

OUR BIPARTISAN DUE PROCESS CLAUSE

Christopher R. Green

ABSTRACT

What it meant to “deprive any person of life, liberty, or property without due process of law” was very well-known to the men who proposed the Fourteenth Amendment: to take away life, liberty, or property without traditional judicial proceedings, except where public safety required it. Congressmen made this very clear, and at great length—but in 1862, rather than 1866.

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I. FEBRUARY 1866: “I ONLY WISH TO KNOW WHAT YOU MEAN BY ‘DUE PROCESS OF LAW.’ ”

Every so often, my eleven-year-old daughter asks me, “If you could go to any point in history and spend the day there, where would you go?” My usual answer is Saturday, April 21, 1866, when the Joint Committee on Reconstruction accepted John Bingham’s proposal of the three critical clauses of the Fourteenth Amendment.² Bingham was undoubtedly a very important part of the story of the Fourteenth Amendment, and others knew it; he was sometimes headlined as its “Author.”³ In the most important sense, however—the sense in which the Fourteenth Amendment is “Part of this Constitution,”⁴ and thus office-holders “shall be bound by Oath or Affirmation, to support” it—the American people were its author. The American 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 (for the three most important clauses of Section One, the same on April 21 as they were in the final version), and the Joint Committee took Bingham’s lead—with fits and spurts, and considerable dissent⁵—when he suggested particular words.

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² BENJAMIN J. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION* 87 (1914). 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 in note 5. For the history of disputes over the legitimacy of proposal by a former-Confederate-excluding Congress and Southern ratification under duress, see my *The History of the Loyal Denominator*, *LA. L. REV.* (forthcoming 2019), <https://ssrn.com/paper=2317471>.

³ The Cincinnati Commercial, for instance, headlined a speech by Bingham as “The Constitutional Amendment Discussed by its Author.” *CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866* at 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*, 42nd Cong. 1st Sess. app. 256 (1871).

⁴ U.S. CONST. art. V.

⁵ 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, *id.* at 98, rejected the same day as a separate proposition 8-4, *id.* at 98, and finally reinserted 10-3 in the place of the racial-discrimination-in-civil-rights provision on

The critical 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 reasonable informed reader, taking part in 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*.

Bingham’s own understanding of the language he selected, of course, if we could find it out, would offer important *evidence* of what that language expressed. Given the disputes that the Fourteenth Amendment has engendered in our day,⁶ 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.’”⁷ If the other members of the Joint Committee were to have asked Bingham this question on April 21, we do not know quite what he would have said. We do know, however, what Bingham would say if asked *two months before*, on February 28, because he was. Andrew Jackson Rogers—one of

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 4 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
Morrill	GOP	Y	Y	N	N
Grimes	GOP	Y		N	N
Howard	GOP	Y	N	N	N
Harris	GOP		N		
Fessenden	GOP				

Bingham’s precise language had been formulated only a short time before the April 21 meeting of the Joint Committee. The Chicago Tribune reported language that was slightly different in several details in its Washington dispatch from 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.’” Chicago Tribune, April 16, 1866, at 1.

⁶ See, e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) (ambiguously distinguishing, or perhaps overruling, the tradition-based approach to substantive due process in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

⁷ CONG. GLOBE, 39th Cong. 1st Sess. 1089 (1866) (February 28).

the three Democrats on the Joint Committee, and a fellow member with Bingham and Boutwell on a subcommittee that had considered the proposal⁸—asked this question in the midst of Bingham’s defense of an earlier proposal, but it was *not a question about the meaning of Bingham’s proposal*. Indeed, perhaps unlike the situation if we were to ask such a question today, *Rogers’ question was not a reflection of his lack of understanding of the phrase “due process of law.”*

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.”⁹ Toward the end of several days’ debate in the House, which Bingham lost when his proposal was tabled, Bingham decided to accuse 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.¹⁰

Bingham’s taste for rhetorical excess had gotten the best of him here, not for the first or last time.¹¹ Rogers then asked—*seeking to pin down Bingham about the meaning of the Fifth Amendment*—“I

⁸ Kendrick, *supra* note 2, at 55-56 (subcommittee appointed January 22, reporting back through Bingham January 27).

⁹ CONG. GLOBE, 39th Cong. 1st Sess. 1034 (1866). There were many, many tweaks to this language when the Joint Committee considered it. See Kendrick, *supra* note 2, at 46, 47, 51, 56, 57, 61 (five versions of the language, all different from what Bingham presented to the House).

¹⁰ CONG. GLOBE, 39th Cong. 1st Sess. 1089 (1866).

¹¹ See, e.g., Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1404 n.61 (1992) (Bingham “exasperating” and “undoubtedly a gasbag”); Frank & Munro, *The Original Understanding of “Equal Protection of the Laws,”* 50 COLUM. L. REV. 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, Matthew Carpenter, George Edmunds, or George Hoar); CONG. GLOBE, 37th Cong. 2nd Sess. 1796 (April 23, 1862) (Cox: “The gentleman from Ohio, upon the Judiciary Committee, [Mr. Bingham,] denied that authority very truculently, and in that tone in which lie 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.”); CONG. GLOBE, 39th Cong. 1st Sess. 3635 (1866) (Bingham in July taunting Stevens for not knowing about the “McMillan’s Lessee” case, Bingham’s misrecollection of *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856); *cf. infra* note 159 (1862 discussions of *Murray’s Lessee*).

only wish to know what you mean by ‘due process of law.’ ” Bingham’s response: “I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions.”¹²

Considered in isolation, the exchange between Bingham and Rogers might suggest (a) that “due process of law” was seen as obscure, and/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 1863.¹³
- Even Bingham treated the issue as “settled ... long ago,” 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 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.” Fessenden replied enigmatically, “We have agreed to that.” Johnson added, “I understand not.” His amendment to delete the Privileges or Immunities Clause failed without a vote tally.¹⁴
- 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,¹⁵ the president celebrated “due process of law.” In

¹² CONG. GLOBE, 39th Cong. 1st Sess. 1089 (1866).

¹³ See *id.* at 1524 (“[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.”).

¹⁴ *Id.* at 3041. The Amendment received final passage in the Senate a page later. *Id.* at 3042.

¹⁵ For instance, Johnson asked in his veto of the Civil Rights Act on March 27, “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. The Republican veto override on April 9

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.”¹⁶

- In the fall, in a widely-reprinted letter “generally taken as the official statement of the Administration’s position,”¹⁷ Interior Secretary Orville O.H. Browning—as we will see, one of the leaders of the due-process-based attack on 1862 confiscation efforts—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.¹⁸

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

and Bingham’s April 21 proposal of the Privileges or Immunities Clause were of course an emphatic “yes” to Johnson’s rhetorical question.

¹⁶ *Id.* at 3838 (veto message read in House), 3849 (veto message read in Senate).

¹⁷ Harper’s Weekly, October 6, 1866, at 627.

¹⁸ See, e.g., Chicago Tribune, October 26, 1866, at 1:

This [after quoting the Fifth Amendment] is identically the same, except that it 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 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 Government 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 without 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 the 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 the 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.

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 middle-man. “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 evidence from how “deprived of life, liberty, or property, without due process of law” was used in 1861 and 1862 to what principle “deprive any person of life, liberty or property without due process of law” expressed a few years later in the Fourteenth Amendment? Because the relevant *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.¹⁹ Only in the context of a sentence does a word really have meaning—“Nur im Zusammenhang eines Satzes bedeuten die Wörter etwas,” as Gottlob Frege puts it. 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.

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 partake of different tacit exceptions, or of 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, have been seen as conventional in 1866? Would Alvan Stewart’s 1837 due-process attack on the constitutionality of slavery? Would both?²⁰

The conviction underlying this study is that the discussions of the Fifth Amendment 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. A great many of the members of each Congress were the same. 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. Moreover, unlike 1871 Equal Protection Clause evidence²¹ and 1872 Privileges or Immunities Clause evidence,²² which I have elsewhere canvassed in great detail, no one can accuse those in the Thirty-

¹⁹ For some of my theoretical considerations of context, see *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL’Y 167, 171-74 (2017).

²⁰ In fact, by the way, Story’s and Stewart’s readings have important elements in common; they would diverge most importantly, as I see things, on the word “deprive” rather than “due process of law.” See *infra* note 162.

²¹ See *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 224-54 (2009).

²² EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 63-64, 164-211 (2015).

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 wasn’t, 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 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.”²³ Those looking for a genuine gusher of evidence about due process need to dig into 1862 instead.

II. 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.²⁴

“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 1862.²⁵ An uncomfortably-fuzzy boundary line divided situations when direct action was allowed and those in which the “processes and forms of law”—and which of them, if so—must be employed. But everyone acknowledged that sometimes, the “process of law” was dispensable.

²³ See <https://www.youtube.com/watch?v=Pk-B0s0jOwE>.

²⁴ Cong. Globe, 37th Cong. 1st Sess. app. 2 (July 4, 1861).

²⁵ See, e.g., CONG. GLOBE, 37th Cong. 2nd Sess. 507 (January 28) (Trumbull), 1558 (April 7) (Trumbull), 1719 (April 18) (Howard), 1783 (April 23) (Sherman), 1875 (April 30) (Wilmot), 2195 (May 19) (Sumner), 2235 (May 20) (Eliot), app. 169 (May 23) (Sheffield), app. 273 (May 23) (Maynard), app. 200 (May 24) (Hutchins), 2963-64 (June 27) (Sumner), 3382 (July 16) (Sumner); Norris v. Doniphan, 61 Ky. 385, 399-400 (1863).

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.” 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.” 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,²⁶ but Reverdy Johnson (not yet back in the Senate²⁷) defended Lincoln’s view.²⁸ No one suggested at the time—though a few would (implausibly) do so later²⁹—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. *Luther v. Borden* likewise 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.”³⁰

Due process was not itself 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.” Congress passed a resolution approving in general terms Lincoln’s actions in resisting the rebellion with force. Congress only specifically authorized habeas, however, confronting some relatively minor due-process objections in doing so, in March 1863.

III. 1862: THE SECOND CONFISCATION ACT

The 1861 discussions and intellectual skirmishes over habeas rights were just a forerunner of the much more protracted disputes over the Second Confiscation Act of 1862. If the habeas-

²⁶ Ex parte Merryman, 17 F. Cas. 144, 151–152 (C.D. Md. 1861).

²⁷ 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).

²⁸ See Reverdy Johnson, *Power of the President to Suspend the Habeas Corpus Writ*, in THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 185, 188 (1866).

²⁹ As 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 Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 644 n.211 (2009) (discussing the 1863 arguments 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. 3rd Sess. 1093, 1193, 1195, 1475 (1863)); AMANDA TYLER, HABEAS CORPUS IN WARTIME 377–78 n.45 (2017) (discussing minority report of Confederate Judiciary Committee and the March 16, 1864 speech of Vice President Alexander H. Stephens, taking similar position); Redish & McNamara, *Due Process and the Suspension Clause*, 96 VA. L. REV. 1361, 1367 (2010) (“the Due Process Clause trumps the Suspension Clause”). 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, *supra*, at 378 n.45.

³⁰ *Luther v. Borden*, 48 U.S. 1, 44 (1849).

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—and how broad the consensus—was between Democratic and Republican understandings of due process. In presenting these arguments, and responding to them, congressmen made very, very clear what “nor be deprived of life, liberty, or property, without due process of law” expressed at the time.

Why has this argumentative material never been canvassed in significant detail before? Daniel Hamilton has surveyed the politics of the Second Confiscation Act in great detail,³¹ but he glosses over the argumentative nitty-gritty. For instance, he describes 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.³²

The sheer mass and detail of the argument defies the faint-hearted. The whole debate covers on the order of about 500 Congressional Globe pages, or about a million words. 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.”³³ It was well-considered indeed. 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.”³⁴ 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.”³⁵ 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.³⁶ Beaman noted that the

³¹ DANIEL HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007).

³² *Id.* at 64.

³³ CONG. GLOBE, 37th Cong. 2nd Sess. 516 (January 28, 1862).

³⁴ *Id.* at 1900 (May 1).

³⁵ *Id.* at 1955 (May 6). He counted 20 speeches and 173 Congressional-Globe columns just in the Senate. *Id.* This was before the very extensive debates of late May.

³⁶ *Id.* at 2999 (June 28).

constitutional discussion had been “thorough, minute, and exhaustive.”³⁷ Harris called the debate a “very protracted and full discussion.”³⁸

The First Confiscation Act of August 6, 1861, liberated slaves directly used in fighting the rebellion, such as digging trenches for confederate troops. 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. Congress decided in the First Confiscation Act, reasonably enough and with relatively little controversy, to free such men.

By December 1861, when the Second Session met, Republicans were thinking much more ambitiously. They targeted property away from the front. The most-immediately-available such property was confederate-owned property in the North (or the West, where some rebels were said to be engaged in significant land speculation). But as initially conceived, Republicans also sought a law that would say what would happen to Confederate property in the South; they wanted something like a reconstruction measure. Especially before the bloodshed of Shiloh in April 1862, but even after it, congressmen still expected a quick victory and thought Reconstruction was nigh. 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. 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. The confiscation measure in the final bill, however, was only an *in-rem* measure dealing with rebel-owned property in the North, in the control of its courts. The bill also provided for measures besides confiscation, including several measures for treason prosecutions. 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.

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

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 “Christianity” and “civilization.” 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.

³⁷ *Id.* app. at 203 (May 24).

³⁸ *Id.* at 3375 (July 16).

Second, we had the due-process arguments of most interpretive relevance today. Even if international law allowed confiscation, our own constitution 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—could be applied to other property on *land*, and only only *indirectly* supporting the war effort. Getting to this point in the legislative and intellectual struggle took a *very* long time. While exhausting and exasperating to the participants, for our purposes today, 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, we had 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”³⁹ and “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”⁴⁰ 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 their definitions of due process. Critics complained of the violations of all of the provisions of the Fifth, Sixth, and Seventh Amendments (and occasionally the excessive-fines provision of the Eighth) 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. Also in this basket we can place 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. At the last hour, Lincoln eventually required Congress to limit the law to life estates.

Fourth, we had a range of policy arguments, most prominently the argument that the confiscation policy did not properly distinguish “ringleaders” from the rank and file. No matter where the line was drawn, there would be congressmen who either thought it was too lenient or too harsh, and the issue was fought over with vigor. 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 relatively 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.” 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*.⁴¹ Hamilton says the argument

³⁹ U.S. CONST. art. I, § 8, cl. 11.

⁴⁰ U.S. CONST. art. I, § 8, cl. 15.

⁴¹ 61 Ky. 385 (1863).

“reads like a speech made by a conservative Democrat in the Senate in opposition to confiscation,”⁴² and indeed one of the separate opinions of the court quoted the congressional speeches of Thomas at some length.⁴³ The Court, however, also rejected after considerable consideration a law-of-nations argument against confiscation rooted in the harshness of the law.⁴⁴ 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 a challenge in *McVeigh v. United States* in which the lower court had decided the issue of loyalty prematurely⁴⁵ and rebuffing the other 7-2 in *Miller v. United States* based on the processes required in civil versus criminal settings.⁴⁶

A few other disputes considered during in Congress in 1862 concerned due process. The issue of executive detention continued to crop up regularly, and was discussed in terms of due process. In April, Congress banned slavery in the District of Columbia, with compensation only for loyal owners. 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. Finally, the confinement of prisoners in D.C. jails, many of them fugitives from slavery, repeatedly raised issues of due process.

⁴² Hamilton, *supra* note 31, at 149.

⁴³ 61 Ky. at 437-38 (separate opinion of Williams, J.).

⁴⁴ 61 Ky. at 391 (noting that although *United States v. Percheman*, 32 U.S. 51, 86 (1833), had held that “[t]he modern usage of nations ... has become law,” this language was governed by *Brown v. United States*, 12 U.S. 110, 128 (1814), which held, “This 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.”).

⁴⁵ 78 U.S. 259, 267 (1871). 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,” noting, “A different result would be a blot upon our jurisprudence and civilization.” 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 defense.” 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.”

⁴⁶ 78 U.S. 268, 307-08 (1871) (Second Confiscation Act was sufficiently analogous to the blockade allowed in the *Prize Cases* and *The Amy Warwick*); *but see id.* at 323 (Field & Clifford, JJ., 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 courthouse, 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 offense be inflicted.”).

IV. 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, Roscoe 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—entered in 1863.

I put the participants here in rough order of importance; notes at the end of the section show where they discussed due process and kindred issues in 1862. It was a massive debate.

	1862 roles	1866 roles
Bingham ⁴⁶	Confiscation sponsor; leader in Judiciary Committee	Member of Joint Committee; sponsors key Fourteenth-Amendment language
Howard ⁴⁷	Confiscation supporter; critic of alternative proposal	Joint Committee member, presented Fourteenth Amendment to Senate
William Pitt Fessenden ⁴⁸	Confiscation supporter	Joint Committee co-chair
Stevens ⁴⁹	Confiscation supporter	Joint Committee co-chair
Harris ⁵⁰	Confiscation sponsor; member of confiscation committee; member of conference committee	Joint Committee member
Roscoe Conkling ⁵¹	Confiscation supporter	Joint Committee member
Justin Morrill ⁵²	Confiscation sponsor; due-process critic of alternative procedure	Joint Committee member
Grider ⁵³	Confiscation opponent	Joint Committee member
Grimes ⁵⁴	Confiscation supporter	Joint Committee member
Ashley ⁵⁵	Confiscation supporter	Fourteenth Amendment supporter
Colfax ⁵⁶	Confiscation supporter	Fourteenth Amendment supporter; Speaker of House; important speaker in campaign

Beaman ⁵⁷	Confiscation committee; confiscation supporter	Fourteenth Amendment supporter
Clark ⁵⁸	Sponsors treason-trial substitute; chair of confiscation committee; member of conference committee; messenger from Lincoln about non- veto conditions	Fourteenth Amendment supporter
Eliot ⁵⁹	Member of confiscation committee; reports proposal; member of conference committee	Fourteenth Amendment supporter
Browning ⁶⁰	Confiscation opponent	Led attack on Fourteenth Amendment
Cowan ⁶¹	Confiscation critic; member of confiscation committee	Fourteenth Amendment opponent
Henry Wilson ⁶²	Confiscation sponsor; member of confiscation committee	Fourteenth Amendment supporter
James Falconer Wilson ⁶³	Confiscation supporter; member of conference committee	Chairman of House Judiciary Committee, in charge of Civil Rights Act of 1866
Trumbull ⁶⁴	Chairman of Senate Judiciary Committee; leads confiscation push	Chairman of Senate Judiciary Committee; in charge of Civil Rights Act of 1866
Henderson ⁶⁵	Confiscation opponent; member of confiscation committee	Fourteenth Amendment supporter
Foster ⁶⁶	Confiscation supporter	Fourteenth Amendment supporter
Davis ⁶⁷	Confiscation opponent	Fourteenth Amendment opponent
Doolittle ⁶⁸	Confiscation opponent	Fourteenth Amendment opponent
Aaron Harding ⁶⁹	Confiscation opponent	Fourteenth Amendment opponent
Howe ⁷⁰	Confiscation opponent	Fourteenth Amendment supporter
Julian ⁷¹	Confiscation supporter	Fourteenth Amendment supporter
Kelley ⁷²	Confiscation supporter	Fourteenth Amendment supporter
Lane ⁷³	Confiscation supporter	Fourteenth Amendment supporter

McDougall ⁷⁴	Confiscation opponent	Fourteenth Amendment opponent
Sherman ⁷⁵	Confiscation sponsor; member of confiscation committee	Fourteenth Amendment supporter; important speaker on campaign
Willey ⁷⁶	Confiscation opponent; member of confiscation committee	Fourteenth Amendment supporter
Sumner ⁷⁷	Confiscation supporter	Fourteenth Amendment supporter
Wade ⁷⁸	Confiscation sponsor	Fourteenth Amendment supporter
Saulsbury ⁷⁹	Confiscation opponent	Fourteenth Amendment opponent
Edward Rollins ⁸⁰	Confiscation supporter	Not voting on Fourteenth Amendment
Dixon ⁸¹	Confiscation opponent	Not voting on Fourteenth Amendment
Collamer ⁸²	Confiscation-alternative sponsor; member of confiscation committee	
Noell ⁸³	Confiscation sponsor; member of confiscation committee	
Sedgwick ⁸⁴	Confiscation sponsor; member of confiscation committee	
Hutchins ⁸⁵	Confiscation supporter; member of confiscation committee	
Harlan ⁸⁶	Member of confiscation committee	
Mallory ⁸⁷	Confiscation opponent; member of confiscation committee	
Arnold ⁸⁸	Confiscation sponsor	
Campbell ⁸⁹	Confiscation sponsor	
Gurley ⁹⁰	Confiscation sponsor	
Lovejoy ⁹¹	Confiscation sponsor	
Porter ⁹²	Confiscation sponsor	
Shanks ⁹³	Confiscation sponsor	

Shellabarger ⁹⁴	Confiscation sponsor	
Upton ⁹⁵	Confiscation sponsor	
Patton ⁹⁶	Confiscation supporter	
Rice ⁹⁷	Confiscation supporter	
Spaulding ⁹⁸	Confiscation supporter	
Sargent ⁹⁹	Confiscation supporter	
Wallace ¹⁰⁰	Confiscation supporter	
Babbitt ¹⁰¹	Confiscation supporter	
Samuel Blair ¹⁰²	Confiscation supporter	
Francis Blair ¹⁰³	Confiscation supporter	
Cutler ¹⁰⁴	Confiscation supporter	
Duell ¹⁰⁵	Confiscation supporter	
Dunn ¹⁰⁶	Confiscation supporter	
Ely ¹⁰⁷	Confiscation supporter	
Samuel C. Fessenden ¹⁰⁸	Confiscation supporter	
Hale ¹⁰⁹	Confiscation supporter	
Hanchett ¹¹⁰	Confiscation supporter	
Kellogg ¹¹¹	Confiscation supporter	
King ¹¹²	Confiscation supporter	
Lansing ¹¹³	Confiscation supporter	
Loomis ¹¹⁴	Confiscation supporter	
Lot Morrill ¹¹⁵	Confiscation supporter	
Wilkinson ¹¹⁶	Confiscation supporter	
Wilmot ¹¹⁷	Confiscation supporter	

Walton ¹¹⁸	Confiscation-alternative supporter	
Wright ¹¹⁹	Confiscation-alternative supporter	
Olin ¹²⁰	Confiscation opponent; briefly member of confiscation committee	
Allen ¹²¹	Confiscation opponent	
Maynard ¹²²	Confiscation opponent	
Biddle ¹²³	Confiscation opponent	
Carlile ¹²⁴	Confiscation opponent	
Clements ¹²⁵	Confiscation opponent	
Conway ¹²⁶	Confiscation opponent	
Cox ¹²⁷	Confiscation opponent	
Crisfield ¹²⁸	Confiscation opponent	
Crittenden ¹²⁹	Confiscation opponent	
Diven ¹³⁰	Confiscation opponent	
Dunlap ¹³¹	Confiscation opponent	
Hickman ¹³²	Confiscation opponent	
Holman ¹³³	Confiscation opponent	
Law ¹³⁴	Confiscation opponent	
Menzies ¹³⁵	Confiscation opponent	
Norton ¹³⁶	Confiscation opponent	
Nugen ¹³⁷	Confiscation opponent	
Pendleton ¹³⁸	Confiscation opponent	
Powell ¹³⁹	Confiscation opponent	
Price ¹⁴⁰	Confiscation opponent	
Richardson ¹⁴¹	Confiscation opponent	

Sheffield ¹⁴²	Confiscation opponent	
Thomas ¹⁴³	Confiscation opponent	
Train ¹⁴⁴	Confiscation opponent	
Wadsworth ¹⁴⁵	Confiscation opponent	
Wickliffe ¹⁴⁶	Confiscation opponent	

⁴⁶ See CONG. GLOBE, 37th Cong. 2nd Sess. 7 (December 3, 1861) (proposing bill), 56 (December 11) (proposing bill), 346-48 (January 15, 1862) (defending view that due process is merely the law of the land), 462, 467 (January 23) (Van Horn endorsing Bingham’s defense), 956-57 (February 25) (insisting on due-process rights of purported fugitive slaves), 1202-05 (March 12) (defending confiscation), 1303 (March 20) (giving minority report of Judiciary Committee in favor of confiscation), 1321 (March 21) (printing substitute confiscation act), 1638-40 (April 11) (suggesting Fifth Amendment prohibits slavery in the District of Columbia because of shift from “freeman” to “person”), 1682 (April 16) (submitting amendment to confiscation bill), 1767 (April 22) (proposing substitute), 1768 (April 22) (suggesting even retrospective confiscation might be OK), 1771 (April 22) (proposal approved by House), 1788 (April 23) (proposal tabled by House), 2052 (May 9) (noting there had been no compensation for rebel owners when D.C. slavery abolished), 2066 (May 12) (objection to introduction of resolution making due-process objection to “wholesale” confiscation); *id.* app. 154 (May 21) (engaging with Mallory on whether “forfeiture” in Article III applies to personalty); *id.* app. 187 (May 24) (Harding listing Bingham among leaders on confiscation); *id.* 2361 (May 26) (absent during confiscation vote, but paired with confiscation opponent).

⁴⁷ See *id.* at 375 (January 17) (arrives in Senate for first time), app. 100 (April 11) (interrupting to clarify that seizure isn’t essential to confiscation), 1714-20 (April 18) (distinguishing cruelty from unconstitutionality, defending confiscation on many fronts), 1787 (April 23) (correcting Doolittle on timing of chattel forfeiture), 1883 (April 30) (seeking instruction to committee to limit confiscation to leaders), app. 145 (May 5) (Howe saying that Howard’s speech demanded more attention than any other), 2164 (May 16) (dispute with Henderson about what counts as a confiscation measure), 2170 (May 16) (worryes that Trumbull’s approach to “forfeiture” is evasion of Article III), 2172 (May 16) (marking “clear distinction which ever exists in all human societies between a state of war and a state of peace”), 2223 (May 20) (correcting Davis on where Booth was from: Wisconsin, not Minnesota), 2229 (May 20) (explaining procedure for seizure of property without arrest of person), 2828 (June 23) (asking that confiscation bill be read through), app. 303-07 (June 24) (criticizing at length Clark’s substitute, using confiscation as a means of compelling attendance at treason trials, quoting *Greene* and *Murray’s Lessee* at length), 2931 (June 25) (correcting misinterpretation by Dixon), 2966-69 (June 27) (discussing limits on presidential power), 2991 (June 28) (Wilkinson commending Howard on presidential power).

⁴⁸ See *id.* at 97 (December 16) (defending detention in “times like these”), app. 66 (March 3) (McDougall paying tribute to Fessenden’s thoroughness), 1473 (April 1) (“common consent” and “custom” establish baseline for compensation of D.C. emancipation, which cannot be disregarded, even if not constitutionally obligatory), 1739 (April 21) (concern about military versus civil jurisdiction), 1963 (May 6) (taken aback when Trumbull says he was opposed to confiscation), 1964 (May 6) (Trumbull reading transcript of exchange with Fessenden), 2039 (May 9) (hoping that constitutional issues with confiscation-resembling tax bill would be “thoroughly and well considered”).

⁴⁹ See *id.* at 439-40 (January 22) (defending emancipation as a war measure, not limited to rebels because of fraud, but with compensation for loss of loyal citizens), 462 (January 23) (Van Horn endorsing Stevens on confiscation), 1199 (March 12) (refusing to give up confiscatory emancipation unless persuaded), 1645 (April 11) (defending lack of jury for equivalent of suits in chancery), 2130 (May 14) (Crisfield responding to Stevens).

⁵⁰ See *id.* at 861 (February 18) (proposing outlawing traitors), app. 63 (March 3) (pestering McDougall on seizing rebels’ property in New York), 1627 (April 11) (noting that he has amendments to propose), 1652-55 (April 14) (confiscation substitute limited to Article-VI-oath-denying rebels, but forfeiting all constitutional rights, pioneering in-rem provisions), 1991 (May 7) (appointed to confiscation committee), 2191 (May 19) (Sumner defending Harris on in-rem proceedings),

2235 (May 20) (Eliot commending how learned Harris is), 3166 (July 8) (appointed to conference committee), 3267 (July 11) (report back from conference committee), 3375 (July 16) (calling debate “very protracted and full discussion”).

⁵¹ See *id.* at 1514 (April 2) (urging discussion of compensated emancipation), 1819 (April 24) (noting need for speed on confiscation, because it could not be retrospective, and wanting limit to “ringleaders”).

⁵² *Id.* at 49 (December 11) (introducing bill), 2233 (May 20) (proposing substitute for emancipation of the rebel-enslaved), app 187 (May 24) (Harding complaining of inconsistency in earlier opposing congressional emancipation power), 2360 (May 26) (substitute voted down).

⁵³ See *id.* app. at 162-66 (quoting Washington’s Farewell 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”).

⁵⁴ See *id.* at 2039 (May 9) (urging that confiscation be sent to committee), 2306 (May 23) (claiming that DC committee isn’t a committee of lawyers, and so judiciary committee should consider DC issues involving difficult legal questions).

⁵⁵ See *id.* app. 101 (April 11) (defending D.C. emancipation), app. 224-25 (May 23) (supporting confiscation, quoting historical materials and defending concept of state treason).

⁵⁶ See *id.* at 1789-90 (April 23) (stressing lack of retroactivity in bill, not trusting the court that gave us *Dred Scott*), 2623 (June 9) (proposing jury trial for Fugitive Slave Act).

⁵⁷ See *id.* at 1553 (April 4) (saying rebels had forfeited rights), app. at 203 (May 24) (supporting confiscation).

⁵⁸ *Id.* at 26 (December 9, 1861) (complaining that no “law or regulation” justifies detentions in D.C. jails), 817 (February 14, 1862) (proposing requirement for “precept by which said prisoner was committed”), 1011 (February 28) (proposing ban on D.C. slavery), 1958 (May 6) (noting some good things in various proposals), 1991 (May 7) (appointed chair of special confiscation committee), 2112 (May 14) (reporting back from special committee), 2163 (May 16) (hoping bill can be adopted quickly), 2166 (expecting attack from those who want confiscation “without any trial”), 2199 (May 19) (managing proposals on floor), 2842 (June 20) (dispute about what bill to take up), 2916 (June 25) (wanting to take up confiscation), 2970 (June 27) (declining to take part in debate so that bill can be passed soon), 2989 (June 28) (text of substitute), 2996 (amendment approved 21-17), 3006 (bill passed 28-13), 3166 (July 8) (appointed to conference committee), 3274 (July 12) (conference report, adopted 27-12), 3374 (July 16) (bringing message from president on limiting confiscation of land to life estate), 3383 (passing his amendment to clarificatory joint resolution).

⁵⁹ *Id.* at 79-80 (December 12, 1861) (defending confiscation), 1846 (April 28, 1862) (appointed to confiscation committee), 2128 (May 14) (reports confiscation bill), 2232-37 (May 20) (discusses bill limited to most important rebels, defending in-rem procedure at length), app 225 (May 23) (Ashley endorsing Eliot’s speech), app 187 (May 24) (Harding complaining about Eliot previously denying congressional emancipation power), 2356-57 (May 26) (concluding debate, explaining amendments, distinguishing severity from unconstitutionality), 2764 (June 17) reporting back again), 3178 (July 8) (appointed to conference committee), 3266-67 (July 11) (presents conference report, adopted 82-42).

⁶⁰ *Id.* at 97 (December 16, 1861) (criticizing detention of Buchanan-administration ambassador “without having passed through the ordinary forms required by municipal law”), 961 (February 26, 1862) (worrying at length about loyal property owners behind Confederate lines), 1136-40 (March 10) (claiming lack of denial the confiscation is bill of attainder, and saying President can exercise war power of confiscation), 1857-60 (April 29) (claiming exclusive presidential power over confiscation, attacking in-rem procedure under due process), 2171 (May 16) (complaining his position has been misrepresented in debate), 2917-23 (June 25) (responding to Sumner’s “novel and extraordinary” claims, invoking excessive-fines clause, complaining about in-rem procedure); 2965-66 (June 27) (responding to Sumner on Third Amendment); 2970 (responding to Howard).

⁶¹ See *id.* at 129 (December 18) (distinguishing confiscation from emancipation), 517-18 (January 28) (urging full consideration of difficult constitutional issues), 1050-53 (March 4) (proclaiming consensus on due-process definition, distinguishing *Brown* and other authorities), 1558 (April 7) (Trumbull responds to Cowan), 1654 (April 14) (Harris

expressing agreement about how to define most-important rebels), 1718 (April 18) (Howard replies to Cowan), 1832 (April 25) (asks for special committee), 1846 (asks for special committee again), 1878-79 (April 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), 1881 (April 30) (urging special committee), 1991 (May 7) (appointed to confiscation committee), app. 243 (June 3) (Cox relies on Cowan), 2959-62 (June 27) (praises Clark substitute, doesn’t like in-rem procedure, harps on *Percheman*), 2967 (June 27) (Howard replies to Cowan).

⁶² *Id.* 185 (January 6) (petition on arrest without rationale), 917 (February 24) (proposal to ban DC slavery), 1048 (March 4) (bill to ban military from re-enslaving fugitives), 1350 (March 25) (history of slavery in DC), 1523 (April 3) (disputing lack of compensation for DC emancipation), 1556 (April 7) (gives list of confiscation measures to be postponed), 1785 (April 23) (disputing with Sherman about which rebels are important enough), 1895 (May 1) (distinguishing “leaders” from “masses”), 1854 (proposing amendment of First Confiscation Act), 1921 (May 2) (proposing confiscation scheme), 1955 (May 6) (confessing lack of legal expertise, nice IANAL ode to others), 1991 (May 7) (member of confiscation committee).

⁶³ *See id.* at 3178 (July 8) (appointed to conference committee), 3267 (July 11) (conference committee reports back).

⁶⁴ *See* CONG. GLOBE, 37th Cong. 2nd Sess. 1 (December 2, 1861) (proposing bill), 18-19 (December 5, 1861) (initial speech on confiscation), 90-91, 94 (December 16, 1861) (raising due-process issues about detention), 153 (December 20) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* 334 (January 15, 1862) (reporting back confiscation bill), 375 (January 17) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 507, 510, 517, 518 (January 28) (discussing due-process objections to court-martial provisions in railroad bill), 719 (February 10) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels); *id.* at 739 (February 11) (seeking to begin confiscation discussion); *id.* at 849 (February 17) (seeking to begin confiscation discussion), 941-44 (February 25) (defending confiscation); *id.* app. at 63 (March 3) (assuring McDougall that bill is prospective), 1158 (March 11) (explaining how bill evades life-estate-forfeiture-only issue), 1332 (March 24) (discussing compensated emancipation), 1371 (March 26) (discussing compensated emancipation), 1557-60 (April 7) (clarifying procedures in bill, making prospectivity clear, responding to Cowan and Browning, explaining in-rem procedures), 1571 (April 8) (explaining difference between judicial and administrative proceedings in bill); *id.* app. 100 (April 11) (clarifying reach of bill in response to Doolittle), 1627 (April 11) (upset Senate considering so slowly), 1813 (April 24) (explaining relationship of proposals), 1883 (April 30) (participating in Senate-procedures issues), 1940 (May 5) (Foster endorsing Trumbull’s explanations of his bill), 1959 (May 6) (explaining distinction between proposals), 1960 (May 6) (acknowledging distinction in covered rebels might be too harsh), 1964 (May 6) (dispute with Fessenden about who supported which proposals), 2165-66 (May 16) (Trumbull saying treason-penalty bill wasn’t confiscation, defending confiscation against due-process attack), 2170 (May 16) (proposing amendment), 2226 (May 20) (accusing due-process foes of confiscation of acting on behalf of rebels), 2776 (June 18) (noting another bill coming soon), 2842 (June 20) (estimating numbers of votes for different proposals), 2902 (June 24) (distinguishing support for bills), 2916 (discussing timing of discussion), 2961 (June 27) (distinguishing power to confiscate from whether its policy), 2971-72 (June 27) (discussing distinctions between bills), 3000 (discussing what vote meant).

⁶⁵ *See id.* at 1569-74 (April 8) (opposing confiscation), 1991 (May 7) (appointed to confiscation committee), 2164 (May 16) (distinguishing confiscation from increased penalty for treason), 2199 (May 19) (offering several proposals, which Clark says have been voted down before), 2200 (May 19) (amendment voted down 25-12).

⁶⁶ *Id.* at 579 (January 31, 1862) (“satisfactory evidence” requirement for administrative adjudication is implicit), 1940 (May 5) (endorsing Trumbull’s explanations of his bill), 1942 (preferring Collamer’s proposal), 1960 (participating in discussion about who supported referral to committee).

⁶⁷ *See id.* at 176 (December 26) (proposing very limited confiscation), 178 (December 30) (proposing very limited confiscation), 509 (January 28) (stringent limits on trials outside civil law), 785 (February 13) (resolution against retroactivity), 986 (February 27) (moving substitute), 1191 (March 12) (insisting that test of constitutionality be submitted to courts), 1334-36 (March 24) (discussing *Antelope* at length, complaining about amount of compensation for slaves in D.C.), 1446 (March 31) (interacting with Sumner on whether slaves are property), 1498-99 (April 2) (discusses *Antelope* and other cases and when law-of-nations usage ripens into law), 1720 (April 18) (wanting to reply to Howard), 1757-62 (April 22) (attacking confiscation, distinguishing many cases, noting uncertainty of in-rem jurisdiction), 1776-82 (April

23) (quoting Wendell Phillips's reply to Lysander Spooner at length, discussing *Prigg v. Pennsylvania* and *Somerset's Case* at length), 1785 (April 23) (engaging on "forfeiture" Article III issue), 2167-68 (May 16) (arguing about "forfeiture," old English statutes and treason cases), 2169 (May 16) (amendment to take emancipation out of treason-penalty-enhancement substitute voted down 31-7), 2197 (May 19) (discussing possible denaturalization of rebels), 2218-23 (May 20) (defense of slavery, misrecollection that *Booth* happened in Minnesota corrected by Howard), app. 218 (May 24) (Kellogg praises speech), 2961 (June 27) (distinguishing *Brown*).

⁶⁸ See *id.* at 124 (December 18) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels), 125 (December 18) (presenting bill to tax South), 505 (January 28) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels), app. 94-100 (April 11) (criticizes confiscation, promotes voluntary colonization, interaction with Trumbull and Howard on scope of bill and how confiscation works), 1785-87 (April 23) (controversy on whether Article III "forfeiture" only applies to land titles already partitioned into series of life estates), 1813 (April 24) (Trumbull agrees with Doolittle on broad scope to Article III "forfeiture"), app. 137-40 (May 2) (harping on law-of-nations limits on what can give good title after war, proposing tax on South as alternative), 2039 (May 9) (reporting back tax-on-South bill deemed too similar to confiscation to be discussed separately).

⁶⁹ See *id.* app. at 28 (December 17, 1861) (condemning emancipation on several grounds, distinguishing constitutional concerns from policy), app. 186-87 (May 24, 1862) (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), app. 200 (May 24) (Hutchins says Harding misinterpreted vote).

⁷⁰ See *id.* at 178 (December 26) (summarizing procedural complaints about Fugitive Slave Act of 1850), 1900 (May 1, 1862) (noting mass of speeches on confiscation to read), app. 142-46 (May 5) (deploring Saulsbury's racism, interpreting Howard's proposal to be absurd).

⁷¹ See *id.* at 327-31 (January 14) (speech on emancipation, inserted into debate on London exhibition), app. 184 (May 23) (demanding "due process of war," a phrase Nathan Chapman has since picked up—see goo.gl/W8TVNy).

⁷² See *id.* at 596 (January 31) (expressing joy at expression of support for confiscation), 1770 (April 22) (worrying about jury nullification in South).

⁷³ See *id.* at 88 (December 16, 1861) (proposing prohibition on rebel debt collection), 3379 (July 16) (discussing usefulness of confiscating life estates).

⁷⁴ See *id.* at 1021 (February 28) (urging Senate to take up confiscation), app. 60-66 (March 3) (speech against confiscation focused on law of nations and attainder charge, but appreciating Trumbull's ode to the rule of law), app. 66 (March 4) (finishing speech from day before, focusing on administration's promise to continue to return fugitive slaves).

⁷⁵ *Id.* at 32 (December 9, 1861) (enthusiastically advocating confiscation in general terms), 316 (January 14, 1862) (noting general agreement on due-process principles for D.C. jail detention), 516 (January 28) (military shouldn't wait for "slow process of the laws of Pennsylvania" to deal with Northern saboteurs); *id.* app. 66 (March 3) (McDougall praises Sherman's amount of attention to financial details), 1180 (March 12) (introducing bill), 1495-96 (April 2) (advocating "the most rigid law of confiscation," but to be tempered by "forbearance" and "moderation" via amnesty provision), 1604 (April 10) (proposing elaborate amendment), 1719 (April 18) (Howard endorsing Sherman's approach on ringleaders v. rank and file), 1783-85 (April 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 can't pass), 1807 (April 24) (discussion of substitute proposal), 1803 (proposing amendment), 1814 (proposal adopted 26-11), 1874 (April 30) (Wilmot praising Sherman's approach), 1883 (opposing instructions for committee), 2235 (May 20) (learning praised by Eliot), 2902 (June 24) (supporting House bill), 2992 (June 28) (exasperation at length of debate), 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), 3374 (July 16) (demanding that Clark make Lincoln's veto threat explicit).

⁷⁶ See *id.* app. at 33 (December 19, 1861) (complaining about going beyond limits of First Confiscation Act), 1300 (March 20) (DC emancipation constitutional, but a breach of faith with Maryland).

⁷⁷ *Id.* at 16 (December 5, 1861) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels), 25 (December 9) (same), 88 (December 16) (same), 109 (December 17) (same), 142 (December 19) (same), 221 (January 8, 1862) (same), 286 (January 13) (same), 736 (February 11) (state-suicide resolutions), 911 (February 22) (presenting petition for compensated emancipation for loyal owners, uncompensated for rebels), 1449 (March 31) (claims D.C. slavery violates due process), 1738 (April 21) (proposing military-necessity exception to right to face accusers), 1855 (April 29) (proposing giving President option to tell Congress that revealing details of rationale for detention would not be in public interest), 1957 (May 6) (disagreeing with Wade and Hale on constitutional issue), 2056 (Hale recalling Sumner's position on administrative adjudication in fugitive-slave setting), 2113 (May 14) (motion to add if-in-public-interest limit to demand for information on detentions), 2188-96 (May 19) (discussing "forfeiture," defending in-rem procedure at length, noting that rights can be "harsh and repulsive"), 2842 (June 20) (supporting House bill), 2963-65 (June 27) (noting Third Amendment quartering allowed confiscation without due process of law, but noting that judicial proceedings in bill satisfy due process), 2991 (June 28) (Wilkinson endorsing Sumner in exchange with Browning), 2998 (June 28) (proposing adopting House bill on emancipation of rebels' slaves), 3382 (July 16) (noting that armies take life without due process).

⁷⁸ *See id.* at 1917 (May 2) (responding to Browning on executive power), 1957 (May 6) (worrying about jury nullification in South), 1961 (May 6) (reflecting on extent of disagreement on constitutional issues), 2139 (presenting petition for rigorous confiscation bill), 2170 (May 16) (limiting Article III "forfeiture" to land already pre-partitioned into life-estate temporal chunks), 2203 (May 19) (noting inconsistency of other senators in mocking in-rem proceedings in one context, but incorporating them into their own proposal), app. 225 (May 23) (Ashley quotes Wade), 2929 (June 25) (aghast at talk of exclusive executive power).

⁷⁹ *See id.* at 1923 (May 2) (racist stuff), app. 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."), 2898-2902 (June 24) (racist defense of slavery, summary claim that confiscation is "flagrantly unconstitutional").

⁸⁰ *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 audience IANAL), app. 146 (May 22) (Menzie's says Rollins speech produced "pleasure, not unmingled with pain").

⁸¹ *Id.* 2924 (June 25, 1862) (opposing Sumner's theories of union), 2973 (opposing Trumbull on presidential power).

⁸² *Id.* at 319-20 (January 14, 1862) (demanding "legal process" for confinement in jail, no matter color); *id.* app. 64 (March 3) (correcting McDougall on what *Brown* held), 1759-60 (April 22) (correcting Davis on what *Brown* held), 1768 (Walton praising Collamer's proposal), 1783 (19-19 vote on substituting his amendment for Sherman's), 1785 (April 23) (engaging on "forfeiture" issue), 1791 (Dunn praises his proposal), 1808-12 (April 24) (responding to use of *Palmira* to defend in-rem jurisdiction without juries, but OK with requiring fugitive re-enslavers to prove loyalty), 1814 (April 24) (proposal read), 1881 (April 30) (Cowan proposes Collamer as committee chair), 1895 (May 1) (motion to replace confiscation with alternative), 1920 (May 2) (noting that all proposals would require re-establishment of government in South, "not a perfect lawlessness"), 1942 (May 5) (Foster preferring Collamer's scheme), 1959 (May 6) (Trumbull noting Collamer's effective humor in mocking in-rem scheme), 1961-62 (criticizing Revolutionary precedents, noting prospectivity of current proposals, discussing difference between temporary seizure and permanent disposition of title); *id.* app. 243 (June 3) (Cox relying on Collamer's arguments).

⁸³ *Id.* at 33 (December 9, 1861) (introducing confiscation joint resolution), 1846 (April 28, 1862) (member of House confiscation committee), 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), app 147 (May 22) (correcting Menzie's on reading case), app 177 (May 23) (Sargent quoting and endorsing Noell's defense of confiscation); app 218 (Kellogg praising Noell's speech), app 193 (May 26) (noting the ubiquity of collateral consequences from governmental action).

⁸⁴ *See id.* at 1861 (April 29) (selected for confiscation committee in place of Olin), 2323-24 (May 23) (proposes emancipating slaves who will fight, with compensation for loyal owners, quoting Thomas on "direst extremity, which Sedgwick says exists, though Thomas immediately disagrees), app. 225 (May 23) (Ashley endorsing Sedgwick), app. 187 (May 24) (Harding complaining about earlier disavowal of congressional emancipation power).

⁸⁵ See *id.* app. at 103-04 (April 11) (denying legal existence of slavery in DC), 1846 (April 28) (appointment to confiscation committee), 2066 (May 12) (objection to Wickliffe’s introduction of anti-“wholesale” confiscation resolution, “emphatically”), app. 187 (May 24) (Harding complains about Hutchins earlier disclaiming congressional emancipation power), app. 200-02 (May 24) (rebutting Harding’s characterization of resolution, analogizing confiscation bill to blockade and First Confiscation Act, exchange with Thomas).

⁸⁶ See *id.* at 1991 (May 7) (appointment to confiscation committee in place of Trumbull, who begs off).

⁸⁷ See *id.* at 1846 (April 28) (appointed to confiscation committee), app. 153-56 (May 21) (attacking in-rem procedure, dispute about what early-1861 resolutions meant, accusations that North banned black migration, corrected by Bingham).

⁸⁸ See *id.* 229 (January 8) (proposing confiscation bill), 400 (January 20) (proposing voiding transfers of property by rebels), 858-59 (February 17) (arguing that attack on slavery is attack on its strength), app. 182-84 (May 23) (responding to Grider, arguing that Union had been too kind to rebels, discussing several cases and treatises).

⁸⁹ See *id.* at 6 (December 6, 1861), 345 (January 15, 1862) (pestering Bingham about why Judiciary Committee hadn’t reported on confiscation), 1682 (associated with reported bill).

⁹⁰ *Id.* at 35 (December 9) (introducing bill), app 187 (May 24) (singled out for supposed inconsistency by Harding for agreeing earlier on lack of congressional emancipation power), app 234 (May 26) (defense of confiscation).

⁹¹ See *id.* at 158 (December 20) (proposing instructing Judiciary Committee to report confiscation bill, but failing narrowly), 229 (January 8) (proposing sequestration bill), 1413 (March 27) (suggesting that anti-confiscation Browne, complaining about money, was in favor of confiscation), 1645 (April 11) (asking what process of law has enslaved those in DC), 1815-17 (April 24) (replying to Crittenden, complaining about perversion of Constitution, ode to privileges of American citizenship), 2030 (May 8) (reporting bill for prohibition on slavery in federally-controlled areas), 2042 (May 9) (House refuses 65-50 to table Lovejoy’s bill), 2077 (Diven replies to Lovejoy by complaining about Illinois racial restriction on migration), app. 187 (May 24) (Harding complaining that Lovejoy once disavowed congressional emancipation power).

⁹² See *id.* at 1767-68 (April 22) (proposing bill much like Sherman’s, but preferring too-severe bill to none at all), 1770, 1772 (April 22) (involvement in agenda-setting about which bills considered).

⁹³ See *id.* at 1682 (April 16) (House considers proposal associated with Shanks), app. 196-99 (May 23) (defends confiscation, responding to Dunlap and Wadsworth).

⁹⁴ See *id.* at 935-36 (February 24) (defending in rem confiscation in light of *Murray’s Lessee*), 1636 (April 11) (asking Crittenden if lowering age of emancipation for those who haven’t reached it yet is deprivation of property—a bit like regulatory-takings issue), 1682 (April 16) (House begins considering his proposal), 2069-74 (defending Lincoln on habeas).

⁹⁵ *Id.* at 36 (December 9) (introducing bill).

⁹⁶ See *id.* at 1800 (April 23) (stressing prospectivity).

⁹⁷ See *id.* app. at 205-08 (May 24) (those on battlefield are subject to “summary laws of war,” which are a *kind* of “punishment by due process of law”).

⁹⁸ See *id.* app. at 174-75 (May 23) (wartime suspension of “ordinary forms of judicial proceedings”).

⁹⁹ See *id.* app. at 175-77 (May 23) (endorsing Noell’s defense of confiscation, insists that executive detention procedures are responsive to facts).

¹⁰⁰ See *id.* at 2292-94 (May 22) (defending confiscation, distinguishing need for mercy from due-process concerns).

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- ¹⁰¹ *See id.* app. at 166-68 (May 22) (defending confiscation, worrying about jury nullification in South).
- ¹⁰² *See id.* at 2298-2301 (May 22) (defending confiscation, analogizing First and Second Confiscation Acts, celebrating Northwest Ordinance, noting that blockade fell on loyal & disloyal alike).
- ¹⁰³ *See id.* app. at 171 (May 23) (discussing whether international law applied to confiscation).
- ¹⁰⁴ *See id.* app. at 114-15 (April 23) (arguing about “blessings of liberty” in preamble, arguing that *partus sequitur ventrem* works corruption of blood, complains about lack of juries under Fugitive Slave Act).
- ¹⁰⁵ *See id.* at 99 (December 16) (proposing taking away rebels’ pensions), 1797-98 (April 23) (Democrats complain everything is unconstitutional).
- ¹⁰⁶ *See id.* at 1790-91 (April 23) (desiring discrimination between leaders and victims, and wanting to include pro-Confederate newspapers and pastors).
- ¹⁰⁷ *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”).
- ¹⁰⁸ *See id.* at 402 (January 20) (expressing agreement with Bingham), 1199-1200 (March 12) (accused by Wadsworth of harboring emancipation schemes, sort of admits it “if it can be constitutionally accomplished”), 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 retrospective law would “meet the claims of justice,” ode to being man of one idea, calls men “thinking bayonets”).
- ¹⁰⁹ *See* CONG. GLOBE, 37th Cong. 2nd Sess. 92 (December 16, 1861) (applauding Trumbull’s speech on due-process limits on executive detention), 941 (February 25, 1862) (urging haste on confiscation), 961 (February 26) (noting that loyal owners might own part of confiscated vessels), 1785-86 (April 23) (offering tentative thoughts on scope of “forfeiture” in Article III), 1955 (May 6) (complaining about length of debate); *id.* (Henry Wilson noting that Hale is one “to whom we all pay so much deference, and justly too”), 1956 (May 6) (noting that legal study sometimes produces “legal nonsense and judicial quackery”), 2055-56 (May 12) (complaining about administrative adjudication, as others like Sumner had complained about fugitive-slave law), 2928 (discussing “forfeiture”).
- ¹¹⁰ *See id.* app. at 208-12 (May 26) (defends Lincoln on habeas, says no need to limit confiscation to slaves *directly* employed in war service; indirect employment is enough; suggests *Missouri-v-Holland*-style abolition through a treaty).
- ¹¹¹ *See id.* app. at 215-18 (May 24) (defends confiscation, but agrees with critics’ definition of due process, and praises some points of confiscation critics).
- ¹¹² *See id.* at 175 (December 24, 1861) (should use “ordinary tribunals of justice” at the “earliest practicable period”), 1814 (April 24) (should distinguish between loyal people in South and even minor rebels).
- ¹¹³ *See id.* at 2272-73 (May 21) (defending confiscation against Article III attack; complaining about lack of free speech in South).
- ¹¹⁴ *Id.* app 179-81 (May 23) (defending confiscation under law of nations).
- ¹¹⁵ *Id.* at 314-15 (January 14) (discussing bill to discharge detainees held without due process), 817 (February 14) (discussing detention “on a process”), 1054 (desire to discuss confiscation), 1076 (defends confiscation under law of nations), 1191 (begins DC emancipation process), 1336 (defends lack of compensation for D.C. emancipation, because not “property” in constitutional sense).
- ¹¹⁶ *See id.* at 2990-91 (June 28) (defending confiscation, preferring Sumner to Browning, agreeing with Howard).

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- ¹¹⁷ *See id.* at 1873-76 (April 30) (defending confiscation, preferring to limit to leaders, defending use of executive commissioners because courts cannot operate).
- ¹¹⁸ *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).
- ¹¹⁹ *See id.* at 1468 (April 1) (urging discussion of confiscation), 1769 (April 22) (urging proper discrimination between “leaders and instigators” versus those compelled to serve rebellion), 1876-77 (April 30) (best to take before tribunal and allow for amnesty).
- ¹²⁰ *See id.* at 180 (December 30) (raising port-preference objection to blockade), 1170-71 (March 11) (wanting to distinguish important from minor rebels), 1788 (April 23) (constitutional issues key for vote), 1820 (April 24) (proposes sending to select committee, which House does).
- ¹²¹ *See id.* app. at 119-21 (April 24) (Article III arguments about “forfeiture,” distinguishing emancipation from confiscation).
- ¹²² *See id.* app. at 273-75 (May 23) (responds to no-process-of-law-on-battlefield hypothetical, commends the public-relations value of jury verdicts over in-rem proceedings).
- ¹²³ *See id.* at 1770 (April 22) (opposing confiscation, following Thomas, criticizing emancipation).
- ¹²⁴ *See id.* at 1157-61 (March 11, 1861) (insisting on right to examine constitutional issues, distinguishing Trumbull’s authorities, urging restraint for rank and file).
- ¹²⁵ *See id.* app. at 191-92 (urging general clemency for “deluded followers”).
- ¹²⁶ *Id.* at 82-83 (December 12, 1861) (criticizing confiscation on law-of-nations grounds), 679 (February 6, 1862) (attempting to offer resolution asking who has been arrested “without a legal process”), 1157 (March 11) (Carlile quoting Conway).
- ¹²⁷ *See id.* at 1796 (April 23) (describing state-federal procedural interaction), app. 242-45 (June 3) (criticizing confiscation, opposing black citizenship).
- ¹²⁸ *See id.* app. 49 (February 5) (criticizing confiscation), 2129-32 (May 14) (distinguishing humanity from due-process constitutionality).
- ¹²⁹ *See id.* at 1635-38 (April 11) (criticizes confiscation, but dubitante, interacting with Shellabarger, taking Madison’s side on spending power dispute with Hamilton), 1803 (April 23) (calls in-rem proceeding “some sort of legal trick”), app. 271 (May 26) (Law endorses arguments).
- ¹³⁰ *See id.* at 2074-77 (May 12) (arguing that legislation is not required, that confiscation is limited to public property, but would allow abandoned property to be treated as public, predicts Stevens will make fun of him).
- ¹³¹ *See id.* at 598 (January 31) (calling Sheffield’s response to Bingham “invulnerable and invincible”), app. 189-90 (May 24) (condemning lack of hearing, trial, or jury).
- ¹³² *See id.* at 1303 (March 20) (reporting back confiscation proposals, recommending they not pass); *id.* at 1769 (April 22) (Walton saying he wants same proposal as Hickman: territorial emancipation after time to surrender, a la Emancipation Proclamation).
- ¹³³ *See id.* app. at 151 (May 23) (distinguishing magnanimity from constitutional concerns).
- ¹³⁴ *See id.* app. at 271-72 (May 26) (endorsing arguments of Crittenden and Thomas).
- ¹³⁵ *Id.* at 495 (January 27) (attacking Stevens for changing Constitution), app. 146-47 (May 22) (responding to Rollins, drawing distinctions among those in the South, and asserting immunity of property not used in war).

¹³⁶ *See id.* at 1828 (April 24) (unconstitutionality of confiscation “is seen at a glance,” and shouldn’t set confiscated slaves free).

¹³⁷ *See id.* app. at 239-42 (May 26) (attacking confiscation; open to idea that Constitution just doesn’t have enough emergency powers to sustain itself—maybe it *is* a [governmental] suicide pact).

¹³⁸ *See id.* at 41-44 (December 10, 1861) (associating habeas rights with right to due process), 1682 (April 16, 1862) (seeking to table all confiscation bills), 1698 (April 17) (motion to table to be discussed soon), 1766 (April 22) (motion to table voted down 66-38).

¹³⁹ *See id.* at 1523 (April 3) (due-process argument against DC emancipation), 1680 (April 16) (“nearly three hours” on confiscation), app. 105-14 (April 16) (due-process attack on confiscation).

¹⁴⁰ *See id.* app. at 215 (May 26) (seeking “discriminating measure” that would allow “deluded followers” to be pardoned).

¹⁴¹ *See id.* at 2206 (May 19) (expressing racism in terms of hostility to “rights of American citizenship” for enslaved people); app. 189 (May 24) (quotes Douglas’s last speech, warning about unconstitutional acts making innocent suffer).

¹⁴² *See id.* at 501-02 (January 27) (responding to Bingham with definition taken from *Greene*), 598 (January 31) (Dunlap endorsing Sheffield’s response to Bingham, calling it “invulnerable and invincible”), app. 147 (correcting Menzies on holding of case), app. 168-71 (May 23) (giving definition of due process and condemning in-rem procedure), app. 208 (Rice agreeing with Sheffield’s definition of attainder).

¹⁴³ *See id.* at 1614-18 (April 10) (attacking confiscation on various grounds), 1769 (April 22) (distinguishing prize from confiscatory forfeiture, confusion about what different proposals provide for), 1770 (April 22) (Biddle has nothing to add to Thomas’s arguments), 2052-53 (May 9) (takings-clause questions about DC-abolition compensation, interaction with Bingham, who denies that it is compensation), app. 218-21 (May 24) (attacking confiscation on various grounds, distinguishing harshness from due-process complaints), app. 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), app. 261 (May 26) (Wickliffe arguing that anyone unconvinced by Thomas wouldn’t be convinced by someone rising from dead), app. 271 (May 26) (Law endorsing Thomas’s arguments), app. 243 (June 3) (Cox endorsing Thomas’s arguments).

¹⁴⁴ *See id.* at 1645 (April 11) (objecting to lack of juries on Fifth- and Seventh-Amendment grounds), app. 222-24 (May 24) (objecting to confiscation).

¹⁴⁵ *See id.* at 354 (January 15) (responding to Bingham, claiming under his proposals Congress exercises judicial powers), 402 (January 20) (Samuel Fessenden agrees with Bingham, not Wadsworth), 462 (January 23) (Van Horn agrees with Bingham and Stevens, not Wadsworth), 1199 (March 12) (challenging Stevens, Bingham, and Samuel Fessenden to abandon emancipation), 1202 (March 12) (taunted by Bingham on whether federally-subsidized emancipation would be legitimate), 1644 (April 11) (constitutional objection to confiscation), app. 199 (May 23) (Shanks responds to Wadsworth).

¹⁴⁶ *See id.* app. 68-69 (March 11) (taking Madison’s side on dispute over spending power), 1320 (March 21) (arguing that British paid compensation for freeing slaves), 1514 (April 2) (objecting to talking about compensated emancipation), 2030 (May 8) (arguing about conditions in land cessions to federal government), 2043 (May 9) (reading at length from *Prigg*), 2066 (May 12) (introducing due-process-based resolution against “wholesale” confiscation), 2232 (May 20) (defending racial bar on testimony), app. 162 (May 22) (urging abandonment of “unconstitutional projects” like “confiscation without trial,” quoting Joel Parker), app. 260-63 (May 26) (attacking confiscation, relying on Thomas, preferring younger John Quincy Adams—“in his best days”—to older version).

V. 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,’ ” 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.

1. Tradition

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.”¹⁴⁸ 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 iudicium parium suorum, vel 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.¹⁴⁹

This passage was well-known to congressmen in 1862. Powell quoted it explicitly in April,¹⁵⁰ Howard in June,¹⁵¹ and it was paraphrased by many, many others.

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,

¹⁴⁸ Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 452 (2010).

¹⁴⁹ JOSEPH STORY, COMMENTARIES IN THE CONSTITUTION § 1783 (1833).

¹⁵⁰ CONG. GLOBE, 37th Cong. 2nd Sess. app. 106 (April 16, 1862).

¹⁵¹ *Id.* app. at 306 (June 24).

to such modifications as may from time to time be made by law, but which do not impair the right as it then existed.¹⁵²

Cowan said in March,

“[B]y due process of law,” ... all commentators and all lawyers agree, means proceeding, according to the course of the common law.¹⁵³

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.¹⁵⁴

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.¹⁵⁵

Crisfield said in May,

[D]ue process of law ... means trial according to the course of the common law.¹⁵⁶

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, where there is no trial by jury. Captures on land,

¹⁵² *Id.* at 501 (January 27, 1862) (citing *Greene v. Briggs*, 10 Fed. Cas. 1135 (C.C.D.R.I. 1852)).

¹⁵³ *Id.* at 1050 (March 4). Trumbull quoted this language from Cowan in April, *id.* at 1558 (April 7), without disagreeing with the definition of “due process of law,” but arguing that it was tacitly limited in times and situations of war.

¹⁵⁴ *Id.* at 1875 (April 30).

¹⁵⁵ *Id.* app. at 171 (May 23) (quoting *Fisher v. McGirr*, 67 Mass. 1 (1854)).

¹⁵⁶ *Id.* at 2131 (May 14).

however, are tried on the common law side of the court, and cases in rem seem not to be an exception there.¹⁵⁷

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 Company* in 1856, holding that due process of law was to be evaluated by considering the Constitution's own procedures and "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."¹⁵⁸ Several congressmen cited and quoted *Murray's Lessee* in 1862.¹⁵⁹

2. Judicial proceedings

Nathan Chapman and Michael McConnell have offered a reinterpretation of Ryan Williams's evidence in terms of the separation of powers.¹⁶⁰ Legislatures violated due process if they acted directly to divest property rights, eliminating the judicial middle-man. 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.¹⁶¹

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

¹⁵⁷ *Id.* app. at 266 (May 24).

¹⁵⁸ 59 U.S. 272, 277 (1856).

¹⁵⁹ See, e.g., CONG. GLOBE, 37th Cong. 2nd Sess. app. 306 (June 24) (Howard), 936 (February 24) (Shellabarger), 2239 (May 20) (Noell).

¹⁶⁰ *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

¹⁶¹ *Id.* at 1336 (March 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.¹⁶²

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.¹⁶³

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.¹⁶⁴

¹⁶² *Id.* at 1449 (March 31). *Cf.* STEWART, A CONSTITUTIONAL ARGUMENT ON THE SUBJECT OF SLAVERY (September 20, 1837) (the “true and only meaning” of “due process of law” was “an indictment or presentment by a grand jury, of not less than twelve men, and a judgment pronounced on the finding of the 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. Democrats considering this argument said that such children *had* no liberty in the first place, i.e., that the baseline against which “deprive” was to be measured was a state of enslavement. That fit with the traditional “partus sequitur ventrem” rule enslaving children of enslaved mothers. Wadsworth, for instance, said, “This is the first time I ever heard that the slave had liberty or had property to be deprived of.” CONG. GLOBE, 37th Cong. 2nd Sess. 1644 (April 11, 1862). Stewart, Hutchins, and others, however, assumed a baseline of freedom, according to which children would be free until they violated the law, as duly found by a jury.

Along this line, 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 (April 3).

¹⁶³ *Id.* at 1523 (April 3).

¹⁶⁴ *Id.* at 1572 (April 8). Henderson associated this requirement with the law of nations, following *Jecker v. Montgomery* from 1852: “the 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. 498, 516 (1852).

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 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.¹⁶⁵

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 couldn't 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.”¹⁶⁶

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.¹⁶⁷

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.¹⁶⁸

¹⁶⁵ CONG. GLOBE, 37th Cong. 2nd Sess. 1635 (April 11, 1862). 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.*

¹⁶⁶ *Id.* app. 104 (April 11).

¹⁶⁷ *Id.* at 1644 (April 11).

¹⁶⁸ *Id.* at 2190 (May 19).

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.¹⁶⁹

Howard said in June,

[T]he trial is what the Constitution denominates “due process of law” in all criminal cases.¹⁷⁰

Browning said in June,

“[W]ithout due process of law” ... means without presentment or other judicial proceeding.¹⁷¹

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.¹⁷²

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 such 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.¹⁷³

¹⁶⁹ *Id.* app. at 217 (May 24).

¹⁷⁰ *Id.* app. 305 (June 24).

¹⁷¹ *Id.* at 2923 (June 25).

¹⁷² *Id.* at 2963 (June 27).

¹⁷³ *Id.* at 507 (January 28).

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.”¹⁷⁴

3. Contextualism

Noell gave an extended explanation in May of the idea that applying “due process of law” would require sensitivity to context:

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 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.¹⁷⁵

4. Congressional Definition?

Howard rebutted the idea of congressional due-process omnipotence in June:

[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

¹⁷⁴ *Id.* at 1157 (March 11).

¹⁷⁵ *Id.* at 2239 (May 20).

what they intended it to mean, and we cannot by legislation change its meaning.¹⁷⁶

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 referred to judicial writs since the fourteenth century.¹⁷⁷ 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.”¹⁷⁸ Lot Morrill in January complained of the unconstitutionality of detention while having “no process pending.”¹⁷⁹ 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.”¹⁸⁰ He insisted that “you cannot deprive the citizen of his property except by process of law.”¹⁸¹ Crittenden in April explained the due process clause in terms of the meaning of “process of law,” leaving off “due.”¹⁸² 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.”¹⁸³ 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.”¹⁸⁴ Collamer complained in April about emancipation “without

¹⁷⁶ *Id.* app. at 305 (June 24).

¹⁷⁷ Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEG. 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.

¹⁷⁸ *Id.* at 82 (December 12, 1861).

¹⁷⁹ *Id.* at 314 (January 14, 1862).

¹⁸⁰ *Id.* at 1523 (April 3).

¹⁸¹ *Id.*

¹⁸² *Id.* at 1635 (April 11). See *infra* note 230 for the content of the definition.

¹⁸³ *Id.* at 1645 (April 11).

¹⁸⁴ *Id.* app. 106 (April 16).

any process of law.”¹⁸⁵ Diven complained in May about taking property “without trial, without process of law, without just compensation for property taken for public use.”¹⁸⁶ 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 he may be 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.”¹⁸⁷ 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.”¹⁸⁸ Howard said in June, “Congress cannot of its own will make any process of law due process of law.”¹⁸⁹ 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.”¹⁹⁰

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.”¹⁹¹ Conway offered a resolution in February asking who had been detained “without a legal process.”¹⁹² Fessenden proclaimed in April his “jealousy upon every infringement of the ordinary course of judicial proceeding.”¹⁹³ 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!”¹⁹⁴ Shellabarger stressed the lack of “judicial process” in suppressing the rebellion in *Luther*.¹⁹⁵ Wade summarized the position of critics: “[W]e had to do everything by judicial process.”¹⁹⁶ Holman insisted in May, “I

¹⁸⁵ *Id.* 1811 (April 24).

¹⁸⁶ *Id.* at 2075 (May 12).

¹⁸⁷ *Id.* at 2239 (May 20).

¹⁸⁸ *Id.* app. at 169 (May 23).

¹⁸⁹ *Id.* app. at 306 (June 24).

¹⁹⁰ *Id.* at 2963 (June 27).

¹⁹¹ *Id.* at 319 (January 14).

¹⁹² *Id.* at 679 (February 6).

¹⁹³ *Id.* at 1739 (April 21).

¹⁹⁴ *Id.* at 2073 (May 12).

¹⁹⁵ *Id.* at 2074.

¹⁹⁶ *Id.* at 2203 (May 19).

would confiscate the rebel's property, but I would confiscate it by legal process."¹⁹⁷ Dunlap complained in May that confiscation "deprives the citizen of his property, simply by its own enactment, without judicial process."¹⁹⁸ 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."¹⁹⁹

3. "Process"

Even if there were not such explicit evidence, regular use of the simple word "process" alongside due-process discussions with no indication of a holistically-determined meaning in "due process" suggests that we should understand "due process" in terms of its verbal constituents. Hale complained in December regarding a D.C. jail detainee of the inability to find the "process by which he was held."²⁰⁰ Trumbull's bill referred in December to property "within the reach of the process of law in its ordinary forms."²⁰¹ Latham spoke in January of the opportunity for a slave-owner to "sue out ... his process."²⁰² 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,"²⁰³ as well as "different forms of process in different States."²⁰⁴ Bingham spoke in January of those required to pay taxes "not by the process of your courts."²⁰⁵ Sherman asked in January whether waiting for the "slow process of the laws of Pennsylvania" would be enough in case of emergency.²⁰⁶ Lot Morrill said in February that the marshal "commits [the prisoner] on a process, and never without." Trumbull in February noted the limitation of his bill to occasions then "the ordinary process of law cannot be served upon them."²⁰⁷ He referred to "beyond the reach of civil process in the ordinary course of judicial proceedings by reason of [the] rebellion."²⁰⁸ 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.²⁰⁹ Sherman's amendment in

¹⁹⁷ *Id.* app. at 151 (May 23).

¹⁹⁸ *Id.* app. at 190 (May 24).

¹⁹⁹ *Id.* at 2963 (June 27).

²⁰⁰ *Id.* at 10 (December 4, 1861).

²⁰¹ *Id.* at 18 (December 5, 1861).

²⁰² *Id.* at 318 (January 14, 1862).

²⁰³ *Id.* at 319 (January 14, 1862).

²⁰⁴ *Id.* at 320 (January 14, 1862).

²⁰⁵ *Id.* at 346 (January 15, 1862).

²⁰⁶ *Id.* at 516 (January 28, 1862).

²⁰⁷ *Id.* at 942 (February 25).

²⁰⁸ *Id.*

²⁰⁹ *Id.* app. at 105 (April 16).

April authorized power to “issue all process, whether mesne or final ... as in cases of foreign attachment.”²¹⁰ Trumbull’s proposal was limited (though many did not understand the point until he re-explained it a few times in April) to rebels who “cannot be reached by judicial process.”²¹¹ Sherman insisted in April on the right to “seize the property of a public enemy without going through the ordinary process of law.”²¹² He distinguished in rem proceedings from “ordinary civil process.”²¹³ Collamer complained in April about emancipation “without process, without law.”²¹⁴ Howard asked in May in the context of fugitive slaves about the use of “regular process from a commissioner or a court.”²¹⁵ Sheffield spoke in May of those who “resists the execution of a single process of the law” and of a combination who “conspire together to resist all processes of the law.”²¹⁶ Hanchett distinguished in May the three branches of government: “The executive power acts promptly, the legislative deliberately, the judicial slowly and by regular process.”²¹⁷ Howard noted in June that a treasury-officer warrant was “process in very general use in England at the date of our Constitution.”²¹⁸

C. The Permissible Scope of In-Rem Jurisdiction

Advocates of confiscation relied critically on the use of in-rem procedures in *The Palmyra* in 1827.²¹⁹ The fuzziness in the Court’s procedural demands there reflects the uncertain nature of in-rem proceedings in general, which persisted in 1862. Justice Story wrote,

[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

²¹⁰ *Id.* at 1604 (April 10).

²¹¹ *Id.* app. 100 (April 11), 1813 (April 24).

²¹² *Id.* at 1783 (April 23).

²¹³ *Id.* at 1784.

²¹⁴ *Id.* at 1812 (April 24).

²¹⁵ *Id.* at 1902 (May 1).

²¹⁶ *Id.* app. 169 (May 23, 1862).

²¹⁷ *Id.* app. at 210 (May 26).

²¹⁸ *Id.* app. at 306 (June 24).

²¹⁹ 25 U.S. 1 (1827).

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 defense.²²⁰

Many congressmen cited *The Palmyra* in 1862.²²¹ Other cases considering due-process issues with in-rem procedures in detail were *Greene*, from Justice Curtis on circuit in 1852,²²² *Fisher*, from Massachusetts in 1854,²²³ and the trial-court prize case by Judge Sprague, the *Amy Warwick*, decided in the midst of the debate in the spring of 1862.²²⁴ The two sides of the debate showed that they were well-aware of the relevant cases, and did not take sharply different views of the nature of the due-process inquiry. 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 in 1863 (where the in-rem procedure was not even challenged, only the legitimacy of seizures before congressional action), and for situations like the First Confiscation Act, which allowed enslaved persons directly deployed at an active military front to be seized and emancipated. The Second Confiscation Act extended these precedents by applying them to property on land and to property only indirectly supporting the rebellion. 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, while the majority of the Supreme Court in *Miller* found it was not. But both sides evaluated the question by drawing analogies to traditional forms of proceedings.

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

²²⁰ *Id.* at 12-13.

²²¹ See, e.g., CONG. GLOBE, 37th Cong. 1st Sess. 1559 (April 7, 1862) (Trumbull), 1654 (April 14) (Harris), 1809 (April 24) (Collamer), 1875 (April 30) (Wilmot), 2132 (May 14) (Crisfield), 2191 (May 19) (Summer), 2235 (May 20) (Eliot), 2294 (May 22) (Wallace), app. 267 (May 24) (Walton).

²²² See, e.g., *id.* at 501 (January 27) (Sheffield), 1524 (April 3) (Bayard), 2053 (May 9) (Thomas), app. 306 (June 24) (Howard).

²²³ See, e.g., *id.* app. at 171 (May 23) (Sheffield).

²²⁴ See, e.g., *id.* at 943 (February 25) (Trumbull), app. 65 (March 3) (McDougall), 1875 (April 30) (Wilmot), 2189 (May 19) (Summer), 2237 (May 20) (Eliot), app. 178 (May 23) (Warwick), app. 180 (May 23) (Loomis), app. 225 (May 23) (Ashley), app. 267 (May 24) (Walton), 2358 (May 26) (Eliot), 2921 (June 25) (Browning).

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.²²⁵

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 provisions 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.²²⁶

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.²²⁷

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

²²⁵ *Id.* at 1784 (April 23).

²²⁶ *Id.* at 1859, 1860 (April 29).

²²⁷ *Id.* at 2191 (May 19). He said of in-rem proceedings, “these proceedings constitute ‘due process of law.’” *Id.* at 2193.

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.²²⁸

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...²²⁹

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.”²³⁰ 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.²³¹

Hale said in April, “I look ... to the meaning of this clause as it is written.”²³² Trumbull, disagreeing with Collamer’s explanation of his proposal in May, was met with a protest: “I prefer to

²²⁸ *Id.* at 2239 (May 20).

²²⁹ *Id.* at 2962 (June 27).

²³⁰ *Id.* at 1635 (April 11).

²³¹ *Id.* at 1718 (April 18).

²³² *Id.* at 1785 (April 23).

“speak for myself, if you will let me.” Trumbull’s riposte: “I would rather let the bill speak. I know the gentleman’s speech and his bill were not in exact harmony.”²³³

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.²³⁴

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.²³⁵

2. Originalism

In addition to their attachment to textually-expressed meaning in preference to unexpressed intentions or purposes, participants in the 1862 debate also clearly attached themselves to the meaning expressed *at the time of adoption*. Lovejoy complained in April about slaveholders’ “perversion of the original Constitution.”²³⁶

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.²³⁷

²³³ *Id.* at 1959 (May 6).

²³⁴ *Id.* at 2240 (May 20).

²³⁵ *Id.* app. at 237 (May 26).

²³⁶ *Id.* at 1816 (April 24).

²³⁷ *Id.* at 1762 (April 22).

Browning said in May,

[I]t is not for us to review at this day the reason 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.²³⁸

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.²³⁹

Babbitt argued in May,

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...²⁴⁰

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

²³⁸ *Id.* at 2429 (May 29).

²³⁹ *Id.* app. at 163 (May 22).

²⁴⁰ *Id.* app. at 167 (May 22).

government in the richest legacy they ever bestowed on their children.²⁴¹

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.²⁴²

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.²⁴³

E. Vested Rights and Prospectivity

Ryan Williams' survey of the antebellum prevalence of vested-rights readings of due process receives significant support from the 1862 material.²⁴⁴ In his threatened veto message, Lincoln singled out prospectivity as a virtue, and many congressmen talked about prospectivity on the apparent assumption that due process required it.²⁴⁵ Only two congressmen that I have found suggested 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

²⁴¹ *Id.* app. at 271 (May 26).

²⁴² *Id.* app. at 242 (May 26).

²⁴³ *Id.* at 2967 (June 27).

²⁴⁴ 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 *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 anti-retroactivity readings arose only between the Fifth and Fourteenth Amendments.

²⁴⁵ *Id.* app. at 63 (March 3) (Trumbull), 1557 (April 7) (Trumbull), 1761 (April 22) (Davis), 1860 (April 29) (Browning), 1875 (April 30) (Wilmot), 1962 (May 6) (Collamer), 3370 (July 15) (Maynard), 3406 (July 17) (Lincoln's draft veto).

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.²⁵⁰ The issue of “the extent to which it is expedient to go”²⁵¹ was, for Harris, plainly distinguished from the constitutional issue. He distinguished “undue *punishment*”²⁵² from lack of due *process*.

Future Fourteenth Amendment leader Howard likewise in April noted that the “leading objection, *apart from constitutionality*, to the principle of confiscation” was that under the law of nations it was “too antiquated and harsh to receive recognition in modern wars.”²⁵³ 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.”²⁵⁴

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.”²⁵⁵ 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.²⁵⁶

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, be driven to choose between a confiscation measure more severe or none at all, I should not hesitate to choose the more severe one.”²⁵⁷

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

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 1714 (April 18).

²⁵⁴ *Id.* at 1719.

²⁵⁵ *Id.* at 1768 (April 22).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1768 (April 22).

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.²⁵⁸

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 public law,” but insisted that to “deny the *power* of Congress” was inconsistent with approving the First Confiscation Act.²⁵⁹

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.”²⁶⁰ Earlier, Eliot had himself promoted a bill limited only to the most important rebels.²⁶¹

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.²⁶²

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.”²⁶³

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. He was open to “any reasonable measure” for “leaders,” but did not “want to make a general thing of it, applicable to so numerous a class.”²⁶⁴ Independent of this objection, however, Wright wanted juries: “that great Magna Charta principle of our Constitution.”²⁶⁵

²⁵⁸ *Id.* at 2293-94 (May 22).

²⁵⁹ *Id.* at 2300 (May 22).

²⁶⁰ *Id.* at 2358 (May 26).

²⁶¹ *Id.* at 2232 (May 20).

²⁶² *Id.* at 2963 (June 27).

²⁶³ *Id.* at 1137 (March 10).

²⁶⁴ *Id.* at 1769 (April 22).

²⁶⁵ *Id.*

Howe in May complained that confiscation bills would affect the “comparatively innocent,” and separately complained that it would operate before proper conviction.²⁶⁶

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 whole 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.²⁶⁷

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?”²⁶⁸ 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.”²⁶⁹

Powell argued in April: “Apart from the unconstitutionality of the bill, it would be unwise and inexpedient; it would be harsh.”²⁷⁰ 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.”²⁷¹

Thomas in May distinguished his “legal objections,” such as due-process constitutional problems, from his complaints about the “general features of the confiscation bill,”²⁷² such as the fact that, as he saw it, applying confiscation to minor rebels was “harsh and absurd.”²⁷³ These objections were clearly distinct; Thomas talked about both harshness and due process at length without associating them.

²⁶⁶ *Id.* app. at 144 (May 5) (complaint about burden on “comparatively innocent”), 146 (“conviction should precede punishment”).

²⁶⁷ *Id.* at 2129 (May 14).

²⁶⁸ *Id.* app. at 151 (May 23).

²⁶⁹ *Id.*

²⁷⁰ *Id.* app. at 106 (April 16).

²⁷¹ *Id.* at 107.

²⁷² *Id.* app. at 220 (May 24).

²⁷³ *Id.* app. at 221.

The Kentucky Court of Appeals decision in *Norris*, striking down the Confiscation Act on due-process grounds, but rejecting a challenge based on the harshness under the law of nations, likewise betrays the independence of the two arguments vividly. The exercise of belligerent rights under the law of nations, the court conceded, could be inhumane, unwise, and liable to censure. Still, the Court held, following *Brown v. United States*²⁷⁴ that the “morality ... humanity, and ... wisdom” were issues “addressed to the judgment of the sovereign,”²⁷⁵ contrary to any indications in *United States v. Percheman*.²⁷⁶ The due-process violation as seen by the *Norris* court stemmed from Congress’s over-extension of in-rem precedents like *The Palmyra*; property only indirectly supporting the rebellion could not be treated as itself tainted.²⁷⁷

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 times²⁷⁸ 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.

VI. CONCLUSION

“Due process of law” was relatively lightly discussed in 1866, probably both because it was uncontroversial, but also because it had been discussed to death just a few years before. Due process had an important, but limited, role in guaranteeing the rule of law, proper form, and regularity. It was and is 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. Due process had been defined the same way by many people on both sides of the debate in 1862, and the discussions of due process from 1866 give no hint of a recent semantic revolution concerning the clause. While Democrats had in general pushed at the margins a more expansive view of due process in 1862 than had Republicans, that view was not so different that those like Reverdy Johnson could not endorse it on behalf of the freedmen in 1866. The Democrats of 1866 were properly far less agitated about due process than they were about open-ended equal

²⁷⁴ 12 U.S. 110 (1814).

²⁷⁵ *Norris v. Doniphan*, 61 Ky. 385, 391 (1863).

²⁷⁶ 32 U.S. 51 (1833).

²⁷⁷ 61 Ky. at 390.

²⁷⁸ See, e.g., CONG. GLOBE, 37th Cong. 2nd Sess. 19 (December 5, 1861) (Trumbull), 347 (January 15, 1862) (Bingham), 502 (January 27) (Sheffield), 935 (February 24) (Shellabarger), 943 (February 25) (Trumbull), app. 64-65 (March 3) (McDougall and Collamer), 1053 (March 4) (Cowan), 1076 (March 5) (Lot Morrill), 1158 (March 11) (Carlile), 1203 (March 12) (Bingham), 1559-60 (April 7) (Trumbull), 1572-73 (April 8) (Henderson), 1618 (April 10) (Thomas), 1718 (April 18) (Howard), 1759-60 (April 22) (Davis and Collamer), 1798 (April 23) (Duell), 1860 (April 29) (Browning), 1874-75 (April 30) (Wilmot), app. 140 (May 2) (Doolittle), 2192-93 (Summer, noting *Brown* is “so often cited in this debate”), 2237 (Eliot), 2299-2300 (May 22) (Samuel Blair), app. 180-81 (May 23) (Loomis), app. 183-84 (May 23) (Arnold), app. 215-16 (May 24) (Kellogg), app. 219 (May 24) (Thomas), app. 265-66 (May 24) (Walton), app. 195 (May 26) (Ely), 2961 (June 27).

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 know 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. Because both sides knew that the biggest controversies in Reconstruction lay elsewhere, due process of law had bipartisan support.