SEVEN PROBLEMS WITH ANTIDISCRIMINATION DUE PROCESS

Christopher R. Green

ABSTRACT

I explain seven problems with the view, suggested by Akhil Amar, Kurt Lash, and Ryan Williams, that the Fifth and Fourteenth Amendments' ban on "depriv[ing] any person of life, liberty, or property without due process of law" entails freedom from the sort of racial discrimination banned by *Bolling v. Sharpe* and the Civil Rights Acts of 1866, 1870, and 1875:

1. The federal government long imposed racial restrictions on naturalization, beginning in 1790 and including a statute passed two weeks before the Civil Rights Act of 1875.
2. Six of the seven states that Williams identifies as following the Daniel-Webster-pioneered "general law" interpretation of due process imposed openly second-class status on racial grounds without thinking due process might pose any barrier.
3. Democrats fans of due process in 1862 and 1866, most prominently Reverdy Johnson, nonetheless opposed the Civil Rights Act of 1866. They did not think John Bingham's unusual reading of "law" was baked into the Fourteenth Amendment.
4. Superlawyer Matthew Carpenter made clear that the Privileges or Immunities Clause, and no other clause in the Fourteenth Amendment, banned racial occupational limits.
5. The Republican-beloved Northwest Ordinance, Missouri Compromise, and Wilmot Proviso all labeled racially-discriminatory slavery, and fugitive re-enslavement, "lawful."
6. "Law" in the Privileges or Immunities Clause covers racially-discriminatory statutes.
7. Many paradigmatic targets of anti-discrimination rules, e.g., special benefits to one racial group, deprive no one of life, liberty, or property.

TABLE OF CONTENTS

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Christopher R. Green*

INTRODUCTION: WEBSTER, WILLIAMS, BINGHAM, AND LASH

This paper identifies some problems for a strain of substantive due process lately in vogue: one focused on discrimination. A strong antidiscrimination reading of the Fifth and Fourteenth Amendments' Due Process Clauses is undoubtedly morally attractive, and not without *some* historical support. However, I will set out seven contrary clumps of historical and textual evidence. These arguments doom the view that a ban on the states or federal government "depriv[ing] any person of life, liberty, or property without due process of law" would have expressed, in the context of 1791 or 1868, the sort of ban on discrimination contained in *Bolling v. Sharpe*[1] or the Civil Rights Acts of 1866,[2] 1870,[3] and 1875.[4] A constitutional ban on those sorts of discrimination—bans on racial discrimination related to the right to enter occupations, own land, attend integrated public schools, and the like—can only be found in the sort of equal-citizenship rule contained for the states in the Privileges or Immunities Clause[5] and for the federal government in a fiduciary rule treating all citizens as equal beneficiaries of the Constitution.[6] Non-citizens have constitutional rights under the

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[1] 347 U.S. 497 (1954) (racial segregation of D.C. schools unconstitutional).

[2] An Act to Protect All Persons in the United States in their Civil Rights, and furnish the means of their Vindication, 14 Stat. 27 (April 9, 1866) (banning racial discrimination against citizens' rights to make and enforce contracts, own property, sue, testify, and be protected in person and property).

[3] An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for other Purposes, 16 Stat. 140, 144 § 18 (May 31, 1870) (re-enacting Civil Rights Act of 1866); *id.* § 16 (extending provisions of Civil Rights Act of 1866 to aliens, but *not* those regarding property ownership).

[4] An Act to Protect all Citizens in their Civil and Legal Rights, 18 Stat. 335 (March 1, 1875) (banning racial discrimination in common carriers or juries).

[5] See my EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

[6] See GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017) (equal-citizenship fiduciary principles contained, among other places, in "proper" in Art. I § 8

Due Process Clause to traditional judicial proceedings before losing their life, liberty, or property, of course,[7] and the constitutional right under the Equal Protection Clause to be protected against violence to their persons and property and the right to sue when those interests are invaded,[8] as well as any statutory rights that Congress may grant them under the Commerce Power as part of "foreign nations."[9] Non-citizens do not, however, have a constitutional right against racial discrimination as such.

In March 1818, Daniel Webster presented an important argument to the Supreme Court, one of many he made defending Dartmouth College against New Hampshire's attempt to take it over. Quoting Edward Coke and then William Blackstone, Webster asked the Court,

> Have the plaintiffs lost their franchises by "due course and process of law"? On the contrary, are not these acts "particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws"? By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring

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cl. 18 and "faithfully" in Art. II § 3); Gary Lawson, Guy Seidman, and Robert Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014).

[7] See my *Our Bipartisan Due Process Clause*, GEO. MASON L. REV. (forthcoming 2020).

[8] See my *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 219 (2008); *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009) (*Subsequent Interpretation*). These papers dissent from the orthodoxy that the "the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Instead the Equal Protection Clause requires that states supply "protection of the laws," and do so equally, but it does not forbid discrimination generically. Two of the seven arguments I present below—Problem 1, on racial discrimination against aliens, and Problem 4, Matthew Carpenter's argument in *Bradwell*—also apply against the Equal Protection Clause. See *Subsequent Interpretation* at 266-70 (racial discrimination against aliens was rampant), 273-74 (*Bradwell* argument only featured Privileges or Immunities Clause). But the other five arguments in this article are unique to due process.

[9] See my *Nations, Tribes, States, and Our Three Commerce Powers* (with Meredith Pohl), work in progress (defending the view of Indian-Tribes and Foreign-Nations commerce power in United States v. Holliday, 70 U.S. 407 (1866); and United States v. Bailey, 24 Fed. Cas. 937 (C.C. Tenn. 1834), that "commerce with Foreign Nations ... and with the Indian Tribes" includes any commerce with *individual members* of such nations, rather than being defined in terms of commerce involving foreign or Indian territory).

> one man's estate to another, and forfeitures in all possible forms, would be the law of the land.[10]

A year later, the Supreme Court itself used the Contracts Clause rather than New Hampshire's law-of-the-land provision to rule in favor of Dartmouth. As Ryan Williams recounts, however, Webster's definition was widely quoted, first by several cases in Tennessee,[11] later by those in Arkansas, Iowa, Maryland, Michigan, Mississippi, and Texas.[12] Echoing Akhil Amar, Williams has called these uses of Webster's definition "a recognizable form of substantive due process,"[13] commenting, "This general law conception interpreted due process to require general and impartial laws rather than 'special' or 'class' legislation that imposed particular burdens upon, or accorded special benefits to, particular persons or particular segments of society."[14] That does not seem right to me; Williams will thus be this article's first target.

In February 1866, John Bingham proposed a rough draft of the Fourteenth Amendment which he claimed—quite implausibly—was merely a restatement of the Fifth Amendment. Just before his proposal was defeated in the House (postponed, never to be taken up again), Bingham made a final pitch in his inimitable style:

> Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life, liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.[15]

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[10] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 581-82 (1819) (argument of counsel); see https://www.supremecourt.gov/opinions/datesofdecisions.pdf for the date of the argument.

[11] *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 462 n.247 (2010) (citing Vanzant v. Waddell, 10 Tenn. (2 Yerg.) 259 (1829); Bank of the State v. Cooper, 10 Tenn. (2 Yet.) 599, 605 (1831); Jones's Heirs v. Perry, 18 Tenn. (10 Yerg.) 59, 71-72 (1836); Budd v. State, 22 Tenn. (3 Hum.) 482, 491 (1842); and Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 103, 123 (1854)).

[12] *Id.* at 463 n.248 (citing Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 411-12 (Md. 1838); Reed v. Wright, 2 Greene 15, 23-25 (Iowa 1849); Ex parte Woods, 3 Ark. 532, 536 (1841); Noonan v. State, 9 Miss. (1 S. & M.) 562, 573 (1844); Janes v. Reynolds' Adm'rs, 2 Tex. 250, 252 (1847); and Sears v. Cottrell, 5 Mich. 251, 254 (1858)).

[13] *Id.* at 495.

[14] *Id.* at 425 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)); see AKHIL AMAR, THE BILL OF RIGHTS 282-83 (1998).

[15] CONG. GLOBE, 39th Cong. 1st Sess. 1094 (1866). For some comments on Bingham's style, see Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1404 n.61 (1992) ("exasperating"); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 164-65 n.169 (1950) ("strong egocentricity and a touch of the windbag"); CONG. GLOBE, 37th Cong. 2nd Sess. 1796 (1862) (Representative Cox complaining about "that tone in which [Bingham] 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.").

Two weeks later, Bingham explained why he wanted rights for aliens, not just citizens, in the Civil Rights Act of 1866:

> If this is to be the language of the bill, by enacting it are we not committing the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates? Do we not thereby declare the States may discriminate in the administration of justice for the protection of life against the stranger irrespective of race or color? Sir, that is forbidden by the Constitution of your country. The great men who made that instrument, when they undertook to make provision, by limitations upon the power of this Government, for the security of the universal rights of man, abolished the narrow and limited phrase of the old Magna Charta of five hundred years ago, which gave the protection of the laws only to "free men" and inserted in its stead the more comprehensive words, "no person;" thereby obeying that higher law given by a voice out of heaven: "Ye shall have the same law for the stranger as for one of your own country." Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination. This bill, sir, with all respect I submit, departs from that great law. The alien is not a citizen. You propose to enact this law, you say, in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason on conscience? With all respect to every gentleman who may be a supporter of it, I ask, can it be sanctioned? Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says "no person," not "no citizen," "shall be deprived of life, liberty, or property," without due process of law.[16]

Relying heavily on Bingham, particularly this speech, Kurt Lash has recently embraced a strong antidiscrimination reading of the Due Process Clause as the real basis for the Civil Rights Acts of 1866 and 1870.[17] One of Lash's purposes is to make room for his enumerated-rights-only reading of the Privileges or Immunities Clause.[18] That would not work if the Privileges or Immunities Clause treats constitutionally-unenumerated rights from the Civil Rights Act, like the rights to contract and

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[16] CONG. GLOBE, 39th Cong. 1st Sess. 1292 (1866).

[17] See *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389 (2018); *The Enumerated Rights Reading of the Privileges or Immunities Clause*, NOTRE DAME L. REV. (forthcoming 2020), available at https://papers.ssrn.com/paper=3351142.

[18] See his THE FOURTEENTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

testify, as privileges of citizens of the United States. A bigger Due Process Clause, however, makes more plausible a smaller (or at least more clearly bounded) Privileges or Immunities Clause. A broader, antidiscrimination Privileges or Immunities Clause, likewise, makes an antidiscrimination Due Process Clause less plausible. Lash, then, is our second target. Though Bingham is the one who proposed the language of Section One to the Joint Committee on Reconstruction on April 21, 1866, his views on due process turn out to be an unreliable guide to the meaning expressed by the text in the context of its adoption by the country.[19]

I should note some caveats in my hostility to substantive due process. As Justice Gorsuch, Chief Justice Roberts and Justice Thomas recently noted, the untimely death of the Privileges or Immunities Clause in 1873 produced "hydraulic pressures" expanding the Due Process Clause.[20] Until the *Slaughterhouse Cases* are overruled, improperly expanded Due Process and Equal Protection Clauses might offer the closest available approach to the Fourteenth Amendment's original meaning. Also, the actual traditional-judicial-process meaning of the Due Process Clause would require courts to assess the merits of constitutional disputes more aggressively than they have since *O'Gorman & Young v. Hartford Fire Insurance*[21] and *Williamson v. Lee Optical*[22]: courts have a duty to clarify the law by imposing a burden of production, though not a burden of persuasion, on those who rely on governmental regulations or claim that they are justified.[23] Much of the "substantive" due process from Randy Barnett and Evan Bernick[24] is thus quite defensible, though I would put my hostility to *Williamson* in terms of the need for judges to perform their traditional role of clarifying initially-unclear constitutional requirements, rather than a heavy distinction between mere legislation and genuine "law."

The next seven sections each set out a problem for antidiscrimination due process as a basis for *Bolling* and the Civil Rights Acts. The first four problems are broadly historical—racial discrimination against aliens alongside the Fifth Amendment (Problem 1), racially-based slavery and

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[19] Fellow member of the Joint Committee, Thaddeus Stevens, who introduced the Fourteenth Amendment to the House, later said of Bingham, "In all this contest about reconstruction I do not propose either to take his counsel, recognize his authority, or believe a word he says." CONG. GLOBE, 39th Cong. 2nd Sess. 816 (1867).

[20] Gundy v. United States, 139 S.Ct. 2116, 2148 n. 68 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); McDonald v. Chicago, 561 U.S. 742, 762 n.9 (2010) (construing the Due Process Clause by putting a "Fourteenth Amendment" label on descriptions of the Privileges or Immunities Clause by Jacob Howard and John Bingham); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (construing Due Process Clause by relying on the concurrence of Justices Bradley, Harlan, and Woods in Butchers' Union Company v. Crescent City Company, 111 U.S. 746, 762 (1884), which in turn relied on Bradley's dissent in the Slaughterhouse Cases, 83 U.S. 36 (1873)); Romer v. Evans, 517 U.S. 620, 623 (1996) (construing the Equal Protection Clause by relying on the first Justice Harlan's equal-citizenship-themed dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896)).

[21] 282 U.S. 251 (1931).

[22] 348 U.S. 483 (1955).

[23] See my *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169 (2015); and *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403 (2014).

[24] *No Aribitrary Power: An Originalist Theory of the Due Process of Law*, available at https://papers.ssrn.com/paper=3149590.

limits on the rights of free black populations in the South alongside Webster-influenced readings of due process (Problem 2), Democratic hostility to the Civil Rights Acts alongside their enthusiasm for due process (Problem 3), and Matthew Carpenter's very explicit identification of the Privileges or Immunities Clause as the *only* source for equal occupational freedom (Problem 4). The other three problems focus on text: Republican treatment of racially-based slavery as "lawful" (Problem 5), "law" in the Privileges or Immunities Clause as encompassing racially-discriminatory statutes (Problem 6), and the fact that racially-distributed benefits do not "deprive" anyone of liberty or property (Problem 7).

PROBLEM 1: RACIAL LIMITS ON NATURALIZATION

On September 25, 1789, Congress proposed the Fifth Amendment to the states, who ratified it between then and December 15, 1791. In between, Congress adopted the Naturalization Act of 1790: "[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof..."[25] The same "free white person" language was repeated without Fifth Amendment controversy in 1795,[26] 1802,[27] 1804,[28] 1824,[29] 1828,[30] and 1875[31]—two weeks before the Civil Rights Act of 1875.

It seems implausible that Congress thought there might have been a Fifth Amendment issue with the Naturalization Acts, or that any relevant updating or correcting of the facts might allow us to disagree with Congress about this application.[32] We might, however, reconcile the Naturalization Acts with the Fifth Amendment in two ways: by saying that they give aliens "due process of law," whatever that means, or instead by saying that such limits on aliens' rights are not deprivations of constitutional "liberty." Those permanently unable to naturalize of course have fewer rights than those who can; they may at some point in the future be removed from the country in ways citizens

[25] An Act to Establish an Uniform Rule of Naturalization, 1 Stat. 103 (March 26, 1790).

[26] An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Act heretofore Passed on that Subject, 1 Stat. 414 (January 29, 1795) ("[A]ny alien, being a free white person...").

[27] An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts heretofore Passed on that Subject, 2 Stat. 153 (April 14, 1802) ("[A]ny alien, being a free white person...").

[28] An Act in Addition to an Act Entituled "An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts heretofore Passed on that Subject," 2 Stat. 292 (March 26, 1804) ("[A]ny alien, being a free white person...").

[29] An Act in Further Addition to "An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts heretofore Passed on that Subject," 4 Stat. 69 (May 26, 1824) ("[A]ny alien, being a free white person...").

[30] An Act to Amend the Acts Concerning Naturalization, 4 Stat. 310 (May 24, 1828) ("[A]ny alien, being a free white person...").

[31] An Act to Correct Errors and Supply Omissions in the Revised Statutes of the United States, 18 Stat. 316, 318 (February 18, 1875) (inserting "free white persons" into the Revised Statutes).

[32] On the possibility that those adopting a provision could get the application-determining facts wrong, see my *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. LJ. 555 (2006).

may not.[33] But aliens whose legal rights are merely limited on racial grounds might not be said to have been "deprived of ... liberty" at all. They are not detained or incarcerated simply because their legal entitlements are smaller. William Blackstone, for instance, defined liberty solely in terms of lack of imprisonment: "[P]ersonal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[34] On this understanding of liberty, the history of restrictions on naturalization tell us little about the meaning of due process of law, simply because a limit on aliens' powers to naturalize does not even trigger the Fifth Amendment at all.

If, however, racial naturalization discrimination is not a Fifth Amendment issue because "liberty" means merely the absence of detention or incarceration, then the Due Process Clauses clearly also do not apply to the imposition of inequality in, say, occupational, land-ownership, or schooling rights. Those subject to occupational limits, not allowed to own land, or not allowed to go to particular schools are also not detained or incarcerated. Think of our due-process-clause coverage as a rectangle. A smaller horizontal "liberty" dimension would allow a taller (i.e., most robustly nondiscriminatory within its sphere) "process of law" dimension without causing trouble for the Naturalization Act.

Either way, however, the longstanding tradition of racial discrimination against aliens makes clear that the Fifth Amendment was not the sort of simple ban on all alienage classifications that Bingham suggested it was. Indeed, it could not even have entailed a more limited ban on all *racial* alienage classifications. Given that the racialized immigration law persisted even among Republicans who in 1875 thought racial distinctions in common carriers, juries, occupations, and land ownership were all invidiously, and hence unconstitutionally, discriminatory when applied to citizens, it is very hard to see how those Republicans could simultaneously have thought that the Fifth and Fourteenth Amendments prohibited invidious racial discrimination against aliens as well. The law for members of other nations visiting or residing in America has always been very different from the law for American citizens themselves. For a very long time, moreover—until 1952![35]—this difference between the rights of citizens and aliens was cast in racial terms. While shameful, it is very hard to say that this difference was also unconstitutional.

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[33] See, e.g., An Act Concerning Aliens, 1 Stat. 570, 571 (June 25, 1798) (President may "order all such aliens as he shall judge dangerous to the peace and safety of the United States ... to depart out of the territory of the United States").

[34] 1 COMMENTARIES ON THE LAW OF ENGLAND *134 (1765).

[35] Congress overhauled immigration law in 1952 without including explicit racial categories. Immigration and Nationality Act, 66 Stat. 163 (June 27, 1952). Before then the anti-Asian rule was gradually encumbered with exceptions. See An Act to Authorize the Naturalization of Certain Resident World War Veterans, 49 Stat. 397 (June 24, 1935) (allowing non-African, non-white World War I veterans to naturalize); Nationality Act of 1940, 54 Stat. 1137, 1140 § 303 (October 14, 1940) (allowing whites, Africans, natives of the Western Hemisphere, and Filipinos with military service to naturalize); An Act to Authorize the Admission into the United States of Persons of Races Indigenous to India, and Persons of Races Indigenous to the Philippine Islands, to Make Them Racially Eligible for Naturalization, and for Other Purposes, 60 Stat. 413 (July 2, 1946) (allowing whites, Africans, Filipinos, Chinese, Indians, and native Central and South Americans to naturalize).

The issue was particularly drawn to the attention of Congress in both 1870 and 1875, a month and a half after the passage of the Civil Rights Act of 1870 and two weeks before the passage of the Civil Rights Act of 1875. After the first sentence of the Civil Rights Act of 1866 had naturalized the freedmen *en masse*, a decision constitutionalized in the first sentence of the Fourteenth Amendment, Congress relaxed the ban on African naturalization in 1870. On May 31, Congress had re-enacted the Civil Rights Act of 1866 and extended most of its provisions—but *not* property ownership—to aliens.[36] In July, Charles Sumner made a concerted push to remove all racial limits on naturalization, and the Senate debated the issue at some length, especially with respect to immigration from China. Lyman Trumbull suggested that a racial limit on naturalization was unconstitutional because it was not "uniform,"[37] as did Sumner,[38] but no one suggested that the Fifth or Fourteenth Amendments might bar such a rule. William Stewart distinguished sharply equality among citizens from equality between citizens and aliens: "We propose to regard them as citizens when naturalized; and we propose to let one naturalized citizen have as much right as another."[39] Equal citizenship was one thing, but for Stewart, equality for all persons was quite another. Ultimately Sumner's proposal was voted down 30-14.[40] The Republicans in the Senate who had voted for the Fourteenth Amendment broke 10 to 7 against Sumner's proposal. This is of course a weaker majority than the 20-7 vote for Fourteenth Amendment non-framers, but still a majority.[41]

After the defeat of Sumner's proposal—i.e., the embrace of racial limits on naturalization by the majority of the Fourteenth Amendment framers present—Congress provided simply that "the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."[42] This did not remove the "free white persons" language; it was extremely clear from context that Congress intended to keep a ban on the naturalization of aliens from Asia. But the compilers of the Revised Statutes—whose work was approved to be published as "legal evidence of the laws ... contained therein" on June 20, 1874[43]—included no "free white persons" language. Section 2169 said only, "The provisions of this Title shall apply to aliens of African nativity and to persons of African descent." Taken as exclusive, this language excluded European naturalization, but taken as non-exclusive, it added nothing at all. Congress thus corrected the codification in February 1875 by adding a "free white person" alternative. Representative Charles Willard called the discrimination

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[36] See *supra* note 3.

[37] CONG. GLOBE, 41st Cong. 2nd Sess. 5165 (1870).

[38] *Id.* at 5175.

[39] *Id.* at 5168.

[40] *Id.* at 5176.

[41] *Id.* (Sumner's proposal favored by Ira Harris, Timothy Howe, Justin Morrill, Samuel Pomeroy, William Sprague, Sumner himself, and Lyman Trumbull, but opposed by Zachariah Chandler, Roscoe Conkling, Aaron Cragin, George Edmunds, James Nye, Alexander Ramsey, William Stewart, Waitman Willey, George Williams, and Henry Wilson).

[42] An Act to Amend the Naturalization Laws and to Punish Crimes against the Same, and for other Purposes, 16 Stat. 254, 256 § 7 (July 14, 1870).

[43] An Act Providing for the Publication of the Revised Statues and the Laws of the United States, 18 Stat. 113 (June 20, 1874).

against Asian aliens an "invidious distinction,"[44] but without claiming it was unconstitutional.[45] Senator Orris Ferry, noting that "the real question ... would be whether the Senate would deliberately exclude from the operation of the naturalization laws all Asiatics, a third of the human race or more,"[46] likewise called the anti-Asian rule an "invidious distinction" and "contrary to the whole tendency of legislation and of government in this country for the last twenty years,"[47] but he too did not condemn it in constitutional terms. Senator Aaron Sargent replied that he would be willing to rebut that argument in the proper setting, but that correcting "a blunder of the most obvious character" in the Revised Statutes was more pressing.[48] The correction then passed without a recorded vote.

A final data point on the status of aliens and citizens during Reconstruction is the Burlingame-Seward Treaty with China, agreed to the very day (July 28, 1868) that Secretary of State William Seward proclaimed the Fourteenth Amendment ratified. Like the Civil Rights Act of 1870, the treaty banned some forms of discrimination against Chinese subjects, but authorized others, and is thus inconsistent with seeing the Fifth or Fourteenth Amendments as entailing a complete ban on any racial discrimination against any persons. Article VI of the treaty provided: "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation. But nothing herein shall be held to confer naturalization upon ... the subjects of China in the United States."[49] Article VII added, "Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favored nation. The citizens of the United States may freely establish and maintain schools ... and ... Chinese subjects may enjoy the same privileges and immunities in the United States."[50] Note particularly the absence of many of the rights in the Civil Rights Act of 1866 as well as the specific exclusion of naturalization. It was thus quite clear on the day the Fourteenth Amendment's ratification was formally recognized that aliens were subject to some forms of discrimination in ways citizens were not.

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[44] 3 CONG. REC. 1081 (February 9, 1875).

[45] *Id.*

[46] *Id.* at 1238 (February 13, 1875).

[47] *Id.* at 1237.

[48] *Id.* Sargent also briefly defended of the Asian exclusion: "[I]f the Senator desires to bring forward a bill which will enable Asiatics to be naturalized, I shall be prepared to debate that question with him. Before, however, that debate comes I most earnestly hope that the Senator would take a trip to the Pacific States that he would pass through our towns and villages there, that he would see in some of the back streets of our cities the condition of the population there which is to be brought up in large numbers to our polls. I should like to have him investigate upon the spot. I assure him that if he has these ideas strongly, he will return without them." *Id.* Responding to Willard in the House, Horace Page defended the policy in similar terms: "[A]ny one who knows anything about the history of this class of Chinese upon the Pacific coast, and who come there in great numbers, (and there are about eighty thousand,) will admit that the naturalizing of these people would be a great injustice to the people of California..." *Id.* at 1081.

[49] Treaty with China, 16 Stat. 739, 740 art. VI (July 28, 1868). In 1875, Representative Page relied on the treaty in defending racial limits on naturalization. 3 CONG. REC. 1081 (1875).

[50] *Id.* art. VII.

PROBLEM 2: RACIAL ENSLAVEMENT AMONG FANS OF "GENERAL LAW" DUE PROCESS

Turning from federal law to state practices, it is important to acknowledge how helpful Ryan Williams's work has been in setting down a map of antebellum due process (and law-of-the-land) law in America.[51] His catalogue of the twenty states that he says had adopted a "recognizable form of substantive due process" by 1868 does not, however, clearly segregate the states that adopted vested-rights readings from those that followed Webster's "general law" definition.[52] Only seven of the states Williams cites support any sort of antidiscrimination readings of due process: Arkansas, Iowa, Maryland, Michigan, Mississippi, Tennessee, and Texas.[53] Five of these seven, of course, were slave states. A glance at these states' slave codes—none of which, of course, were struck down as unconstitutional under due-process principles—suggests that whatever devotion to equality these states may have displayed when discussing the due process of law, it did not stop them from framing their slave codes in aggressively racial terms and energetically restricting the rights of free blacks. The very title of Thomas R.R. Cobb's 1858 treatise—the Law of *Negro* Slavery—displayed how inextricably slavery was tied up with race. As Gilbert Stephenson later put it, "[T]he distinctions based on race were ... inseparably interwoven with those based on the state of slavery. Thus, it is impossible to say whether a law was passed to regulate a person's actions because he was a slave or because he was of the Negro race."[54] Cobb summarized how the law in every slave state imposed racial limits on the liberty of even free blacks:

> Public policy has made it necessary for the slaveholding states, by statute, to impose other restrictions upon free persons of color. They have been forced to extend over them their patrol and police regulations, to deny them the privilege of bearing arms, to require of them the selection of a guardian, who shall stand as patron, and contract for them; to restrain their acquisition of negro slaves as property; to place them on the same footing with slaves as to their intercourse with white citizens; such as purchasing spirituous liquors, &c. [Cobb here cites the statutes of all of the slave states except Kentucky, Louisiana, and Florida.] These various restrictions, differing in the different states, place the free negro but little above the slave as to civil privileges.[55]

Cobb noted that some non-slaveholding states had allowed the privileges of citizenship to free blacks, but that every slave state imposed a racial bar to citizenship: "In all the slaveholding states, and in

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[51] Williams, *supra* note 11, at 460-70.

[52] *Id.*

[53] *Id.* at 463 n.248 & 464 n.251.

[54] RACE DISTINCTIONS IN AMERICAN LAW 8 (1910).

[55] 1 THE LAW OF NEGRO SLAVERY § 387, at 314 (1858).

many of the non-slaveholding states, the admixture of Negro blood is a disqualification for citizenship. The quantum varies in the different states."[56]

As Williams notes, the first and most enthusiastic state in embracing Webster's definition of due process was Tennessee. Its Supreme Court spoke in 1829 of "general" and "equally binding" laws,[57] in 1831 of "equal rights" for "weak and unpopular minorities"[58] and of "partial" laws,[59] in 1836 of laws "operating equally,"[60] in 1842 of the need to "protect minorities from the wrongful action of majorities,"[61] and in 1854 of "all persons ... in the same situation or circumstances."[62] Taken for all they might be worth, these expressions could have represented a serious commitment to equality. But Tennessee during this time did not take them very far at all. An 1831 statute made it illegal for free blacks to enter the state and required emancipated slaves to leave.[63] An 1836 statute banned free blacks from selling groceries.[64] An 1852 statute allowed "disorderly" free blacks to be forced to work and imprisoned if they refused.[65] An 1854 statute required that emancipated slaves and any free blacks failing to post proper bond for good behavior be exiled to Africa.[66]

The laws of the other four slave states that indulged equality rhetorically in their due-process cases were similar:

- Maryland's high court in 1838 required that statutes have some "relation to the community in general."[67] But an 1831 statute banned immigration of free blacks and imposed special rules for free blacks' gun ownership, religious assembly, and sale of

[56] *Id.* § 391, at 316-17.

[57] Vanzant v. Waddell, 10 Tenn. (2 Yer.) 259, 270 (1829).

[58] Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 557 (1831).

[59] Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 605 (1831).

[60] Jones's Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 71-72 (1836).

[61] Budd v. State, 22 Tenn. (3 Hum.) 482, 491 (1842).

[62] Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 103, 123 (1854).

[63] An Act Concerning Free Persons of Color, and for Other Purposes, Tenn. Pub. Acts, 19th General Assembly, ch. 102, at 121-22 (December 16, 1831). An 1842 statute gave courts discretion to permit emancipated slaves to live in the state, provided they stayed in a particular county. An Act to Amend the Laws Now in Force in Relation to Free Persons of Color, Tenn. Pub. Acts, 24th General Assembly, ch. 191, at 229, 230 (February 4, 1842).

[64] An Act to Regulate Free Negroes and for Other Purposes, Tenn. Pub. Acts, 21st General Assembly, ch. 57, at 167 (February 20, 1836).

[65] An Act to Construe the Laws of this State in Relation to Free Persons of Color, Tenn. Pub. Acts, 29th General Assembly, ch. 160, at 237 (February 23, 1852).

[66] An Act to Regulate the Emancipation of Slaves, and to Provide for the Transportation of Free Persons of Color to the Western Coast of Africa, Tenn. Pub. Acts, 30th General Assembly, ch. 50, at 121-22 (February 24, 1854).

[67] Regents of the University of Maryland v. Williams, 9 G. & J. 365, 412 (Md. 1838).

agricultural products.[68] An 1846 statute denied blacks, slave or free, the right to testify in cases involving whites.[69]

- The Supreme Court of Arkansas in 1841 required "general law."[70] But an 1843 statute prohibited migration of free blacks,[71] and the state Supreme Court itself in 1846 forbad free blacks to testify against whites, calling it "a principle settled in all the States of the Union, at least where slavery is tolerated."[72]

- The high court of Mississippi in 1844 required that law be "equal and general, not partial and particular."[73] But an 1842 statute provided for the re-enslavement of any previously emancipated freedmen who returned to the state and prohibited the migration of free blacks on pain of whipping or enslavement.[74]

- The Supreme Court of Texas in 1847 spoke of "general public laws, binding all the members of the community under similar circumstances, and not partial or private laws."[75] But an 1846 statute prevented free blacks from hiring the time of slaves.[76] The 1857 penal code explicitly provided that "offenses ... when committed by ... free persons of color ... are subject to different rules from such as are prescribed in defining such offenses when committed by a free white person."[77]

Even the free state of Iowa, whose Supreme Court in 1849 required a "general law,"[78] in 1851 banned free-black immigration and testimony by blacks against whites.[79] When its constitutional convention sought in 1857 to put equality on firmer provision, it chose the language the privileges and immunities of citizenship, rather than personhood and the due process of law: "[T]he general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the

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[68] An Act Relating to Free Negroes and Slaves, Md. Pub. Stat., ch. 323, at 1068, 1071 (1831).

[69] Laws of Md., 1846-47, ch. 27.

[70] Ex parte Woods, 3 Ark. 532, 536 (1841).

[71] An Act to Prohibit the Emigration and Settlement of Free Negroes, or Free Persons of Color, into this State, Ark. Laws, 4th General Assembly, at 61 (January 20, 1843).

[72] Pendleton v. State, 6 Ark. 509, 511 (1846).

[73] Noonan v. State, 9 Miss. (1 S. & M.) 562, 573 (1844).

[74] An Act to Amend the Several Acts of this State in Relation to Free Negroes and Mulattoes, Laws of Mississippi, ch. 4, at 65 (February 26, 1842).

[75] Janes v. Reynolds' Adm'rs, 2 Tex. 250, 252 (1847).

[76] Tex. Session Laws, 1st Legislature, at 195 (May 11, 1846).

[77] An Act Supplementary to and Amendatory of an Act Entitled "An Act to Adopt a Penal Code for Texas," Tex. 7th Legislatue, ch. 121, art. 802, at 156, 186 (February 12, 1858).

[78] Reed v. Wright, 2 Greene 15, 23 (Iowa 1849).

[79] Laws of Iowa, 1850-51, at 172-73. This law was repealed in 1864. Laws of Iowa, 1864, at 6.

same terms shall not equally belong to all citizens."[80] The Iowa Supreme Court in 1868 used the requirement of "equal privileges," in tandem with a specific provision for schools, to strike down racial segregation in 1868.[81] Due process was not mentioned at all. The Court associated state-constitutional equal-privileges rules with the Fourteenth Amendment's Privileges or Immunities Clause in 1884.[82]

Among the seven due-process-equality states Williams identifies, Michigan had clearly the best record in avoiding gross discrimination against its free black population. The Michigan Supreme Court had in 1858 condemned under its due-process clause a "special act" that affected one person "in a way which the same rights of other persons are not affected by existing laws"; the court required that laws "affect the rights of all alike."[83] But even Michigan's relatively-happy history on equality suggests that due process was not a key ingredient to its development. Its 1835 constitution, like Iowa's in 1857, expressed equality in terms of a ban on special privileges: "No man or set of men are entitled to exclusive or separate privileges."[84] In 1869, the Michigan Supreme Court, in an opinion by Thomas Cooley, held that a statute granting the "equal right to attend any school" barred local school segregation.[85] The year before, the first edition of Cooley's famous treatise noted of Webster's definition that "[n]o definition, perhaps, is more often quoted."[86] In striking down school segregation, however, Cooley made no mention of Webster's definition—or due process of law—at all. Cooley certainly brought Webster's definition's to bear as part of his promotion of the protection of vested property rights. And Cooley also played an important role in fostering equality during Reconstruction. But he did not tie the two ideas together.

PROBLEM 3: DEMOCRATIC ENTHUSIASM FOR DUE PROCESS BUT HOSTILITY TO EQUAL CIVIL RIGHTS

Returning to federal law and the more immediate context of the Civil War and Reconstruction, what can we say about what those in Congress thought about due process? How idiosyncratic was Bingham among his immediate contemporaries in thinking that we should understand "law" in its "highest sense"? Pretty idiosyncratic, it seems. While Bingham's usage of "law" was *one* way to read the word, even Bingham recognized that it was not the only way. Democrats did not see due process of law as any sort of higher-law or antidiscrimination talisman, and they did not think that the public saw it as one either. In 1862, Democrats invoked Fifth

[80] Iowa Const. of 1857, art. I, § 6.

[81] Clark v. Board of Directors, 24 Iowa 266, 276 (1868).

[82] Bucklew v. Central Iowa Railway, 21 N.W. 103, 107 (Iowa 1884) (Fourteenth Amendment and state constitution similarly ban "exclusive privileges ... not shared by others in like circumstances).

[83] Sears v. Cottrell, 5 Mich. 251, 254 (1858).

[84] Mich. Const. of 1835, art. I, § 3.

[85] People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400, 409 (1869).

[86] A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 353 (1868); *see also* Amar, *supra* note 14, at 282 (relying on Cooley to show influence of Webster's definition).

Amendment due process at very, *very* great length in opposing the Confiscation Act of 1862.[87] They repeatedly (alongside their Republican opponents in debate) defined "due process of law" as traditional judicial proceedings, not freedom from discrimination.[88] The very same Democrats who lauded due process in 1862—and some who made similar arguments against the confiscation aspects of the Freedman's Bureau in 1866—were opposed in lockstep to the Civil Rights Act of 1866.

I will not repeat here what I have said at length elsewhere about the details of the 1862 debate. But the overlap between the due-process-based opponents of the Second Confiscation Act and 1866 opponents of equal civil rights is striking. I count seven players in both debates: Garrett Davis,[89] Aaron Harding,[90] James McDougall,[91] Willard Saulsbury, [92] Henry Grider, [93] Edgar Cowan[94] and James Doolittle.[95] None of them breathed a word of regret about the principles of due process of law or suggested they might fear the antidiscrimination consequences of embodying them in the Constitution as a limit on states.

Given that Democrats and Republicans disagreed about the application of due process principles, how should we interpret the repetition of those principles in the Fourteenth Amendment? Reiteration is not clarification. In merely *repeating* the Fifth Amendment's due process language, rather than *rewriting* it in a way that to express his distinctive understanding of its

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[87] See Green, *supra* note 7.

[88] *Id.*, draft at 31-38 (traditional-judicial-proceedings-style definitions of "process of law" offered by Browning, Cowan, Crisfield, Crittenden, Davis, Henderson, Howard, Hutchins, Kellogg, Noell, Powell, Sheffield, Sumner, Wadsworth, Walton, and Wilmot).

[89] For Davis's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. 176, 178 (1861), 509, 785, 986, 1191, 1334-36, 1446, 1498-99, 1720, 1757-62, 1776-82, 1785, 2167-68, 2169, 2197, 2218-23, 2961, app. 218 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 523-25, 528-30, 575-78, 595-99, 1414-16, 1288, 2918-19, 3041, app. 181 (1866).

[90] For Harding's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. app. 28 (1861); app. 186-87, 200 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 212, 2253-56, 3147-48 (1866).

[91] For McDougall's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. 1021, app. 60-66 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 365, 367-68, 375, 392-94, 397, 400-02, 604-05, 746-47, 1282-83, 1287, 3030-31, 3038, 3041 (1866).

[92] For Saulsbury's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. 1923, 2898-2902, app. 142 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 28, 42, 95-96, 112-14 (1865), 348, 362-64, 372, 476-81, 606, 1049-50, 1142, 1146, 1809, 2919-21, 3840-42 (1866).

[93] For Grider's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. 162-66 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 171 (1866); he was also a member of the Joint Committee on Reconstruction.

[94] For Cowan's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. 129 (1861), 517-18, 1050-53, 1558, 1654, 1718, 1832, 1846, 1878-79, 1881, 1991, 2959-62, 2967, app. 243 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 28, 40, 41, 96-97 (1865), 334, 340-45, 498-03, 506-07, 954-55, 1132-38, 1285-86, 1781-85, 2890-91, 2899-2900, 2987-91 (1866).

[95] For Doolittle's contributions to the 1862 debate, see CONG. GLOBE, 37th Cong. 2nd Sess. 124 (1861), 125, 505, 1785-87, 1813, 2039, app. 94-100, 137-40 (1862). For his contributions in 1866, see CONG. GLOBE, 39th Cong. 1st Sess. 25-26, 28-29, 266-75, 571, 956, 983-84, 1028, 1139-41, 1232, 1287, 1804-09, 2892-93, 2895-97, 2900-01, 2914-18, 2942-44, 2984-86, 3040 (1866).

meaning, Bingham gained no upper hand for his own views. As a textual matter, any disputes over the Fifth Amendment's meaning and application were simply carried over whole into new disputes over the Fourteenth Amendment's meaning and application. Where two parties already agree on language A, but one party thinks it means X and the other party thinks it means Y, getting the parties to agree again on A will not resolve the dispute between X and Y. *Resolving* the dispute requires embodying either X or Y in *new* language. One way to put the point is to distinguish *semantic* from *normative* agreement. To have both semantic and normative disagreement is to disagree both about what a particular collection of words means *and* about what would be a good idea. Those two disagreements might offset each other, though, producing a superficial verbal agreement: "Whatever text A means, it's a good idea!" On the other hand, two parties with semantic agreement but normative disagreement both know what a group of words expresses, but disagree about whether they express something good. Given normative disagreement of the sort that obviously existed during Reconstruction, this is what we need to put our constitutional house in order, i.e., for one party to clearly prevail in the normative dispute. Put another way, disagreement about *whether to uphold a particular text* can be a sign that those whose goals obviously clash may have achieved semantic agreement about *what that text means*. We need both sides to be able to crystallize their normative dispute into a single statement of what it is they disagree *about*. Only if that happens we can make progress in finding a clear winner in the struggle over what to do.

The language of the privileges and immunities of citizens of the United States—condemned by Democrats because they opposed equal civil rights and embraced by Republicans because they favored them—is much closer to offering just such a situation. The President's Civil Rights Act veto asked concerning the freedmen on March 27, 1866, "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?"[96] President Johnson's answer was no, of course, but Republicans overriding that veto and then adopting the Privileges or Immunities Clause—proposed to the Joint Committee by Bingham just 3½ weeks later, on April 21—answered yes.

I am unapologetically elitist in seeking out the best-informed, clearest-headed, most-plain-speaking guides to the meaning of legal terminology. And we can, alas, find somewhat better guides than Bingham. John Frank and Robert Munro, who read through "substantially all of Bingham's Congressional utterances between 1860 and the termination of his service in Congress in 1873," pronounce him "able," but add, "As a legal thinker, he was not in the same class with the top notch minds of his time, such as such as Reverdy Johnson, Lyman Trumbull, Matt Carpenter or George Edmunds in the Senate, or George Hoar in the House."[97] As it happens, there is very good evidence from two of these five—Democrat Reverdy Johnson and Republican Matthew Hale Carpenter—about the meaning of due process. Reverdy Johnson was not in Congress during the 1862 debate, but his 1866 explanation of his enthusiasm for a Fourteenth Amendment Due Process Clause was quite clear indeed. Just before the Fourteenth Amendment was approved, he stated,

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[96] CONG. GLOBE, 39th Cong. 1st Sess. 1679, 1858 (1866).

[97] *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 164-65 n.169 (1950).

> 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.[98]

Only a broad, abstract, indefinite grant of constitutional power could cover the sorts of rights Republicans wanted to cover in the Civil Rights Act of 1866 and its anticipated sequels like the Civil Rights Act of 1875. Reverdy Johnson very clearly opposed such statutes and the grant of such a power; in defending President Johnson's veto of the Civil Rights Act, for instance, he said that if Congress could require equality in the right to make contracts, own property, and testify, it could do anything: "the States are abolished."[99] He opposed what he saw as "an entire annihilation of the power of the States."[100] When the Fourteenth Amendment was articulated, Johnson's opposition to the Civil Rights Act and to a large, imperfectly-defined expansion of federal power were squarely focused on the Privileges or Immunities Clause, and quite explicitly *not* the Due Process Clause.

PROBLEM 4: CARPENTER IN *BRADWELL*

Republican Matthew Carpenter is a separate problem for antidiscrimination due process. Unlike Reverdy Johnson, Carpenter was a fan of federally-enforced equal civil rights for the freedmen. He spoke eloquently on behalf of drafts of what became the Civil Rights Act of 1875 and favored using federal power to desegregate common carriers and schools, afford equal occupational opportunity to the freedmen, and allow women to practice law. On successive Thursdays in early 1872, he was at the center of four different fights over the meaning of the Fourteenth Amendment:

- the Louisiana slaughterhouse monopoly, which Carpenter defended at the Supreme Court on January 11;[101]
- women's right to practice law, for which Carpenter argued at the Supreme Court on January 18,[102]

[98] CONG. GLOBE, 39th Cong. 1st Sess. 3041 (1866). For his earlier remarks related to civil rights, see *id.* at 188-93, 209-10, 372-74, 445, 504-07, 573-74, 747, 956, 1027-28, 1107-13, 1142-43, 1411, 1775-80, 2893-94, 2898-99, 2916, 2991, and 3026-30.

[99] *Id.* at 1777.

[100] *Id.*

[101] See Slaughterhouse Cases, 83 U.S. 36, 44, 57 (1873) (procedural history of the case, in which Carpenter argued for the monopoly on January 11, 1872 and again in February 1873).

[102] See Bradwell v. State, 83 U.S. 130, 133 (1873) (Carpenter's argument). The argument was January 18, 1872, but the decision delayed until the day after *Slaughterhouse*. See https://www.supremecourt.gov/opinions/datesofdecisions.pdf.

- women's right to vote, against which Carpenter reported unfavorably to the Senate as chair of the Senate Judiciary Committee on January 25;[103] and
- the desegregation of common carriers and schools, which Carpenter advocated at length on the Senate floor on February 1.[104]

Regarding the freedmen's occupational freedom, Carpenter insisted on the Senate floor that under the Privileges or Immunities Clause, "all avocations, all honors, all positions are alike open to everyone"; it "offers all the pursuits and avocations of life to the colored man, in all the States of the Union."[105] As a Senator, Carpenter urged that freedmen's civic freedom be expanded to common carriers and schools. But the specter of a lack of equal occupational freedom for the freedmen also figured in his argument two weeks before, when he spoke on behalf of Myra Bradwell. In that argument, it was a reductio:

> If the legislature under pretense of fixing qualifications, declare that no female citizen is permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen." And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.[106]

The main point here is not so much the merits of Carpenter's factual assumptions; he and Chief Justice Chase, who dissented, obviously disagreed with the claim in Bradley's concurrence that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life," [107] such as lawyering. For what it is worth I agree with Carpenter and Chase on that factual issue and think the prevalence of Bradley's view of the facts among Fourteenth Amendment framers should not bind interpreters today.[108] The key thing to notice here for an evaluation of antidiscrimination due process is that Carpenter saw the Privileges or Immunities Clause as the *only* provision that would be implicated if a state deprived male freedmen of the right to be lawyers. Any reading of antidiscrimination due process strong enough to cover Civil Rights Act of 1866 rights like the right to make contracts on an equal basis with white citizens would thus mean that Carpenter was wrong about a very basic aspect of the Fourteenth Amendment's meaning. Given

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[103] See S. Rep. no. 42-21 (January 25, 1872).

[104] See CONG. GLOBE, 42nd Cong. 2nd Sess. 758-63 (February 1, 1872); for more of his contributions to this debate, see *id.* at 264, 275, 277-78, 731, 767, 818, 820-28, 843-45, 870, 874, 879, 893, 897-900, 910-11, 919, 3705.

[105] CONG. GLOBE, 42nd Cong. 2nd Sess. 762 (1872).

[106] Bradwell, 83 U.S. at 135-36.

[107] *Id.* at 141.

[108] See *supra* note 32.

Carpenter's strong advocacy of equality and obvious grasp on the relevant history relating to all aspects of the interpretation of the Fourteenth Amendment, this seems quite implausible. We should classify Bingham, not Carpenter, as the idiosyncratic one.

PROBLEM 5: REPUBLICAN ACKNOWLEDGMENT OF "LAWFUL" RACIAL SLAVERY AND RE-ENSLAVEMENT

On to my three textual problems. The first such problem is that "law," while it *could* be read in a strongly-moralized way to entail equality or justice, could also be read to refer to positive laws that are deeply unjust and discriminatory. And the foundational documents of the Republican Party—the Northwest Ordinance, Missouri Compromise, and Wilmot Proviso—all apply the word "lawful" to claims based on racially-discriminatory, obviously-unjust slave statutes. If depriving a slave of liberty—literally taking away liberty with chains—could be done on racial grounds and yet be "lawful," we are clearly not speaking of "law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice."[109] We are speaking of positive human law of the sort that is often deeply and horribly unjust.

On June 13, 1787, the Northwest Ordinance banned slavery and involuntary servitude, subject to a crime exception, north of the Ohio River. This led to July 13 becoming a minor holiday in anti-slavery circles; Jacob Howard noted in 1864 during the discussion of the Thirteenth Amendment, on which it was based, that the language of the Ordinance was "peculiarly near and dear to the people of the Northwestern Territory, from whose soil slavery was excluded by it."[110] The Northwest Ordinance did not, however, open up the federal territories as a haven for fugitive slaves. Here is the key language:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: Provided always, That any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid.[111]

For slave to have their labor "lawfully claimed in any one of the original States" is to have their labor extracted by force under openly-racially-discriminatory laws. Recall Stephenson's summary: "[D]istinctions based on race were ... inseparably interwoven with those based on the state of slavery."[112] States like Mississippi, for instance, in defending a secession "thoroughly identified with the institution of slavery," claimed that "by an imperious law of nature, none but the black race can

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[109] *See supra* note 15.

[110] CONG. GLOBE, 38th Cong. 1st Sess. 1489 (1864).

[111] Act of Aug. 7, 1789, 1 Stat. 50, 53 (readopting Northwest Ordinance of July 13, 1787).

[112] *See supra* note 54 and accompanying text.

bear exposure to the tropical sun."[113] The slave codes of the South were, of course, all shot through with race. Claims to slaves under those codes were nonetheless described by the Northwest Ordinance as "lawful."

In addition to the presupposing that the racially-based rules of slave codes can cause labor to be "lawfully claimed," the Ordinance also described a re-enslaved fugitive as being "lawfully reclaimed." If being forcibly brought back into a racially-based regime of slavery is something that could happen "lawfully," "law" is obviously not a term that implies impartiality or justice, especially for a Republican party based on recognizing the *in*justice of racially-based slavery.[114]

The Constitution's article IV section 2 clause 3 used slightly different language for the fugitive slave clause when it was written in Philadelphia later in the summer of 1787; the first "lawfully" became "held ... under the Laws thereof," and the second became a simple "delivered up on Claim."[115] But in 1820, when Congress banned slavery in the Louisiana Territory north of the 36° 30′ line, the distinctive language of the Northwest Ordinance came back:

> [I]n all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the State contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited: Provided always, That any person escaping into the same, from whom labour or service is lawfully claimed, in any state or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labour or services as aforesaid.[116]

The fugitive-slave provision is slightly broader here than in the Northwest Ordinance, because it applies to fugitives from slavery in the territories, as well as the original states. But like the Ordinance, the Compromise uses "lawfully" to describe both racial enslavement and re-enslavement.

"Lawfully" appears another two times in the failed Wilmot Proviso of 1847, which Abraham Lincoln, then in the House, sought with others to attach to Mexican War territories:

> And be it further enacted, That there shall be neither slavery nor involuntary servitude in any territory on the continent of America

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[113] J.L. POWER, PROCEEDINGS OF THE MISSISSIPPI STATE CONVENTION 34 (1861).

[114] "Their thinking [slavery] right, and our thinking it wrong, is the precise fact upon which depends the whole controversy." Address at Cooper Institute, N.Y.C., Feb. 27, 1860, in 3 WORKS OF ABRAHAM LINCOLN 549 (Basler ed., 1953).

[115] U.S. CONST. art. IV § 2 cl. 3.

[116] An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, and to Prohibit Slavery in Certain Territories, 3 Stat. 545, 548, § 8 (March 6, 1820).

> which shall hereafter be acquired by, or annexed to, the United States, except for crimes whereof the party shall have been duly convicted: Provided always, That every person escaping into such territory from whom labor or service is lawfully claimed in any one of the United States, such fugitive may be lawfully reclaimed and conveyed out of said territory to the person claiming his or her labor or service.[117]

Again there are some tweaks to the language of 1787 and 1820. Like the Ordinance but unlike the Compromise, the Proviso's rule for fugitives applies only to those escaping from enslavement in the states, rather than the territories, and it underlines the requirement that those re-enslaved must be taken out of the territory. But again the "lawfully claimed"/"lawfully reclaimed" labels are applied to racial enslavement and re-enslavement, and in yet another of the documents beloved by the Republican Party since its birth. This is clearly a view of "law" with only the very thinnest of conceptual ties to justice or non-discrimination. In interpreting a text like the Fourteenth Amendment that was the product of a party that payed such reverence and attention to these documents, it would not be plausible to read "law" in the Fourteenth Amendment to entail a strong ban on discrimination.

PROBLEM 6: RACIALLY-DISCRIMINATORY "LAW" IN THE PRIVILEGES OR IMMUNITIES CLAUSE

For a second textual indication of a positivistic use of "law," we need not know anything about the sturdiness of the Republican Party's continued love in 1866 for the documents of 1787, 1820, and 1847. This use of "law" appears in the very text of the Privileges or Immunities Clause: "No state shall make or enforce any *law* which shall abridge the privileges or immunities of citizens of the United States."[118] All three of the main clauses of the Fourteenth Amendment use the term "law," but they do so in ways that point opposite directions. Twice, law is a *requirement*: "due process *of law*" and "equal protection *of the laws*."[119] If enough "process of law" is supplied, the Due Process clause will be satisfied; if enough "protection of the laws" is given, states will be clear of the Equal Protection Clause. These provisions demand, in certain circumstances, *more* law. The Privileges or Immunities Clause, by contrast, demands *less*. To make or enforce a law of the wrong sort is exactly what the Clause bans.

But that means that if a heavily justice-infused or non-discrimination-infused reading of "law" was proper for the Due Process Clause, that reading would have to be replaced with a positivistic reading for the Privileges or Immunities Clause. For legislation not to be "law" means, for the Equal Protection and Due Process Clauses, that the clauses remain *un*satisfied, but doing so renders the Privileges or Immunities Clause *satisfied*. If a sufficiently discriminatory enactment is literally not even worthy of the label "law," then it would not even be *subject* to the Privileges or Immunities Clause, because the Clause is only about the making and enforcing of literal laws. And whatever the

[117] CONG. GLOBE, 29th Cong. 2d Sess. 303 (1847).

[118] U.S. CONST. art. XIV §1.

[119] *Id.*

Privileges or Immunities Clause forbids, it would not make sense to read it to carve out an exemption for racially-discriminatory instances. To avoid jumping implausibly from one reading of "law" to another within the Fourteenth Amendment, we should abandon antidiscrimination due process.

PROBLEM 7: RACIALLY-DISCRIMINATORY BENEFITS

A final textual problem with the Due Process Clause as a basis for *Bolling v. Sharpe* and the Civil Rights Acts of 1866, 1870, and 1875 is the implausibility of seeing many of these rights as any sort of deprivations of life, liberty, of property. Williams claims that the "general law" interpretation applied to "special benefits,"[120] but that just does not work textually. *Bolling*, of course, is about schools, but lots of other rights—the right to testify in court in the Civil Rights Act of 1866, or the right to be on a jury or use a common carrier under the Civil Rights Act of 1875—likewise involve the opportunity to participate in others' activities and projects, rather than freedom from interference. For the government to establish schools for the benefit of only one group of citizens does not in itself deprive *other* citizens of anything. If the word "liberty" were to be read so broadly that my inability to access a particular piece of property owned by the government counts as a deprivation of liberty, one might say that the inability to attend a school represents the loss of liberty. But that reading is much too broad. Property owners do not, simply by excluding trespassers, deprive those trespassers of liberty. Even the right to vote—consistently held by Republicans in 1866 to be outside the Fourteenth Amendment—could be deemed a "liberty" on this sort of reading. Indeed, such a broad reading of liberty renders "property" superfluous. If simply taking something away from me literally deprives me of the "liberty" to possess it, there is no need to speak separately in a constitution of both liberty and property.

We need not go all the way to Blackstone's view of "liberty" as limited to the "power of locomotion ... without imprisonment or restraint" [121] to cause insuperable problems for antidiscrimination due process. Even if prospective restrictions on the right to make contracts, say, could somehow be the sort of deprivation of "liberty" that requires due process of law, it is a long way from there to see schooling (or common-carrier rights, or jury rights, or the right to testify) as part of life, liberty, or property. In 1923, for instance, *Meyer v. Nebraska* went far beyond Blackstone:

> [L]iberty ... denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[122]

[120] *See supra* note 14 and accompanying text.

[121] *See supra* note 34 and accompanying text.

[122] 262 U.S. 390, 399 (1923).

Even on this very expansive view, "liberty" is still only freedom from interference, rather than positive rights to receive benefits or participate in others' activities. And negative rights can't get us to *Bolling* or the Civil Rights Acts of 1866, 1870, and 1875.

One might try to salvage a more robust scope for antidiscrimination due process by viewing discrimination by entities supported by taxation as deprivations of those *taxpayers'* property without due process of law. But I doubt this move can work, because the discrimination that undermines "due process of law" might not match the taxation that deprives someone of property. The taxation, for instance, might not take place at the same time as the discrimination. Suppose at time 1, everyone is taxed, and government behaves in a non-discriminatory manner, but at time 2, the government behaves discriminatorily, but does not yet need more taxes. Since discrimination at time 2 can't render the taxation at time 1—perfectly appropriate at the time—without due process of law, our antidiscrimination norm will have a very big hole. Or the taxation and the discrimination might involve different people. Imagine a tax-supported entity that improperly discriminates against those who for whatever reason are not subject to the tax: they are too poor, too young, don't consume the taxed item, or the like. If receiving "due process of law" means not suffering discrimination, no individual people in this scenario have actually been both (a) deprived of property (b) without due process of law. Some people have been deprived of property, but because they haven't been discriminated against, they've received "due process of law." Others *have* been discriminated against, so by hypothesis they haven't received "due process of law," but they haven't been deprived of property. Any antidiscrimination principle that might let this sort of scheme slip through the cracks is plainly not getting the job done.

CONCLUSION

Ryan Williams is right that anti-discrimination rhetoric worked its way into a number of antebellum due-process cases. But that rhetoric accomplished little on the ground. Significant tangible gains in actual equality were achieved through other means and expressed in other terms. Kurt Lash is likewise right that John Bingham and others suggested that the Fifth Amendment contained a sufficiently radical notion of equality to justify the Civil Rights Acts. But the dominant historical streams of how the federal government and states behaved involved longstanding, open, largely-unchallenged racial discrimination against non-citizens. Because this discrimination was treated by the vast majority of Democrats and Republicans, even when unjust, as a genuine part of what counted as "law," it could not be rooted out simply by appealing to a provision designed to insure the rule of law. The *rule* of law is important, to be sure, but equality goes beyond it, governing the *content* of law. The key move towards equality for the freedmen was thus not the Due Process or Equal Protection Clauses' requirements of "process of law" and "protection of the laws," but a direct requirement that states respect civil rights when they make or enforce law: the Privileges or Immunities Clause.