mere "unconstitutionality" of imposing it on "fomenters and leaders."[344]

Wright in April insisted on a proper "discrimination" between "leaders and instigators," on the one hand, and "those who have been compelled into the service of the confederate States," on the other.[345] He was open to "any

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338 *Id.* at 1768.
339 *Id.* at 2293–94 (May 22).
340 *Id.* at 2300.
341 *Id.* at 2358 (May 26).
342 CONG. GLOBE, 37th Cong., 2d Sess. 2232–33 (1862) (May 20).
343 *Id.* at 2963 (June 27).
344 *Id.* at 1137 (Mar. 10).
345 *Id.* at 1769 (Apr. 22).

reasonable measure" for "leaders," but did "not want to make a general thing of it, applicable to so numerous a class."[346] Independent of this objection, however, Wright wanted juries: "[T]hat great Magna Charta principle of our Constitution."[347]

Howe in May complained that confiscation bills would affect the "comparatively innocent," and separately complained that it would operate before proper conviction.[348]

Crisfield noted in May that his constitutional objections covered all of the proposals, but his excessiveness complaint only applied to some of them:

> Some of these propositions are framed in a ferocious spirit, and if adopted and executed would exterminate almost the entire southern people; others, with more humanity and judgment, discriminate among the guilty . . . They all, however, propose to confiscate . . . by a process unknown to the common law.[349]

Holman likewise in May very clearly distinguished his constitutional due-process objections from those based on the failure to distinguish among rebels. "*[I]ndependent of the constitutional objection*, would this effort at emancipation be wise as a measure of policy?"[350] His prudential concern concerned excessiveness: "[I]n a spirit of noble magnanimity, hold out the olive branch of peace and reconciliation, not to the arch-traitors—let them suffer the penalty of their infamous crimes—but to the deluded masses."[351]

Powell argued in April: "*Apart from the unconstitutionality* of the bill, it would be unwise and inexpedient; it would be harsh."[352] He added,

> [I]f you attempt to take the property of those engaged in this war against the Government, you call do it only for life, and then only by process of law. . . . *Another objection* to the bill is . . . [i]t is harsh; it is cruel; it is unbecoming the age in which we live; and in my judgment unbecoming the American people.[353]

Thomas in May distinguished his "legal objections," such as due-process constitutional problems, from his complaints about the "general features of the confiscation bill,"[354] such as the fact that, as he saw it, applying confiscation to minor rebels was "harsh and absurd."[355] These objections

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346 *Id.*

347 *Id.*

348 CONG. GLOBE, 37th Cong., 2d Sess. app. at 144 (1862) (May 5) (complaint about burden on "comparatively innocent"); *id.* at 146 ("[C]onviction should precede punishment . . . .").

349 *Id.* at 2129 (May 14).

350 *Id.* app. at 151 (May 23) (emphasis added).

351 *Id.*

352 *Id.* app. at 106 (Apr. 16) (emphasis added).

353 *Id.* at 107 (emphasis added).

354 CONG. GLOBE, 37th Cong., 2d Sess. app. at 220 (May 24).

355 *Id.* app. at 221 (May 24).

were clearly distinct; Thomas talked about both harshness and due process at length without associating them.

The Kentucky Court of Appeals in *Norris* struck down the Confiscation Act on due-process grounds.[356] The court rejected, however, a harshness-based law-of-nations challenge, and the juxtaposition of these two conclusions likewise betrays the independence of the two arguments vividly.[357] The exercise of belligerent rights under the law of nations, the court conceded, could be inhumane, unwise, and liable to censure.[358] Still, the court held, following *Brown v. United States*[359] that the "morality . . . humanity, and . . . wisdom" were issues "addressed to the judgment of the sovereign,"[360] contrary to any indications in *United States v. Percheman*.[361] The due-process violation as seen by the *Norris* court had nothing to do with the harshness of confiscation, but stemmed from Congress's overextension of in rem precedents like *The Palmyra*; property only indirectly supporting the rebellion could not be treated as itself tainted.[362]

The sharp distinction in *Brown* between issues of harshness and issues of legal right were, moreover, quite prominent in 1862. *Brown* held (over Story's dissent) that confiscation could not proceed without an act of Congress, and it was cited and discussed a *great* many times,[363] both on the right to confiscate and on the division between legislative and executive power. But the references in *Brown* to modern usage condemning confiscation as inhumane, harsh, or unwise were never connected with the due-process arguments that were also made at such length in the debate.

VII. CONCLUSION

Why was "due process of law" so lightly discussed in 1866? Two reasons are obvious from a review of 1862: Both parties favored it, and the

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356 Norris v. Doniphan, 61 Ky. (4 Met.) 385, 399–400 (1863).

357 *Id.* at 391–92.

358 *Id.* at 395–97.

359 12 U.S. (8 Cranch) 110 (1814).

360 *Norris*, 61 Ky. (4 Met.) at 391 (quoting *Brown*, 12 U.S. (8 Cranch) at 128).

361 32 U.S. (7 Pet.) 51 (1833).

362 *Norris*, 61 Ky. (4 Met.) at 390.

363 CONG. GLOBE, 37th Cong., 2d Sess. 19 (1861) (Dec. 5) (Trumbull); *id.* at 347 (1862) (Jan. 15) (Bingham); *id.* at 502 (Jan. 27) (Sheffield); *id.* at 935 (Feb. 24) (Shellabarger); *id.* at 943 (Feb. 25) (Trumbull); *id.* app. at 64–65 (Mar. 3) (McDougall and Collamer); *id.* at 1053 (Mar. 4) (Cowan); *id.* at 1076 (Mar. 5) (Morrill); *id.* at 1158 (Mar. 11) (Carlile); *id.* at 1203 (Mar. 12) (Bingham); *id.* at 1559–60 (Apr. 7) (Trumbull); *id.* at 1572–73 (Apr. 8) (Henderson); *id.* at 1618 (Apr. 10) (Thomas); *id.* at 1718 (Apr. 18) (Howard); *id.* at 1759–60 (Apr. 22) (Davis and Collamer); *id.* at 1798 (Apr. 23) (Duell); *id.* at 1860 (Apr. 29) (Browning); *id.* at 1874–75 (Apr. 30) (Wilmot); *id.* app. at 140 (May 2) (Doolittle); *id.* at 2192–93 (May 19) (Sumner, noting *Brown* is "so often cited in this debate"); *id.* at 2237 (May 20) (Eliot); *id.* 2299–300 (May 22) (Blair); *id.* app. at 180–81 (May 23) (Loomis); *id.* app. at 183–84 (May 23) (Arnold); *id.* app. at 215–16 (May 24) (Kellogg); *id.* app. at 219 (May 24) (Thomas); *id.* app. at 265–66 (May 24) (Walton); *id.* app. at 195 (May 26) (Ely); *id.* at 2961 (June 27) (Trumbull).

concept had just recently been discussed to death. The Republicans, Democrats, and Unionists of 1862 all defined due process the same way, and the discussions of due process from 1866 give no hint of a recent semantic revolution. While Democrats had at the margins pushed a more expansive view of due process in 1862 than had Republicans—a vision that would not allow in rem proceedings to stretch quite as far—the leading thinkers of the two parties repeatedly used the same explicit definition based on traditional judicial proceedings and a public-safety exception, with no ban on excessiveness.

As both parties saw things in both 1862 and 1866, due process had an important—but limited—role in guaranteeing the traditional rule of law and the separation of powers. It was an important principle for guaranteeing the ample investigation, ventilation, and clarification of the merits of constitutional claims, and of preventing the evasion of the substantive vision that Republicans wanted to impose on the South. But due process did not itself embody that substantive agenda.

Given the parties' identical definitions of due process in 1862, it is not surprising that Reverdy Johnson endorsed due process on behalf of the freedmen in 1866, even at the same time that he criticized their equal civil rights as embodied in the Civil Rights Act and the Privileges or Immunities Clause.[364] The Democrats of 1866 were properly far less agitated about due process than they were about open-ended equal citizenship for the freedmen, which ran directly counter to their policy goals in the wake of slavery. Many of the Republicans behind the Fourteenth Amendment, for their part, had spent much of 1862 pushing a somewhat narrower scope for due process. They too knew that they would have to use other tools besides just due process to entrench their policy goals on behalf of the freedmen and Republicans in the South. Both sides knew that the biggest civil-rights controversies in Reconstruction lay elsewhere, particularly in the Privileges or Immunities Clause.[365] Due process of law therefore attracted bipartisan support, but little discussion.

364 *See supra* text accompanying notes 24–27.

365 *Id.*