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## The Due Process Plank

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## The Due Process Plank

*Andrew T. Hyman*<sup>\*</sup>

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## I. INTRODUCTION

The Republican Party's national platform of 1860 is useful for interpreting the Fourteenth Amendment of the United States Constitution, which was written just six years later by a Republican-controlled Congress.<sup>1</sup> That platform, however, has frequently been overlooked or misunderstood.<sup>2</sup> In particular, the due process plank of the platform has often been portrayed as supporting the doctrine called "substantive due process."<sup>3</sup> A close look at the platform, though, shows that it did not actually support that doctrine, and instead refutes it.

In Chicago during May of 1860, on the brink of the Civil War, the Republican Party held its second national convention,<sup>4</sup> and the plank in question took the form of a resolution:

That the normal condition of all the territory of the United States is that of freedom; That as our Republican fathers, when they had abolished slavery in all our national territory, ordained that "[sic] no persons should be deprived of life, liberty or property, *without due process of law*," it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United

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<sup>1</sup> See U.S. CONST. amend. XIV; National Republican Platform (May 17, 1860) in KIRK PORTER & DONALD JOHNSON, NATIONAL PARTY PLATFORMS, 1840–1964, at 30–32 (1966).

<sup>2</sup> See Howard Jay Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830–1860*, 40 CALIF. L. REV. 483, 493 (1952): "That historians—both general and constitutional—have almost completely ignored the party platform as a source for understanding the Fourteenth Amendment itself testifies to serious oversights and misconceptions." This remains true.

<sup>3</sup> See, e.g., MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 62–63 (2006); EDWARD CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT 114 (1948); Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT. 733, 762 (2007); Richard Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About its Interpretation*, 39 AKRON L. REV. 289, 300 (2006); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 396 (1993).

<sup>4</sup> NATIONAL PARTY CONVENTIONS, 1831–2000, at 24 (Cong. Q. ed., 2001). The party's first national convention was in Philadelphia during June of 1856. *Id.* at 49. There had been a mass meeting in February of 1856 at Pittsburgh, but this should not be considered a "convention," because anyone could attend, not just delegates. See WILLIAM GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856, at 254 (1987).

States.<sup>5</sup>

Throughout this Article, I will call this the due process “plank,” and will only use the term “Due Process Clause” with reference to the Constitution. At first sight, this plank looks something like an assertion that slavery violated substantive due process, but that conclusion is incorrect and rests only upon faulty inference.<sup>6</sup>

By its terms, this plank of the platform addressed liberty in free federal “territory,” rather than in areas like the District of Columbia where substantive due process would have applied equally.<sup>7</sup> Even the most prominent and ardent abolitionists recognized that this plank offered no opposition to federal support of slavery in the District of Columbia.<sup>8</sup> Congress largely stopped supporting slavery in 1862, but not because of any substantive penumbra of the Due Process Clause.<sup>9</sup>

In his first inaugural address, Abraham Lincoln said that the Republican Party’s platform, which had been adopted at their 1860 convention, was like “a law to themselves and to me.”<sup>10</sup> Few sources were as widely publicized and broadly representative as this platform, which makes it a very good indicator of public meaning.

Consider briefly the big picture. In 1791, the Fifth Amendment was ratified, declaring that the nation would deprive no one of “life,

<sup>5</sup> See PORTER & JOHNSON, *supra* note 1, at 32 (emphasis added). This plank was the platform’s eighth resolution or “declaration.” *Id.* The first internal quote mark was misplaced, and belonged after the word “should” because the Fifth Amendment does not include that word. See U.S. CONST. amend. V. Some versions of the 1860 platform omit the internal quote marks altogether. See, e.g., Downes v. Bidwell, 182 U.S. 244, 297 n.11 (1901) (White, J., concurring) (this footnote in Justice White’s concurring opinion recites the 1860 due process plank without any internal quote marks; it is the second footnote on page 297, and so is sometimes numbered “2” even though it is the eleventh footnote in White’s opinion). See generally *infra* Kasson Papers, note 98 (draft platform is in Iowa archives).

<sup>6</sup> See EMERSON DAVID FITE, THE PRESIDENTIAL CAMPAIGN OF 1860, at 124 (1911).

<sup>7</sup> See, e.g., 4 DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861, at 12 (2005) (“It had long been assumed . . . that various Bill of Rights provisions applied” in the District).

<sup>8</sup> For example, Frederick Douglass protested the omission of the District from the 1860 platform. See FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 410 (Philip Foner & Yuval Taylor eds., 1999). So did William Lloyd Garrison. See Theodore Lockwood, *Garrison and Lincoln the Abolitionist*, 6 THE ABRAHAM LINCOLN QUARTERLY 199, 208 (1950).

<sup>9</sup> Congress first banned slavery in the District. See Act of Apr. 16, 1862, ch. 54, 12 Stat. 376. Then Congress banned slavery in the territories. See Act of July 1, 1862, ch. 119, 12 Stat. 432; ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 203 (2011).

<sup>10</sup> Abraham Lincoln, Inaugural Address (March 4, 1861) in RICHARD GILDER AND DANIEL FISH, 6 COMPLETE WORKS OF ABRAHAM LINCOLN, 169–70 (1905). Cf. *Letter of Edward Bates to O.H. Browning*, N.Y. TIMES, June 23, 1860, at 10 (belittling platforms).

liberty, or property, without due process of law.”<sup>11</sup> In 1868, this same clause was applied to the states.<sup>12</sup> Later, the United States Supreme Court used this clause to rule on substance that was not enumerated in the Constitution, such as English-only schools,<sup>13</sup> abortion,<sup>14</sup> grandparent visitation,<sup>15</sup> and sex.<sup>16</sup> The Court has unanimously acknowledged that the substantive aspect of the Due Process Clause “is suggested neither by its language nor by pre-constitutional history.”<sup>17</sup> Yet they have forged ahead, believing, in the words of Justice Anthony Kennedy, that “we must never fail to ask ourselves not only what the law is, but what the law should be.”<sup>18</sup> Defenders of substantive due process cherish it,<sup>19</sup> but the doctrine remains highly disputed.

The term “substantive due process” was not in use before the twentieth century, though the concept of substantive law has been analytically useful for centuries.<sup>20</sup> An intriguing article by Professor

<sup>11</sup> U.S. CONST. amend. V.

<sup>12</sup> U.S. CONST. amend. XIV.

<sup>13</sup> See *Bartels v. Iowa*, 262 U.S. 404, 412–13 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 398–99 (1923).

<sup>14</sup> See generally *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). For present purposes, it makes no difference whether the social results of these cases are wonderful or catastrophic.

<sup>15</sup> See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>16</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific.”). See generally *infra* note 210 (incorporating enumerated rights against the states).

<sup>17</sup> *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985) (citations omitted). Justice Powell filed a concurring opinion but no justices dissented. *Id.* at 214.

<sup>18</sup> Richard Reuben, *Man in the Middle*, CAL. LAW., Oct. 1992, at 35 (quoting Anthony Kennedy). Cf. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>19</sup> See Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 318–20 (2012) (lauding the courts as a barrier against the “representative body”). But see *id.* at 345 (claiming that federal courts are themselves representative bodies).

<sup>20</sup> See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 138 (First Edition, 1765). Blackstone distinguished substantive from procedural law:

Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself.

*Id.* This excerpt is often misquoted. See the *errata* after Blackstone’s Table of Contents. Substantive and remedial law are also distinguishable. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (“remedial, rather than substantive”). Not only Blackstone, but also the antebellum United States Supreme Court, distinguished

Ryan Williams in 2010 suggested that the Due Process Clause of the Fourteenth Amendment might affect substantive law even while the identical clause in the Fifth Amendment does not.<sup>21</sup> Williams cited the 1860 due process plank as a reason for attributing substantive content to the Due Process Clause in the Fourteenth Amendment.<sup>22</sup> Putting aside what effect a Republican endorsement of substantive due process in 1860 would have had, such an endorsement did not happen.

The 1860 plank deliberately omitted places like the District of Columbia where slavery was common, because Republicans such as Abraham Lincoln believed that federally enforced slavery was constitutional there, albeit deplorable.<sup>23</sup> According to the 1860 Census, there was a much larger number of slaves in the District than in the entire remainder of exclusive federal jurisdiction, including all of the federal territories combined (putting aside slaves held by Native American tribes).<sup>24</sup> Republicans in 1860 were primarily attempting to stop the spread of slavery, as compared to uprooting that oppressive system where it already existed, and prior to the Civil War the Republican platform was one of containment rather than abolition.<sup>25</sup>

The word “territory” in the platform was used by Republicans in its typical narrow sense, which excluded the individual states and other areas like federal forts and dockyards. The “republican fathers” had abolished slavery in the territories that were then in existence, but had not abolished slavery within federal property throughout the south, where slavery remained legal up to the Civil War.<sup>26</sup> Given the narrow use of the word “territory” in the due process plank, the common understanding was that it did not include the District of Columbia.<sup>27</sup> Likewise, the phrase “give legal existence to slavery” in

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“modes of proceeding” from other law. *See infra* text accompanying note 45. Before the Civil War, the word “process” was often limited to procedural matters. *See infra* note 53 (citing a legal dictionary).

<sup>21</sup> Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 474 (2010).

<sup>22</sup> *Id.* Cf. Frederick Gedicks, *An Originalist Defense of Substantive Due Process*, 58 EMORY L. J. 585, 590 (2009) (remarking that the “overwhelming” consensus is that the Fifth Amendment’s clause is not substantive).

<sup>23</sup> *See infra* notes 101–03 and accompanying text.

<sup>24</sup> *See infra* notes 85, 86, and accompanying text.

<sup>25</sup> *See* PAUL RONAN, *HEROES, VILLAINS & DUPES: HOW THE ANTEBELLUM PRESIDENTS ALLOWED SLAVERY TO DRIVE THE COUNTRY TO THE CIVIL WAR* 163 (2010).

<sup>26</sup> *See* FONER, *supra* note 9, at 203 (2011).

<sup>27</sup> *See, e.g., supra* note 8 (views of abolitionists).

the plank was widely understood as being applicable only to areas (unlike the District) where slavery had not already attained legal existence.<sup>28</sup>

There is no reason to doubt that the 1860 plank used the concept of “due process” in the traditional ancient manner of Magna Carta, in order to insist that government officials can only deprive people of liberty if the deprivation is authorized by law.<sup>29</sup> Of course, an act of Congress unauthorized by the Constitution is not law, and therefore the U.S. Supreme Court explained in 1856 that a key test of due process is to, “examine the [C]onstitution itself, to see whether this process be in conflict with any of its provisions.”<sup>30</sup> Antebellum Republicans who disagreed about which constitutional provisions collectively barred territorial slavery nevertheless agreed that one of those provisions was the Due Process Clause, which thereby served as a kind of lowest common denominator.<sup>31</sup>

If the 1860 platform had employed due process in a substantive way, then its logic would have applied to the District too, where thousands of slaves resided. The fact that the due process plank did not refer to or affect the District thus confirms that substantive due process was not employed. The due process plank relied implicitly upon other constitutional material to prevent slavery from spreading where it did not already exist, in the same way that the plank was inexplicit about the constitutional authority by which the “Republican fathers” had abolished territorial slavery decades earlier.<sup>32</sup>

The 1860 due process plank mostly retained its form four years after the 1856 convention, which shows considerable devotion to the plank.<sup>33</sup> This part of the 1860 platform is often mistakenly cited

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<sup>28</sup> See, e.g., *infra* note 127 and accompanying text (Lyman Trumbull discusses this distinction in Congress).

<sup>29</sup> See Williams, *supra* note 21, at 434 (discussing interpretation of due process and Magna Carta in eighteenth century Britain).

<sup>30</sup> *Den ex dem. Murray v. Hoboken Land & Imp. Co. (Murray’s Lessee)*, 59 U.S. 272, 277 (1856). This case was decided on February 19, 1856. See CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 72 (1999). The first national Republican convention occurred four months later. See *supra* note 4.

<sup>31</sup> I am grateful to Eric Foner for suggesting that this mathematical analogy could make the sentence clearer, via private communication.

<sup>32</sup> See, e.g., U.S. CONST. art. IV, § 3 (“Congress shall have power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . .”).

<sup>33</sup> The 1860 plank is recited at text accompanying note 5 *supra*, and the 1856 plank is recited at text accompanying note 65 *infra*.

nowadays as evidence that antebellum Republicans supported the doctrine of substantive due process, and for that reason alone the 1860 platform is well worth considering in detail. Properly understood, the plank is impossible to reconcile with that doctrine.

To get a fuller sense of what the plank was about, it is necessary to consider the political and legal background just before the Civil War—that is the subject of Part II. Part III discusses how the plank was written so as to avoid intra-party controversy, including controversy about whether various other clauses of the Constitution forbade slavery in the District of Columbia. Part IV presents evidence that the plank refers only to areas where slavery lacked legal existence, rather than to areas like the District of Columbia where slavery already had legal existence. Part V describes the various constitutional clauses that implicitly undergird the plank, other than substantive due process, which the plank neither recognized nor endorsed. Part VI discusses abolitionists' criticisms of the 1860 platform, demonstrating that they were well aware that the District of Columbia was omitted. Part VII addresses the use of hortatory rather than mandatory language in the platform, such as use of the word "should" instead of "shall." Part VIII presents some brief conclusions.

## II. POLITICAL AND LEGAL BACKGROUND

The due process plank was central to the 1860 Republican platform, Abraham Lincoln pledged to uphold it, and he urged fellow Republicans to stick to it.<sup>34</sup> In those days, presidential candidates did not make speeches or actively campaign on their own behalf, and therefore party platforms mattered much more than they do now.<sup>35</sup> When the southern states seceded, it was in large part a reaction to the Republican policy implemented by the 1860 due process plank.<sup>36</sup> Much of the federal government's non-military legislation in the 1860s was pursuant to provisions of the 1860 platform,<sup>37</sup> which again shows that the platform was a seriously impactful document, analogous in some ways to the Declaration of Independence which it quoted. Four decades later, the 1860

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<sup>34</sup> See DAVID DONALD, *LINCOLN* 270 (1996).

<sup>35</sup> See HAROLD HOLZER, *LINCOLN PRESIDENT-ELECT* 14–15, 26 (2008) ("Prevailing political tradition called for silence from presidential candidates . . . in an era when party platforms still very much mattered.").

<sup>36</sup> BRIAN FARMER, *AMERICAN CONSERVATISM: HISTORY, THEORY, AND PRACTICE* 171 (2005).

<sup>37</sup> *THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 179 (Michael Kazin et al. eds., 2011).

platform was remembered this way:

The Republican party upon this platform entered and fought its great battle for human liberty. Because it waged a successful warfare it can hardly be said that the principles for which it fought were overthrown in the contest. The Republican party said the Constitution went to the territories, and carried liberty with it.<sup>38</sup>

The historical background of the due process plank is most easily understood by keeping in mind four separate events. In 1856, the Supreme Court decided its first major case about due process in *Murray's Lessee v. Hoboken Land*.<sup>39</sup> Later that year, the first Republican national convention was held in Philadelphia, resulting in a platform that included a due process plank. Then, in 1857, the Court decided a much more famous case involving due process: *Dred Scott v. Sandford*.<sup>40</sup> Lastly, in 1860, the Republicans' held their national convention in Chicago, where they modified the due process plank of four years earlier. The order of these four events is important, and each is worth considering in more detail.

A. *Murray's Lessee Decision in February 1856*

By 1856, the U.S. Supreme Court had said little about due process. Several state courts had used due process clauses (or similar "law of the land" clauses) of state constitutions to implement substantive principles of generality, impartiality, vested rights, or equality,<sup>41</sup> but those state court decisions met considerable

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<sup>38</sup> Charles E. Littlefield & J.B. Henderson, *The Insular Cases*, 15 HARV. L. REV. 281, 285 (1902).

<sup>39</sup> *Murray's Lessee*, 59 U.S. 272; *Cf.* *Bloomer v. McQuewan*, 55 U.S. 539, 553–54 (1853). Chief Justice Taney's brief remarks in *Bloomer* about due process were dicta, and moreover were correct; if Congress offers no compensation as required by the Fifth Amendment, and then takes property contrary to the Takings Clause, then that is a due process violation, but in a remedial rather than substantive sense. As the Court would later correctly explain in 1856, a process is not due process of law if it conflicts with *any* other provision of the Constitution. *See Murray's Lessee*, 59 U.S. at 277.

<sup>40</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857).

<sup>41</sup> When he introduced the Bill of Rights, Madison said that, "equality of mankind . . . is an absolute truth, yet it is not absolutely necessary to be inserted at the head of a Constitution." 1 *Annals of Congress* 454 (June 8, 1789). But this equality principle has been read into due process. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). *Bolling* could have and should have been decided on other grounds. *See* MICHAEL MCCONNELL, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 168 (Jack Balkin ed., 2001).

resistance.<sup>42</sup> Moreover, those state cases were decided in the context of state constitutions, which were substantially different from the federal one; the United States Constitution contains many distinctive clauses that are relevant to interpretation of the Due Process Clause. For example, the Supremacy Clause makes the “laws of the United States” part of the “law of the land”; also, the provisions of the Bill of Rights other than the Fifth Amendment are formulated as separate amendments so that the states could choose to reject them simultaneously with ratifying the Fifth Amendment. Additionally, the Fugitive Slave Clause shows that the framers and ratifiers used the words “due” and “law” even to accomplish what many of them realized was unjust.<sup>43</sup>

By 1856, there was not a single federal appellate substantive due process case, which speaks to the difference between the jurisprudence of the federal government as compared to the few state judicial decisions that had embraced the doctrine. Some Republicans did substantively interpret the word “law” as limiting what rules a legislature could enact.<sup>44</sup> However, that was not remotely the predominant antebellum view among Republicans or within the country as a whole.<sup>45</sup> If a legislative enactment met the definition of a “rule,” then it was very widely considered to be a “law,” unless it violated a constitutional provision.

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<sup>42</sup> See, e.g., *Hoke v. Henderson*, 15 N.C. 1 (1834), *overturned by Mial v. Ellington*, 134 N.C. 131 (1903). *Hoke* was the foremost such decision to date. See Williams, *supra* note 21, at 461. Years later, judges agreed that *Hoke* “stands out in strong contrast . . . to every published decision and opinion on the subject which we have ever seen.” *Conner v. Mayor of N.Y.*, 2 Sandf. 355, 373 (N.Y. Sup. Ct. 1849), *aff’d* 5 N.Y. 285 (1851). In 1843, a state court held that taking property for private roads violated due process. See *Taylor v. Porter*, 4 Hill 140, 145–46 (N.Y. Sup. Ct. 1843). That was overruled by constitutional change in 1846. See CHARLES MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865*, at 284 (2001). By 1856, the leading state substantive due process case was *Wynehamer v. People*, 13 N.Y. 378, 392–93 (1856). Courts in twelve states rejected it, as would the federal courts, and far fewer states accepted it than rejected it. See BERNARD STEINER, *LIFE OF ROGER BROOKE TANEY* 415 n.154 (1922); *Mugler v. Kansas*, 123 U.S. 623, 657, 669 (1887).

<sup>43</sup> See generally Andrew Hyman, *The Little Word “Due”*, 38 AKRON L. R. 1 (2005).

<sup>44</sup> See, e.g., Giddings, *infra* note 121.

<sup>45</sup> See *infra* notes 121 (Lincoln’s view) and 134 (McLean’s view); see also *Ogden v. Saunders*, 25 U.S. 213, 347 (1827) (Marshall, C.J., dissenting); THE FEDERALIST No. 62 (James Madison) (“Law is defined to be a rule of action, but how can that be a rule which is little known, and less fixed?”); WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER’S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY 7 (1847). In *Ogden*, Chief Justice Marshall, joined by Justice Story, wrote that the word “law” is defined as, “a rule of civil conduct prescribed by the supreme power in a state.” *Ogden*, 25 U.S. at 347. No justice disavowed that definition, which was a typical one. See *id.*

The 1856 United States Supreme Court case of *Murray's Lessee v. Hoboken Land* cited several of the state court cases that had employed substantive due process. But those state cases were cited only for the procedural notion that due process “generally implies and includes actor, reus, iudex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true.”<sup>46</sup>

*Murray's Lessee* was the leading antebellum case about due process, and was unanimous.<sup>47</sup> This opinion described a test for whether a process enacted by Congress is due process.<sup>48</sup> The Court said that the test “must be twofold,” rather than threefold or fourfold.<sup>49</sup> The twofold test in *Murray's Lessee* was as follows:

To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute [*sic*] 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.<sup>50</sup>

Justice Benjamin R. Curtis spoke for the Court in *Murray's Lessee*. The substantive matter in the case was “recovery of balances due to the government by a collector of customs,” and the procedural matter was whether a summary method of collection would suffice without a full trial.<sup>51</sup> The Court held that the summary method “cannot be denied to be due process of law” as applied to the corresponding substantive matter of the case.<sup>52</sup> There is no indication that the Court

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<sup>46</sup> *Murray's Lessee*, 59 U.S. at 280 (citations omitted). See generally *supra* note 42 (discussing some of the state cases). See also *infra* note 57 (discussing what the *Murray's Lessee* Court meant when it said that due process “generally implies and includes” various procedures). Notice that the due process plank only referenced due process in the Fifth Amendment, rather than referencing any similar clauses in state constitutions or state cases, and so the prevailing Republican understanding of due process was evidently guided by the former more than the latter.

<sup>47</sup> *Murray's Lessee*, 59 U.S. 272.

<sup>48</sup> *Id.* at 276–77.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 280.

<sup>52</sup> *Id.*

considered the substantive matter of the case to be part of the “process.”<sup>53</sup>

The first prong of the twofold test that the Court used in *Murray’s Lessee* (“We must examine the Constitution itself . . .”) had a firm foundation in the Fifth Amendment, given that the entire United States Constitution is part of the law of the land.<sup>54</sup> In this way, the Due Process Clause helps to effectuate the rest of the Constitution, not just by requiring that the executive branch refrain from depriving people of liberty without authorization, but also by requiring that Congress itself cannot give such authorization except in the form of a law that respects all of the rights enshrined in the Constitution.

The second *Murray’s Lessee* prong, which required the Court to look at old English law that settlers had brought to America, suggests that old processes would comply with due process, without forbidding alternative new processes.<sup>55</sup> Had the second *Murray’s Lessee* prong categorically insisted upon old processes, then it would have lacked the sort of firm foundation upon which the first prong rested, and would have amounted to a straitjacket preventing legislative innovation.<sup>56</sup> Pursuant to its second prong, the Court in *Murray’s*

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<sup>53</sup> The word “process” in the Due Process Clause had often been defined procedurally. See, e.g., JOHN BOUVIER, 2 A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION 373 (2d Edition 1843) (defining “process” as the “means or method of accomplishing a thing,” at the last full paragraph on the page).

<sup>54</sup> See *Murray’s Lessee*, 59 U.S. at 277. The Court stated that the words “due process of law” have the “same meaning” as the words by “the law of the land” in Magna Carta. *Id.* at 276. Cf. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 663 (1833) (Due Process Clause is “an enlargement of the language of Magna Carta”).

<sup>55</sup> The Court later said that “it by no means follows” from the second *Murray Lessee’s* prong that there can be no innovation. See *Hurtado v. California*, 110 U.S. 516, 528–29 (1884). The *Hurtado* Court claimed power to decide whether innovative statutes are valid. *Id.* at 537. That claim covered both procedure and substance. *Id.* at 533. Robert Yates foresaw that the Court would, “give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority.” Brutus, no. XI (January 31, 1788) in 2 THE COMPLETE ANTI-FEDERALIST 419–21 (Storing ed., 1981).

<sup>56</sup> Edward Coke said that “due process of law” is satisfied by following the “law of the land,” which he defined in turn as “common law, statute law, or custom.” See EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45–46 (1797). Notice that Coke included “statute law.” According to Justice Scalia, Coke believed that due process referred “to the customary procedures to which freemen were entitled by ‘the old law of England.’” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring). Indeed, Coke said that the words “due process” in a certain act were “declaratory of the old law of England.” See COKE,

*Lessee* listed several procedural features, and said that due process “generally implies and includes” them.<sup>57</sup> Like the seventeenth-century writings of the eminent English jurist Edward Coke (which the Court cited), the second *Murray’s Lessee* prong did not preclude statutory innovation.<sup>58</sup> That second prong basically counseled a review of history to see how similar matters had been handled in the past. Even if the second *Murray’s Lessee* prong had purported to prevent any statutory innovation,<sup>59</sup> still it applied to procedure rather than substance, which is evidenced by the second prong’s requirement that “modes of proceeding” must be considered.<sup>60</sup>

After describing its twofold test, the Court in *Murray’s Lessee* proceeded to apply the test in reverse order,<sup>61</sup> first reviewing the historical methods used to recover funds owed to the government, and then analyzing compatibility of the disputed summary process with various provisions of the Constitution. In that way, the historical

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*supra*, at 50. But Coke merely meant that the act he was talking about reiterated existing law, and Coke made this clear in his book’s introduction (which he called a “proeme”). See *id.* at Proeme (“[T]he prudent reader may . . . know whether the statute be introductory of a new law, or declaratory of the old . . . .”) The page in question is the seventh page of the proeme. *Id.*

<sup>57</sup> See *Murray’s Lessee*, 59 U.S. at 280 (due process “generally implies and includes. . . a trial according to some settled course of judicial proceedings”). The Court may have merely meant that general common law procedural principles apply unless altered by legislatures. See generally NATHAN DANE, 6 GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW §182 art. 5, 230 (1823) (when “a statute makes an offence, and is silent as to the mode of trial, it shall be by jury, according to the course of the common law”).

<sup>58</sup> Coke stated that at least one type of statutory innovation would conflict with Magna Carta’s “law of the land” clause. He wrote that, when a statute delegates excessive discretion to judges, then the resulting judicial fiats are not “laws” and so cannot be used to take property consistent with Magna Carta. See COKE, *supra* note 56, at 51; see also *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (“important subjects . . . must be entirely regulated by the legislature”). This non-delegation principle is also embodied in the clause vesting “all legislative powers” in Congress (and so it is subsumed in the first prong of *Murray’s Lessee*).

<sup>59</sup> Justice Curtis authored a circuit court opinion in 1852 that relied upon a “law of the land” clause in a state constitution, to prevent procedural innovation. See *Greene v. Briggs*, 10 F. Cas. 1135, 1140 (C.C.D.R.I. 1852) (No. 5,764). That decision encountered strong opposition, including from Horace Greeley (later a lead author of the 1860 platform), which may help to explain why Curtis’s *Murray’s Lessee* opinion was more restrained. See STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA 102 (2005).

<sup>60</sup> The Court said that it must look to ancient “settled usages and modes of proceeding.” *Murray’s Lessee*, 59 U.S. at 277. Those “settled usages” included substantive usages, which the Court examined to determine what corresponding modes of proceeding were applicable. *Id.*

<sup>61</sup> See G. EDWARD WHITE, HISTORY AND THE CONSTITUTION: COLLECTED ESSAYS 157 (2007).

review informed the compatibility analysis.

For present purposes, the *Murray's Lessee* opinion is not just important as court precedent, but also as an explanation of what Republicans thought about due process. There is nothing in the text or history of the 1860 due process plank that deviates from the non-substantive meaning of *Murray's Lessee*, *Coke*, and the Fifth Amendment.

*B. Republican Convention in June 1856*

As mentioned, the *Murray's Lessee* case was decided unanimously, and among those signing off on it was Justice John McLean, who was an active politician while serving on the Court.<sup>62</sup> A few months after *Murray's Lessee* was decided, Justice McLean was runner-up to John Fremont for the 1856 Republican presidential nomination (while Lincoln was runner-up for the 1856 vice-presidential nomination), and in that role McLean was particularly relevant to the development of the 1856 Republican platform.<sup>63</sup>

A former Pennsylvania congressman and state court judge named David Wilmot chaired the platform committee at the 1856 Republican convention in Philadelphia (he had become famous for introducing the “Wilmot Proviso” in Congress to limit slavery), and he presented to that convention a plank that would eventually become the basis for the similar due process plank at the 1860 convention.<sup>64</sup> The plank read as follows in 1856 (this can be compared to the shorter 1860 plank which is recited above in the Introduction):

*Resolved*, That with our Republican fathers we hold it to be a self-evident truth that all men are endowed with the inalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior designs of our Federal Government were to secure these rights to all persons within its exclusive jurisdiction—that as our Republican fathers, when they had abolished Slavery in all our National Territory, ordained that no person should be deprived of life, liberty, or property, without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing Slavery in the Territories of the

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<sup>62</sup> See FRANCIS WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT* 139–52 (1937).

<sup>63</sup> See *infra* note 129.

<sup>64</sup> HENRY WILSON, *RISE AND FALL OF THE SLAVE POWER IN AMERICA* 512 (1884).

United States by positive legislation, prohibiting its existence or extension therein. That we deny the authority of Congress, of a Territorial Legislature, of any individual or association of individuals, to give legal existence to Slavery in any Territory of the United States, while the present Constitution shall be maintained.<sup>65</sup>

In addition to Wilmot, the authors of the 1856 due process plank included Ohio Congressman Joshua Giddings.<sup>66</sup> Both Wilmot and Giddings supported McLean for president in preference to Fremont, who eventually lost the presidential election to James Buchanan.<sup>67</sup>

Among other things, the 1856 platform declared that Republicans were “opposed to the repeal of the Missouri Compromise” (this language was eventually removed by the authors of the 1860 platform).<sup>68</sup> By supporting reinstatement of the Missouri Compromise, Republicans in their 1856 platform suggested a willingness to allow continuance of slavery in some southern territory, meaning that they believed federal recognition and regulation of slavery did not necessarily violate the Due Process Clause. That compromise had, for example, enabled the territorial government of Arkansas to maintain slavery,<sup>69</sup> and in 1836 Arkansas became a slave

<sup>65</sup> *Republican National Convention*, N.Y. TIMES, June 19, 1856, at 1 (original emphasis). This was the platform’s second resolution. Some versions used “shall” instead of “should.” See PORTER & JOHNSON, *supra* note 1, at 27. The fourth resolution in 1856 mentioned due process too. *Id.* See generally *infra* note 116 (Bingham discussing due process violation in Kansas). Notice the lack of quotation marks in the 1856 plank, unlike in the 1860 plank.

<sup>66</sup> *The Republican Platform*, NATIONAL ERA, Jan. 1, 1857, at 2. Gideon Welles, Francis Blair, and John McLean helped write the plank. See JOHN NIVEN, GIDEON WELLES: LINCOLN’S SECRETARY OF THE NAVY 273 (1973); *infra* note 129 (McLean). Giddings said he wrote it. JOSHUA REED GIDDINGS, HISTORY OF THE REBELLION: ITS AUTHORS AND CAUSES 397–98 (1864). But Giddings sometimes magnified his own importance. See GIENAPP, *supra* note 4, at 335. Preston King and David Wilmot were also influential in writing the platform. *Id.* at 337. The 1856 plank was not the first of its kind; in 1852, for example, the fourth plank of the Free Democratic Platform cited the Due Process Clause in combination with a lack of federal enslavement power, and concluded that the federal government should stop perpetuating slavery. See PORTER & JOHNSON, *supra* note 1, at 18.

<sup>67</sup> *The Philadelphia Convention*, NATIONAL ERA at 102 (June 26, 1856). Other supporters of McLean over Fremont included John Bingham and Thaddeus Stevens. See WEISENBURGER, *supra* note 62, at 150–51.

<sup>68</sup> See, e.g., PORTER & JOHNSON, *supra* note 1, at 27 (preamble of 1856 platform). The Missouri Compromise barred territorial slavery in the old Louisiana Territory farther north than Tennessee, except in the planned state of Missouri. See Missouri Compromise, 3 Stat. 545 (1820).

<sup>69</sup> See ORVILLE TAYLOR, NEGRO SLAVERY IN ARKANSAS 23 (1958).

state.<sup>70</sup>

But the 1856 platform also declared that, “it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery.”<sup>71</sup> This language was also eventually removed by the authors of the 1860 platform.<sup>72</sup> This 1856 statement in the platform was evidently a response to the demise of the Missouri Compromise rather than an expression of constitutional principle, given the same platform’s support for the Missouri Compromise. But as we shall see, Republican opinions in 1856 were not monolithic.

C. *Dred Scott Decision in 1857*

Chief Justice Roger Taney used due process as part of his argument forbidding Congress to ban slavery in federal territory in the case of *Dred Scott v. Sandford*.<sup>73</sup> All justices in that case agreed that the Bill of Rights applied against the federal government throughout the country, including the territories.<sup>74</sup> Taney wrote the opinion of the Court, including this oft-quoted sentence:

And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.<sup>75</sup>

Taney did not spell out the source of his assumption that there had been “no offence against the laws” (which I call his “no-offense assumption”), but it is likely that he did not derive it from the Due Process Clause, given that due process was a relatively small part of his argument.<sup>76</sup> Later in his opinion, Taney made an enumerated powers argument, inferring from Article IV of the Constitution that, “[t]he only power conferred [upon Congress over slavery] is the power coupled with the duty of guarding and protecting the owner in

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<sup>70</sup> *Id.* at 46.

<sup>71</sup> *See, e.g.*, PORTER & JOHNSON, *supra* note 1, at 27 (third resolution of 1856 platform).

<sup>72</sup> *Id.* at 31–33.

<sup>73</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857).

<sup>74</sup> *See id.* at 614–15 (Curtis, J., dissenting). *See generally* Charles E. Littlefield & J.B. Henderson, *The Insular Cases*, 15 HARV. L. REV. 281 (1902).

<sup>75</sup> *Dred Scott*, 60 U.S. at 450.

<sup>76</sup> *See* DEAK NABERS, VICTORY OF LAW 103 (2006).

his rights.”<sup>77</sup> That strained inference from Article IV would explain his no-offense assumption. Alternatively, Taney might have meant that a valid territorial emancipation law would have to offer compensation to the slave-owner per the Takings Clause.<sup>78</sup> Either way, Taney’s statement about due process relied upon a conflict between congressional action and other material in the Constitution, and the summary paragraph toward the end of his opinion did not broadly construe or even mention the Due Process Clause.<sup>79</sup> Thus, Taney did not reject the non-substantive *Murray’s Lessee* test, and the dissenting justices in *Dred Scott* would likely have criticized such a rejection if it had occurred.

The dissenting opinion of Justice Curtis did not employ substantive due process either. On the contrary, Curtis placed discretion squarely with Congress:

The purpose and object of the [territories] clause . . . being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition comes within the known and recognized scope of that purpose and object. . . . Regulations must be needful; but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction.<sup>80</sup>

Curtis was a Whig rather than a Republican, but his *Dred Scott* dissent was widely accepted by Republicans, perhaps even more than McLean’s dissent, as the official response to Taney’s opinion.<sup>81</sup> Curtis personally supported abolition of slavery, but like most Republicans

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<sup>77</sup> *Dred Scott*, 60 U.S. at 452. See also DON FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 381 (1978) (Taney relied on a delegation of powers argument distinct from a due process argument).

<sup>78</sup> See U.S. CONST. amend V. See also PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 40 (1997). I no longer believe that Taney invoked substantive due process, given that he did not suggest his no-offense assumption was a consequence of the Due Process Clause. Doubtless, Taney would have employed substantive due process if he felt that it was a legitimate argument to make. Had Taney employed that doctrine, then it would be difficult to now avoid concluding that his opinion (with all the others in the case) demolished the precedent of *Murray’s Lessee* by not even mentioning it.

<sup>79</sup> See FEHRENBACHER, *supra* note 77, at 380–81 (the summary paragraph to which Fehrenbacher refers is the paragraph by Taney that begins, “Now, as we have already said in an earlier part . . .”).

<sup>80</sup> *Dred Scott*, 60 U.S. at 615–16 (Curtis, J., dissenting). Curtis did discuss due process, but only to infer from history that Taney was misapplying it to similar facts, rather than to describe what due process meant. *Id.* at 624–27.

<sup>81</sup> See DON FEHRENBACHER, SLAVERY, LAW, AND POLITICS 214 (1981).

he did not reflexively deny its constitutionality.<sup>82</sup> Curtis's dissent did not mention *Murray's Lessee*, likely because he believed that no governmental deprivation of property occurred in the *Dred Scott* case, which meant that there was no due process requirement.<sup>83</sup>

Justice McLean was the only dissenter in *Dred Scott* other than Curtis. McLean's opinion, like Taney's opposing opinion, asserted that the finite power delegated to Congress by Article IV meant that congressional power over the territories was substantively limited. While Taney argued that Congress could not institute *freedom* there, McLean argued that Congress could not institute *slavery* there:

[T]here is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the Federal powers.<sup>84</sup>

This was an enumerated powers argument, rather than a substantive due process argument. McLean's dissent did not mention *Murray's Lessee* because he did not mention due process at all. No judge in

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<sup>82</sup> The 1860 GOP platform affirmed the constitutionality of slavery within the individual states: "the maintenance inviolate of the . . . right of each state, to order and control its own domestic institutions according to its own judgment exclusively, is essential. . . ." See PORTER & JOHNSON, *supra* note 1, at 32. See generally Russell v. Barney, 21 Fed. Cas. 38, 40 (C.C.N.D. Ill. 1855) (Justice McLean holding that the Due Process Clause is "not obligatory on the states").

<sup>83</sup> See *Dred Scott*, 60 U.S. at 625 (Curtis, J., dissenting) (writing that "the status of slavery must depend on the municipal law"). See also BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 103 (2006). Taney's opinion in *Dred Scott* might have cited *Murray's Lessee* if that earlier decision had been mentioned by the dissents, or if Taney's due process discussion had been longer than a single sentence. See DON FEHRENBACHER, *supra* note 77, at 678 n.24 (1978).

<sup>84</sup> *Dred Scott*, 60 U.S. at 542–43 (McLean, J., dissenting). McLean also said that Congress had discretion whether or not to prohibit slaves "from becoming settlers" in an otherwise free territory, and said that it would be satisfactory for Congress to allow a slave or free territory to remain so, "until the people form a State Constitution." *Id.* McLean had made these arguments before. See, e.g., *infra* text accompanying notes 132 and 167.

*Dred Scott* relied in any way upon substantive due process.

*D. Republican Convention in 1860*

By 1860, there were several thousand slaves in the District of Columbia,<sup>85</sup> while fewer than one hundred were counted elsewhere in exclusive federal jurisdictions.<sup>86</sup> Once Republicans won the 1860 election and had control of the White House and Congress, war broke out in 1861, and in 1862 Republicans in Congress banned slavery in the District before proceeding with emancipation everywhere else.<sup>87</sup> Given the Republican desire to eliminate federal support for slavery in the District of Columbia, the omission of the District from the 1860 due process plank has added significance, and shows that they believed slavery in the District was a statutory rather than constitutional matter.

The 1860 Republican convention was not a homogeneous meeting of radical abolitionists, and their platform was not intended for such an audience. The convention was united regarding non-extension of slavery, but divided on abolition where slavery already existed.<sup>88</sup> Radicalism on slavery meant defeat at the polls, and the moderates sought to contain the radicals while retaining their support.<sup>89</sup> Historians have disagreed about whether the 1860 platform was a defeat of the radicals over the conservatives, or vice

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<sup>85</sup> 1 FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, at 165 (Ira Berlin et al. eds., 1982) (“The commissioners awarded compensation for a total of 2,989 slaves.”).

<sup>86</sup> *The Progress of Population*, N.Y. TIMES, May 5, 1861 at 4 (the 1860 Census counted 3,181 slaves in the District of Columbia, but less than one hundred in the territories). Of course, those numbers do not address the potential that existed for future slave population. Nor did the 1860 census apparently count people in the unorganized territory that would later become Oklahoma, where thousands of African Americans were enslaved by Native Americans. See, e.g., ARRELL GIBSON, THE HISTORY OF OKLAHOMA 60 (1984).

<sup>87</sup> See Act of Apr. 16, 1862, ch. 54, 12 Stat. 376. Then Congress banned slavery in the territories, but not in federal forts and dockyards. See Act of July 1, 1862, ch. 119, 12 Stat. 432; FONER, *supra* note 9, at 203. Then Lincoln declared freedom in rebel states. See *Abraham Lincoln, Proclamation* (September 22, 1862), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 96 (James D. Richardson ed., 1897). Congress compensated owners in the District, but not in the territories. See CONG. GLOBE, 37th Cong., 2nd Sess., 2052–54 (May 9, 1862). Compensation for emancipation of slaves is addressed in the Fourteenth Amendment. See U.S. CONST. amend XIV, § 4.

<sup>88</sup> HENRY HARRISON SMITH, ALL THE REPUBLICAN NATIONAL CONVENTIONS FROM PHILADELPHIA, JUNE 17, 1856, at 19 (1896) (quoting John Kasson).

<sup>89</sup> EDWARD YOUNGER, JOHN A. KASSON: POLITICS AND DIPLOMACY FROM LINCOLN TO MCKINLEY 94–95 (1955).

versa.<sup>90</sup> Doubtless the truth is different for different planks.

The due process plank was not merely a rhetorical flourish<sup>91</sup> or unnecessary argumentation.<sup>92</sup> The subcommittee that wrote the 1860 due process plank included lawyers, judges, and elected officials; skilled wordsmiths, “men opposed only to the extension of slavery, but also abolitionists.”<sup>93</sup> According to John Hay and John Nicolay, who were assistants to Abraham Lincoln, the platform of 1860 was “framed with remarkable skill.”<sup>94</sup> Political motivations were very much in play, one of which was to inspire northerners who were reluctant to take an anti-slavery stand unless those northerners were convinced that the Constitution was at least in some way anti-slavery.<sup>95</sup>

David Wilmot attended the 1860 convention, where he explained: “It is our purpose to restore the Constitution to its original meaning; to give to it its true interpretation; to read that instrument as our fathers read it. (Applause.)”<sup>96</sup> According to historians, there is “no evidence that the Fifth Amendment was intended as a prohibition of the existence of slavery anywhere within the national

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<sup>90</sup> ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 132 (1995).

<sup>91</sup> Cf. Allan Nevins, *The Constitution, Slavery, and the Territories*, in *THE GASPAR G. BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES, 1940–1950*, at 98 (1953) (noting that “recent scholars” have generally viewed platforms “as window-dressing or stage-scenery”).

<sup>92</sup> Cf. Thomas Ewing, *Speech of the Hon. Thomas Ewing at Chillicothe, Ohio*, *THE WORLD: NEW YORK*, Oct. 3, 1860, at 6 (“It seems to be there for no other purpose than to give opponents [of slavery] advantage in the argument.”). Ewing formerly was a cabinet secretary, and U.S. Senator. WILLIAM HENRY SMITH, *HISTORY OF THE CABINET OF THE UNITED STATES OF AMERICA, FROM PRESIDENT WASHINGTON TO PRESIDENT COOLIDGE* 202 (1925).

<sup>93</sup> See YOUNGER, *supra* note 89, at 102. The subcommittee had five official members. See SMITH, *supra* note 88, at 19. They were: William Jessup (chair), a former state judge in Pennsylvania; Horace Greeley, founder of the *New York Tribune*; John Kasson, an Iowa lawyer who later served in Congress; Frederick Tracy, a county attorney from San Francisco; and Austin Blair, a lawyer, prosecutor, and legislator who later was Governor of Michigan. Kasson was the lead author. See SMITH, *supra* note 88, at 18. Others involved with the subcommittee were Carl Schurz, William Otto, Gustave Koerner, and Eli Thayer. See YOUNGER, *supra* note 89, at 404 n.22.

<sup>94</sup> JOHN NICOLAY AND JOHN HAY, *2 ABRAHAM LINCOLN: A HISTORY* 267 (1909). Later, Hay served as Secretary of State, and Nicolay served as marshal of the U.S. Supreme Court.

<sup>95</sup> See FONER, *supra* note 90, at 85.

<sup>96</sup> CHARLES GOING, *DAVID WILMOT, FREE SOILER: A BIOGRAPHY OF THE GREAT AUTHOR OF THE WILMOT PROVISIO* 530 (1924). Likewise, in 1856, Wilmot urged Pennsylvania Republicans to revere “the Constitution as interpreted by its framers.” *Id.* at 482.

jurisdiction.”<sup>97</sup> Only in combination with other clauses, such as the Territories Clause, could the Due Process Clause contribute to prohibiting the existence of slavery.

Once Lincoln was nominated, some conservative Republicans asserted that the due process plank had erroneously denied congressional authority regarding the territories.<sup>98</sup> However, those conservatives did not go so far as to suggest that the plank’s denial of congressional authority had been entirely based on due process, much less that the denial applied to the District.<sup>99</sup>

### III. WRITING THE PLANK SO AS TO AVOID INTRA-PARTY CONTROVERSY

The Republican platform of 1860 “was unusually successful in avoiding points of controversy among its followers,” according to Hay and Nicolay.<sup>100</sup> Diversity of opinion helps to explain why the constitutionality of slavery in the District was not disputed in the platform.

#### A. Abraham Lincoln’s Views

Lincoln’s opinion warrants special attention, given his lead role in 1860. Directly giving his opinion about the District of Columbia, he said that slavery there was constitutional, though deplorable. He put it this way on August 27, 1858:

I do not stand today pledged to the abolition of slavery in the District of Columbia. . . . I should be exceedingly glad to see slavery abolished in the District of Columbia. . . . [I]t would be upon these conditions. *First*, that the abolition should be gradual. *Second*, that it should be on a vote of the majority of qualified voters in the District, and *third*, that compensation should be made to unwilling owners.<sup>101</sup>

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<sup>97</sup> See FONER, *supra* note 90, at 85.

<sup>98</sup> See Ewing, *supra* note 92; CONG. GLOBE, 36th Cong., 2nd Sess., 1385 (March 2, 1861) (Rep. Baker). Those speeches by Ewing and Baker suggest that the word “authority” in the plank meant constitutional power rather than moral authority. *Cf. Manuscript Draft of the Republican National Convention of 1860*, Kasson Papers (State Historical Society of Iowa) (the words “constitutional authority” were shortened to “authority”).

<sup>99</sup> *Id.*

<sup>100</sup> See NICOLAY & HAY, *supra* note 94, at 267.

<sup>101</sup> RICHARD STRINER, FATHER ABRAHAM: LINCOLN’S RELENTLESS STRUGGLE TO END SLAVERY 79 (2006) (describing a debate between Lincoln and Douglas in Freeport, Illinois). Gradual abolition typically meant slaves born after a certain date could be free. Lincoln had worked on this in Congress. See HARLAN HORNER, LINCOLN AND GREELEY 54 (1954).

Lincoln's notes written a few weeks later confirm that he had a non-substantive understanding of due process with regard to deprivations of property, and by extension deprivations of liberty:

The Constitution itself impliedly admits that a person may be deprived of property by "due process of law," and the Republicans hold that if there be a law of Congress or territorial legislature telling the slaveholder in advance that he shall not bring his slave into the Territory on pain of forfeiture, and he still will bring him, he will be deprived of his property in such slave by "due process of law."<sup>102</sup>

His continued public and private statements about the District show that Lincoln always held to his non-substantive view.<sup>103</sup> He did not dispute that the Bill of Rights restrained the federal government both inside the states and outside.<sup>104</sup> It appears that the only passage that anyone has ever relied upon to suggest that Lincoln actually sympathized with substantive due process is the following from an 1854 speech:

It is said that the slaveholder has the same [political] right to take his negroes to Kansas that a freeman has to take his hogs or his horses. This would be true if negroes were property in the same sense that hogs and horses are. But is this so? It is notoriously not so.<sup>105</sup>

According to Professor Mark Graber, this passage shows Lincoln's position was that men had a substantive due process right to take property (like hogs) into territories.<sup>106</sup> But Professor Graber muddles the distinction between different types of rights. The quoted speech explicitly distinguished between legal, social, political, natural, and

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<sup>102</sup> *Fragment: Notes for Speeches*, 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 97, 101 (Roy P. Basler ed., 1953). These notes from 1858 were likely not spoken. The debater who opened set the agenda. THE LINCOLN-DOUGLAS DEBATES xxiv (Davis and Wilson eds., 2008).

<sup>103</sup> See *Debate at Quincy, Ill.* (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 255 (Roy P. Basler ed., 1953). See also MICHAEL BURLINGAME, 1 ABRAHAM LINCOLN: A LIFE 343 (2008); Letter from Lincoln to John Gilmer (Dec. 15, 1860), in LINCOLN ON RACE AND SLAVERY 212 (Henry Gates ed., 2009). Lincoln approved emancipation in D.C. See *Emancipation in the District—Mr. Lincoln's Opinions*, N.Y. TIMES, Apr. 15, 1862, at 4 (Lincoln declined "vetoing an act of Congress on other than Constitutional grounds").

<sup>104</sup> See Charles E. Littlefield & J.B. Henderson, *The Insular Cases*, 15 HARV. L. REV. 281, 283 (1901).

<sup>105</sup> Abraham Lincoln, *Speech at Springfield, Illinois* (Oct. 4, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245 (Roy P. Basler ed., 1953) (brackets in original). Lincoln was still a Whig. See FONER, *supra* note 9, at 63, 69 (on October 16, 1854, Lincoln identified himself as "an old Whig").

<sup>106</sup> See GRABER, *supra* note 3, at 63.

constitutional rights, without classifying this one as a constitutional right much less as a substantive due process right. Lincoln covered this same topic repeatedly,<sup>107</sup> and carefully contrasted different types of rights.<sup>108</sup> Despite hating slavery, he did not believe that governmental maintenance of slavery necessarily violated due process. As one author has put it, “Lincoln’s prime directive was how to rid the nation of slavery without undermining the nation’s system of self-government.”<sup>109</sup>

As in the District of Columbia, slavery was common within the unorganized tract of federal land that would later become the state of Oklahoma.<sup>110</sup> Lincoln discussed this during an 1854 speech, before he joined the Republican Party:

[W]e never attempted to prohibit slavery as to it. I wish particular attention to this. It adjoins the original Missouri Compromise line, by its northern boundary; and consequently is part of the country, into which, by implication, slavery was permitted to go, by that compromise. . . . In all our struggles to prohibit slavery within our Mexican acquisitions, we never so much as lifted a finger to prohibit it, as to this tract. Is not this conclusive that at all times, we have held the Missouri Compromise as a sacred thing; even when against ourselves, as well as when

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<sup>107</sup> Abraham Lincoln, *Speech* (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 264 (Roy P. Basler ed., 1953) (“I admit this is perfectly logical, if there is no difference between hogs and negroes.”); Abraham Lincoln, *Speech* (Oct. 7, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 226 (Roy P. Basler ed., 1953) (“That is perfectly logical if the two species of property are alike.”).

<sup>108</sup> See, e.g., Abraham Lincoln, *Inaugural Address* (Mar. 4, 1861), in RICHARD GILDER AND DANIEL FISH, 6 COMPLETE WORKS OF ABRAHAM LINCOLN 169 (1905) (disclaiming a “lawful right” to interfere with slavery in southern states though slavery “is wrong”).

<sup>109</sup> Lucas E. Morel, *Abraham Lincoln: The Better Angel of Our Nature*, 29 J. ABRAHAM LINCOLN ASS’N 51, 52 (2008). Before the Civil War, Lincoln and most other leading Republicans understood that slavery inherently deprived people of liberty, in particular the God-given liberty that the Declaration of Independence had famously invoked. See ALEXANDER TESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 138 (2012). Years later, Lincoln reiterated that people like himself who “declare for liberty . . . mean for each man to do as he pleases with himself and the product of his labor . . . .” See FONER, *supra* note 9, at 276 (describing Lincoln’s 1864 speech at a Sanitary Fair in Baltimore). What Lincoln said is as important as what he did not say; Lincoln did not claim that the Due Process Clause declares for liberty, or that “due process” should be redefined, or that the God-given liberty to do as one pleases with one’s self and the product of one’s labor is the only liberty worth recognizing. See *id.*

<sup>110</sup> See GIBSON, *supra* note 86, at 60.

for us?<sup>111</sup>

Lincoln made this Peoria speech shortly after the Kansas-Nebraska Act of May 1854 had virtually nullified the Missouri Compromise,<sup>112</sup> and he evidently saw nothing unconstitutional about permitting slavery in the Oklahoma tract, even though he deplored it. Four years later (by which time the Missouri Compromise had been attacked in *Dred Scott*), Lincoln was echoing the 1856 Republican platform: “I am impliedly, if not expressly, pledged to a belief in the *right* and *duty* of Congress to prohibit slavery in all the United States Territories.”<sup>113</sup> The part of the 1856 plank that he was echoing was not the due process plank, however,<sup>114</sup> and there is no indication that Lincoln ever believed he had advocated anything unconstitutional in his 1854 Peoria speech.

#### B. John Bingham’s Views

Some Republican leaders of that era did believe that federally-maintained slavery in the District was unconstitutional. One particularly relevant example is Ohio Congressman John Bingham, later the lead author of the Fourteenth Amendment.

Bingham said that the Due Process Clause applied in full force to protect all persons in the District, but he cited that clause in combination with other substantive clauses to argue for the unconstitutionality of slavery.<sup>115</sup> In other words, Bingham was reasoning just as the United States Supreme Court had instructed in 1856 (“examine the Constitution itself, to see whether this process be in conflict with any of its provisions”).<sup>116</sup>

For example, in 1857, Bingham cited the Due Process Clause in

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<sup>111</sup> Abraham Lincoln, *Speech at Peoria, Illinois* (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 258 (Roy P. Basler ed., 1953). The Missouri Compromise is discussed *supra* at note 68.

<sup>112</sup> Kansas-Nebraska Act of May 30, 1854, ch. 59, 10 Stat. 277.

<sup>113</sup> *Debate at Freeport, Illinois* (Aug. 27, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 40 (Roy P. Basler ed., 1953) (emphasis in original).

<sup>114</sup> See *infra* note 162 (quoting third resolution of 1856 platform).

<sup>115</sup> See Stephen Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. C.R. L.J. 105, 131–32, 144–45 (1995) (discussing various speeches by Bingham).

<sup>116</sup> See *Den ex dem. Murray v. Hoboken Land & Imp. Co. (Murray’s Lessee)*, 59 U.S. 272, 277 (1856). In 1856, Bingham decried an act in Kansas Territory that “abridges freedom of speech” and so he aptly inferred a due process violation. See CONG. GLOBE, 34TH CONG., 1ST SESS., 124 App. (1856). This matter appears in the fourth resolution of the 1856 platform. See PORTER & JOHNSON, *supra* note 1, at 27–28.

combination with the Titles of Nobility Clause against slavery.<sup>117</sup> Further, in 1862, he cited the Due Process Clause in combination with the Privileges and Immunities Clause against slavery.<sup>118</sup> In the latter speech, he urged legislation to free “all *American citizens* held to service or labor within the District,” in preference to legislation aimed more broadly at freeing “all *persons*” held as slaves in the District.<sup>119</sup> In these speeches, Bingham’s interpretation of the Due Process Clause was orthodox and non-substantive, though he had an unorthodox interpretation of the Titles of Nobility Clause and the Privileges and Immunities Clause.<sup>120</sup> As for Bingham’s belief that governmental maintenance and enforcement of slavery in the District deprived people of liberty (with or without due process of law), that belief seems to have been undisputed by Republicans, including Lincoln.

After the Civil War, Bingham said that the word “law” in the Due Process Clause means “the perfection of human reason,” but in context he was seeking more congressional power to perfect state law,

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<sup>117</sup> See U.S. CONST. art. I, § 9 (Title of Nobility Clause); CONG. GLOBE, 34TH CONG., 3D SESS., 140 App. (1857). Two years later, Bingham criticized an Oregon law that gave legal aliens the right to vote notwithstanding that the Constitution only allows citizens to vote; he contrasted that citizenship requirement with the protection that the Due Process Clause and Takings Clause collectively provide for any “person,” not merely any “citizen.” See CONG. GLOBE, 35TH CONG., 2D SESS., 982–83 (Feb. 11, 1859). As usual, he did not cite the Due Process Clause all by itself.

<sup>118</sup> U.S. CONST. art. IV, § 2 (Privileges and Immunities Clause); CONG. GLOBE, 37TH CONG., 2D SESS., 1637–39 (1862).

<sup>119</sup> CONG. GLOBE, 37TH CONG., 2D SESS., 1637–39 (1862) (emphasis added).

<sup>120</sup> The orthodox view of the Privileges and Immunities Clause was that it did not limit how a state treats its own citizens. See, e.g., *Magill v. Brown*, 16 F. Cas. 408, 420 (C.C.E.D. Pa. 1833) (Justice Baldwin called it a “grant by the people of the state in convention, to the citizens of all the other states of the Union, of the privileges and immunities of the citizens of this state”). This clause did not protect natural rights even when those rights were listed in state constitutions, except insofar as such rights were already enforceable by the state’s own citizens. See generally Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1188 (2009) (noting that “any privileges a state granted to its citizens in vindication of those [natural] rights had to be extended to visitors”). When a natural right was enforceable by certain persons, it was often deemed a “privilege.” See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 159–61 (1st ed., 1765) (stating that legislators have “privilege of speech”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 863 (1833) (same). Vindication of a natural right is deemed a “privilege” by the Constitution. See U.S. CONST. art. I, § 9 (Suspension Clause protects liberty). The last (supplementary) resolution at the 1860 convention cited violation of the Privileges and Immunities Clause, with regard to men who had been driven out of their adopted states on account of their opinions. See SMITH *supra* note 88, at 23; cf. PORTER & JOHNSON, *supra* note 1, at 33 (the platform did not include this resolution).

rather than suggesting the clause gives to the judiciary power to strike enactments that the judges deem imperfect.<sup>121</sup> Bingham believed that the Due Process Clause applies to any “person,” and that it consequently applies to rich and poor alike, to weak and strong, to citizen and non-citizen, et cetera.<sup>122</sup> Instead of following from substantive due process, this aspect of the clause apparently flows from its plain text, which does not include any limits as to the type of “person.”

C. *Other Divergent Views About Slavery in District of Columbia*

David Wilmot, who presented the 1856 version of the plank to the Republican convention in Philadelphia, and who also spoke at the 1860 convention in Chicago, took the position that Congress possessed discretion to either make slavery legal or illegal in the District. For example, Wilmot said in 1849 that slavery would “remain perpetual” in the District absent congressional action, which could be taken or not taken as a matter of “propriety or policy.”<sup>123</sup>

Thus, there were diverging opinions regarding whether governmental maintenance of slavery in the District was constitutional; Lincoln and Wilmot were among those who said it was, while Bingham was among those who said it was not. The differing opinions of some other leading Republicans of that era are addressed elsewhere in this Article. That diversity of opinion helps to explain why slavery in the District was not explicitly discussed in the 1860 platform, though the implication of the platform was that government-supported slavery was not an inherent due process violation. For the platform to explicitly discuss slavery in the territories was unproblematic and unavoidable, given the high profile

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<sup>121</sup> See CONG. GLOBE, 39TH CONG., 1ST SESS., 1094 (1866). The pending constitutional amendment said: “Congress shall have power to make all laws which shall be necessary and proper to secure . . . equal protection in the rights of life, liberty, and property.” *Id.* at 806, 813. See generally PHILLIPS, *supra* note 45, at 7 (using a definition of civil law as “what the legislature deems right”). See also Abraham Lincoln, *Inaugural Address* (Mar. 4, 1861), in 6 RICHARD GILDER AND DANIEL FISH, COMPLETE WORKS OF ABRAHAM LINCOLN 169 (1905) (“[T]he intention of the lawgiver is the law.”). Joshua Giddings felt differently, believing that gross injustice is not law. See Joshua Giddings, *Political, Mr. Giddings to Mr. Corwin*, N.Y. TIMES, Aug. 6, 1859 (“[I]t is no law . . .”). Giddings likewise wrote: “the murder or enslavement of the humblest of the human family is not merely unjust, but criminal . . .” Letter from Joshua Giddings to Thomas Ewing (Nov. 7, 1860), in GEORGE WASHINGTON JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 383 (1892).

<sup>122</sup> CONG. GLOBE, 37TH CONG., 2ND SESS., 1638 (1862).

<sup>123</sup> See GOING & WILMOT, *supra* note 96, at 336.

of the *Dred Scott* case, and given the Republican emphasis on halting the spread of slavery rather than uprooting it. The 1860 platform committee's desire to avoid intra-party controversy was intense, and so they would have avoided the controversial doctrine of substantive due process, if indeed they were aware of it, especially because invoking that doctrine would have pleased only a small minority while stirring up trouble about the status of slavery in the District.<sup>124</sup>

#### IV. PLANK REFERS TO AREAS WHERE SLAVERY LACKED LEGAL EXISTENCE

The plank's omission of the District of Columbia was related to the District not being "free soil." In the eighteenth century, the founders had banned slavery in the then-existing territories, as the due process plank explicitly recounted, but had not banned slavery in the area of the District of Columbia.<sup>125</sup> Ergo, the 1860 plank did not oppose slavery in the District, which was not free soil.

The platform's treatment of the District was addressed in Congress by Lyman Trumbull, a Republican Senator from Illinois who would later co-author the great Thirteenth Amendment that banned slavery nationwide.<sup>126</sup> Trumbull explained in 1859 that the due process plank of the 1856 platform had not called into question the constitutionality of slavery in the District of Columbia:

He wanted to know if the slaves are free in the District of Columbia by this platform. No, sir . . . . There may be slavery in a country which does not belong to the United States; the United States may acquire that country, and may not abolish slavery, because the right to hold slaves existed when the country was acquired; but it does not follow that if the country was free when we acquired it, men could afterwards have property in slaves in it; and that is the distinction.<sup>127</sup>

Statements like this one by Trumbull confirm that no substantive due process doctrine was actually endorsed or tolerated in either the 1856 or the 1860 versions of the plank.

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<sup>124</sup> See FONER, *supra* note 90, at 43. The substantive interpretation of due process was usually viewed as absurd by antebellum Republicans, although it had a following within a faction of radical abolitionists. *Id.*

<sup>125</sup> See, e.g., JAN GEISLER, *THE CONCEPT OF FREEDOM AND EQUALITY IN THE AMERICAN CONSTITUTION* 68 (2008).

<sup>126</sup> See, e.g., HORACE WHITE, *THE LIFE OF LYMAN TRUMBULL* 221–25 (1913).

<sup>127</sup> CONG. GLOBE, 36TH CONG., 1ST SESS., 57–58 (1859). The plank that Trumbull was discussing can be found in the text accompanying note 65 *supra*.

As early as 1847, David Wilmot equated extension of slavery into free territory with “giving legal existence to slavery,” which is the same phraseology of the 1856 and 1860 planks.<sup>128</sup> In other words, maintaining slavery was a different issue from giving slavery existence, according to people like Wilmot, and the due process plank only targeted the latter.

Evidently, Trumbull’s and Wilmot’s position paralleled that of the 1856 Republican presidential candidate (and U.S. Supreme Court Justice) John McLean, who was deeply involved in developing the 1856 platform.<sup>129</sup> McLean was familiar with the 1856 platform committee members and vice versa.<sup>130</sup> He had written in 1847 and again in 1856 that Congress lacked complete control over territorial slavery, and that Congress had no power to establish territorial slavery where it did not already exist.<sup>131</sup> But McLean also wrote that Congress could provide for the administration of justice among the settlers (and consequently prohibit slavery), and that Congress could also recognize and regulate pre-existing territorial slavery.<sup>132</sup> McLean consistently said that Congress had some power to legislate about territorial slavery.<sup>133</sup> In 1856, McLean publicly wrote to Senator Lewis

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<sup>128</sup> JONATHAN EARLE, *JACKSONIAN DEMOCRACY & THE POLITICS OF FREE SOIL, 1824–1854*, at 138 (2004). Wilmot asked in 1847, “[s]hall the government of this Republic, by the extension of the Missouri Compromise into free territory, give legal existence to slavery?” *Id.*

<sup>129</sup> The Republicans’ national convention was from June 17–19, 1856. On June 11, McLean outlined a platform. See WEISENBURGER, *supra* note 62, at 149. He wanted the Missouri Compromise to be restored, the constitutional rights of both free and slave states to be preserved, and “no slavery to be instituted into free territory.” See Reel 11, John McLean papers, Manuscript Division, Library of Congress, Washington D.C.

<sup>130</sup> See GIENAPP, *supra* note 4, at 337.

<sup>131</sup> *Id.* at 312.

<sup>132</sup> See John McLean, *Has Congress Power to Institute Slavery?*, DAILY NAT’L INTELLIGENCER, May 15, 1856, at 2. An excerpt follows:

[Congress] may . . . provide for the administration of justice among the settlers, [but] it does by no means follow that they may establish slavery. . . . In the Territories of Louisiana and Florida, Congress recognized, and to a limited extent regulated slavery. But, as before remarked, slavery existed in those Territories at the time they were ceded to the United States. . . .

*Id.* This same essay by McLean had been published anonymously in 1847. *Has Congress Power to Institute Slavery?*, DAILY NAT’L INTELLIGENCER, May 22, 1847, at 3. See also 29 THE FRIEND 306–07 (1856).

<sup>133</sup> Cf. FEHRENBACHER, *supra* note 77, at 143–44. According to Fehrenbacher, by the time of the *Dred Scott* case, McLean had altered his earlier view that Congress had only limited power to legislate concerning territorial slavery, and Fehrenbacher says McLean’s *Dred Scott* dissent agreed with an opinion by Chief Justice John Marshall

Cass that Congress had discretion to either maintain or forbid slavery in a territory, as long as Congress did not establish it in the first place:

You may recollect that I have, in conversation with you, often said that Congress, having the power to establish a Territorial Government, might, in the exercise of a police power, *prohibit* slavery, although they had no constitutional power to *institute* it.<sup>134</sup>

McLean's position regarding territorial slavery was based upon the limited reach of the Territories Clause.<sup>135</sup> This was an enumerated powers argument, not a due process argument. As to the constitutionality of slavery in the District of Columbia, McLean wrote that it had legally existed when the District came under federal control, and, therefore, it never arose as a constitutional issue.<sup>136</sup>

Thus, up until the first Republican national convention in 1856, McLean's position about slavery within federal jurisdiction was consistent over time, and matched Trumbull's explanation of the 1856 due process plank. For them, the due process plank's denial of federal authority "to give legal existence to slavery in any territory of the United States" was inapplicable to locations where slavery already had legally existed when those places entered into exclusive federal jurisdiction. McLean's dissent in *Dred Scott* took a similar approach.<sup>137</sup>

Another key player was Governor Salmon P. Chase of Ohio.

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according to which congressional power over the territories was unquestioned. *Id.* at 144. But Fehrenbacher missed the mark here; McLean continued to assert in his *Dred Scott* opinion that Congress had no power to "make either white or black men slaves," and McLean added that Chief Justice Marshall's opinion to the contrary had been "inadvertently uttered." *Dred Scott v. Sandford*, 60 U.S. 393, 542 (1857) (McLean, J., dissenting).

<sup>134</sup> Letter from John McLean to Lewis Cass (May 13, 1856), in 29 THE FRIEND 307 (1856) (emphasis in original). Generally speaking, McLean believed that judges and jurors should follow laws including ones they believe to be wrong. See *Giltner v. Gorham*, 10 F. Cas. 424, 432 (C.C.D. Mich. 1848) ("However unjust and impolitic slavery may be . . . you are sworn to decide this case according to law."); *Jones v. Van Zandt*, 13 F. Cas. 1047, 1048 (C. C. D. Ohio 1843) ("[I]f convictions . . . of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and protection.").

<sup>135</sup> U.S. CONST. art. IV, § 3 ("Congress shall have power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). See also McLean, *supra* note 84 and *infra* note 167, with accompanying text (elaborating on his enumerated powers argument).

<sup>136</sup> See McLean, *supra* note 132.

<sup>137</sup> *Dred Scott*, 60 U.S. at 542-43 (McLean, J., dissenting) (McLean believed that Congress could not make anyone into a slave, but Congress had discretion whether to allow slaves into an otherwise free territory, and Congress could allow a slave territory or free territory to remain so until statehood).

Chase was McLean's son-in-law, and later would be appointed Treasury Secretary and then Chief Justice by Lincoln.<sup>138</sup> Chase said in June of 1860 that, "[w]e don't mean to interfere with slavery where it is, but mean to stay it there."<sup>139</sup> Chase was under pressure from Lincoln to backtrack from his earlier, more adamant anti-slavery position.<sup>140</sup> Those earlier speeches by Chase, in favor of substantive due process, were more political and tactical than legally convincing, and the flaws in his reasoning were apparent even in the 1840s and 1850s.<sup>141</sup> Chase's 1860 retreat from substantive due process later morphed back into support for it; in passing the Legal Tender Act of 1862,<sup>142</sup> Congress committed what Chase would describe in 1871 as a "manifest violation" of substantive due process.<sup>143</sup> Yet in 1862 neither Chase nor a single member of the Republican-controlled Congress publicly pointed to any such purported violation of substantive due process.<sup>144</sup>

In the years leading up to the Civil War, Republicans were much more united behind halting the spread of slavery than in rolling it back, and their due process plank reflected that policy. Congress would act (in the words of the platform) "whenever such legislation is necessary" to prevent slavery from spreading beyond its existing limits.<sup>145</sup> David Wilmot, for example, was primarily interested in

<sup>138</sup> Chase commented about the 1856 GOP platform: "I hardly believe that the majority understood what broad principles they were avowing." Letter of Salmon P. Chase to George W. Julian (July 17, 1856), *quoted in* WILLIAM GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856*, at 337 (1987) (stating that Chase may have exaggerated those principles).

<sup>139</sup> *Political*, N.Y. DAILY TRIBUNE, June 15, 1860.

<sup>140</sup> See Salmon P. Chase, *The Address of the Southern and Western Liberty Convention Held at Cincinnati, June 11 and 12, 1845*, ANTI-SLAVERY ADDRESSES OF 1844 AND 1845, at 75, 86 (1867) (stating that due process renders slavery "in any place of exclusive national jurisdiction, impossible"). Chase's 1845 position apparently meant slavery was not only unlawful in the District, but also Congress had illegally admitted slave states. By 1859, Chase was under pressure to moderate his positions. See Letter from Abraham Lincoln to Salmon P. Chase (June 20, 1859), *in* 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 386 (Roy P. Basler ed., 1953).

<sup>141</sup> See FONER, *supra* note 90, at 85.

<sup>142</sup> Legal Tender Act of 1862, 12 Stat. 345 (1862).

<sup>143</sup> See *Knox v. Lee*, 79 U.S. (1 Wall.) 457, 580 (1871) (Chase, C.J., dissenting).

<sup>144</sup> See *Ajit v. Pai*, *Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535, 583-84, 588 (1998). Chase helped get the measure passed as Treasury Secretary, and his own picture appeared on the one dollar bill. See BARBARA ALLMAN, *BANKING* 8 (2005).

<sup>145</sup> The platform language "whenever such legislation is necessary" has been characterized as a "loophole." RICHARD CURRENT, *THE LINCOLN NOBODY KNOWS* 102 (1963).

maintaining free territories in a free condition, hoping that the institution might eventually wither elsewhere.<sup>146</sup> While political convenience surely influenced how Republican leaders chose the ingredients of their due process plank, there is little evidence that political convenience influenced how they defined those ingredients.

The 1860 due process plank began by saying (in the present tense) that, “the normal condition of all the territory of the United States is that of freedom.”<sup>147</sup> According to usual usage in 1860, the word “territory” did not include the entire nation, which is evident from the due process plank itself, because the “republican fathers” had not abolished slavery within the states or on other federal properties, like forts and dockyards.<sup>148</sup> Given that narrow usage, it was widely understood in 1860 that the word “territory” in the due process plank did not include the District of Columbia, and therefore abolitionists protested omission of the District from the plank.<sup>149</sup> Few slaves were known to be living in the territories as of 1860, which meant that freedom was in a sense the normal condition there, whereas slavery in the District had been common for many years.<sup>150</sup> Republicans chose not to use the 1860 platform to confront slavery in the District as a matter of legislative policy, much less as a constitutional issue.<sup>151</sup> Everyone knew that Republicans were generally against slavery, but the party was seeking to be conciliatory rather than incendiary, war was not yet inevitable, and accordingly they chose in 1860 to emphasize halting the spread of slavery rather than eliminating it nationwide.

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<sup>146</sup> CONG. GLOBE 29th CONG., 2D SESS., 354 (1847). Wilmot said, of maintaining slave territories in a slave condition, “I will not change its institutions, then.” See also CONG. GLOBE 29th CONG., 2ND SESS., App. 315–17 (1847) (Wilmot’s remarks).

<sup>147</sup> See PORTER & JOHNSON, *supra* note 1, at 32. The drafters of the 1860 plank chose the word “normal,” then replaced it with “constitutional and legal,” and then restored the word “normal.” See *Manuscript Draft of the Republican National Convention of 1860*, Kasson Papers, *supra* note 98. Cf. Ewing, *supra* note 92, at 6 (using the word “normal” in a legal sense).

<sup>148</sup> See FONER, *supra* note 9, at 203.

<sup>149</sup> Lincoln distinguished territories from the District. See, e.g., *Debate at Freeport*, *supra* note 113 (Lincoln committed to prohibiting “slavery in all the United States Territories” but not “slavery in the District of Columbia”). Abolitionists like Frederick Douglass made that same linguistic distinction too, which is why they protested omission of the District from the due process plank. See *infra* note 180. See *generally* *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973) (“Unlike either the States or Territories, the District is truly sui generis.”).

<sup>150</sup> See *supra* notes 85 and 86 (slave populations in the District and the territories, respectively).

<sup>151</sup> See, e.g., N.Y. DAILY TRIBUNE, *supra* note 139 and accompanying text (statement by Chase).

Republicans rightly regarded slavery as barbaric and execrable, wherever it existed, but that by no means indicates they viewed it as an inherent due process violation. On the contrary, the 1860 due process plank was narrowly tailored to apply only in certain areas where slavery did not already have legal existence, and where various other constitutional provisions were applicable against that hated institution.

#### V. PLANK IMPLICATES CLAUSES OTHER THAN SUBSTANTIVE DUE PROCESS

The Due Process Clause was recited in the plank for a reason. Lawyers in the mid-nineteenth century often sought to establish that a process was not a “due” process by showing that it violated another part of the Constitution.<sup>152</sup> In essence, the Due Process Clause provided a remedy for violation of those other clauses upon which it depended. Justice Curtis, on behalf of a unanimous Supreme Court, affirmed this kind of argument in *Murray’s Lessee v. Hoboken Land*.<sup>153</sup> A legal treatise by William Rawle had made a similar point in 1829.<sup>154</sup> The basic remedy for lack of legal and constitutional authorization was that executive, judicial, and legislative officials could not deprive anyone of life, liberty, or property.

##### A. *Substantive Clauses*

As a remedial or dependent provision, the Due Process Clause in the Fifth Amendment operated synergistically with the Territories Clause’s substantive requirement that all rules and regulations must be “needful.” People like John Bingham also viewed slavery as a substantive violation of the Titles of Nobilities Clause and also the Privileges and Immunities Clause, both of which were operable synergistically with the Due Process Clause.<sup>155</sup>

That kind of remedial or synergistic operation has nothing to do

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<sup>152</sup> See, e.g., *New Facts and Presentation of the Case at 1, Commonwealth v. Twitchell* (1869) (on file with the Yale Law School Rare Book Room). This request for pardon (submitted to the Governor of Pennsylvania) asserted that a death warrant is “prohibited by any but a due process of law as in the Fifth Article of that great Instrument, in view of the guaranteed rights of the Sixth Article”). *Id.* See generally *Twitchell v. Commonwealth*, 74 U.S. (1 Wall.) 321 (1869) (opinion by Chase, C.J.).

<sup>153</sup> 59 U.S. (1 How.) 272, 277 (1856).

<sup>154</sup> WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 129 (1970).

<sup>155</sup> See CONG. GLOBE, *supra* notes 117 and 118.

with substantive due process, because the Due Process Clause by itself could not do anything.<sup>156</sup> While substantive clauses provide that some governmental action is unlawful, the Due Process Clause describes the consequence: preservation of life, liberty, and property.<sup>157</sup>

Besides the Territories Clause, the Titles of Nobilities Clause, and the Privileges and Immunities Clause, Justice McLean also referenced implied powers under the Necessary and Proper Clause as a reason why Congress lacked power to give legal existence to slavery on free soil.<sup>158</sup> Additionally, in 1828, the Supreme Court had created some ambiguity about whether Congress might have further power to regulate the territories under Article IV aside from the power given by the Territories Clause.<sup>159</sup> That plethora of substantive constitutional clauses and principles helps to explain why the authors of the due process plank did not try to explicitly pick out one or more of them.

The Territories Clause says that Congress may adopt “*needful*” rules and regulations for the territories.<sup>160</sup> That clause was enough to provide a basis for asserting in the due process plank that, “we deny the authority of [C]ongress . . . to give legal existence to slavery in any territory of the United States.” The due process plank did not explicitly cite the Territories Clause. However, the plank obviously alluded to it by pointing to the Northwest Ordinance,<sup>161</sup> which Congress had reenacted in 1789 pursuant to the Territories Clause.<sup>162</sup>

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<sup>156</sup> See generally *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (distinguishing “remedial, rather than substantive” law); JAMES SIMEON, *CRITICAL ISSUES IN INTERNATIONAL REFUGEE LAW* 208 (2010) (“[T]here is a significant difference between substantive and remedial law.”).

<sup>157</sup> See *supra* note 30 and accompanying text (quoting the Court in *Murray’s Lessee*).

<sup>158</sup> See McLean, *infra* note 167 and accompanying text.

<sup>159</sup> See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (stating that Congress can regulate territories “in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make all needful rules. . .”).

<sup>160</sup> U.S. CONST. art. IV, § 3 (“Congress shall have power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

<sup>161</sup> An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (1787) 1 Stat. 50 (1789). This law banned territorial slavery, but only in the eventual states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. See ROGER RANSOM, *CONFLICT AND COMPROMISE: THE POLITICAL ECONOMY OF SLAVERY, EMANCIPATION, AND THE AMERICAN CIVIL WAR* 24 (1989).

<sup>162</sup> The 1856 Republican platform included a sentence immediately after the due process plank, which again implicitly referred to the Territories Clause:

So, on its face, the due process plank was not intended to be a comprehensive enumeration of all relevant constitutional authority.

David Wilmot's anti-slavery efforts, including his Wilmot Proviso, had long relied upon the Territories Clause, and the due process plank existed in that context.<sup>163</sup> Since the plank was amply supported by the Territories Clause (and perhaps other clauses) for its assertion about the authority of Congress, there was no necessity to cook up any theory of substantive due process to justify the plank, even if such a theory had been considered plausible.

The broad and comprehensive language of the District Clause<sup>164</sup> conferred upon Congress more discretion to maintain and support slavery than the Territories Clause conferred.<sup>165</sup> After all, the District Clause does not require that any regulations be "needful," and that fact is consistent with omission of the District from the due process plank's denial of congressional authority.

According to one anti-slavery congressman speaking in 1850, "[s]lavery is not a needful rule or regulation."<sup>166</sup> John McLean, the 1856 Republican presidential candidate and Supreme Court Justice, took a more nuanced position regarding the limited scope of congressional power under the Territories Clause:

The power here given is limited to the regulation of the

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Resolved: that the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery.

PORTER & JOHNSON, *supra* note 1, at 27 (third resolution of 1856 platform). This "barbarism" plank was omitted from the 1860 platform due partly to concern that its blunt language might jeopardize Lincoln's election. BURLINGAME, *supra* note 103, at 612. Still, the 1860 platform opposed slavery, and called the African slave trade "execrable." PORTER & JOHNSON, *supra* note 1, at 33 (ninth declaration of the 1860 platform).

<sup>163</sup> BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 107 (1995).

<sup>164</sup> U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To exercise exclusive Legislation in all cases whatsoever, over . . . the Seat of Government of the United States . . .").

<sup>165</sup> See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 17 (2000) ("A lawyer could credibly argue that an 'exclusive' power is broader than a power to make 'needful' rules. . ."). David Wilmot said, of the District Clause in 1849, "[t]here could be no broader or more comprehensive grant of power. . ." GOING, *supra* note 96, at 336.

<sup>166</sup> CONG. GLOBE, 31ST CONG., 1ST SESS., App. 231 (1850) (Rep. Sackett). Sackett became a Republican in 1856 because "its platform embraced the prominent principles he had always advocated, particularly the abolition of slavery." GEORGE BAKER ANDERSON, OUR COUNTY AND ITS PEOPLE: A DESCRIPTIVE AND BIOGRAPHICAL RECORD OF SARATOGA, NEW YORK 500 (1899).

property of the Government. . . . [I]mplied powers can only be exercised in carrying into effect a specific power. . . . [Congress may] provide for the administration of justice among the settlers, [but] it does by no means follow that they may establish slavery.<sup>167</sup>

This narrow interpretation of the Territories Clause forbade federal *establishment* of slavery, but did not forbid federal *maintenance* of slavery.<sup>168</sup> The substantive provisions upon which McLean relied did not include the Due Process Clause.<sup>169</sup> McLean's position is evidently embodied in the due process plank that was adopted in 1856 when he sought the party's presidential nomination.

### B. Procedural Clauses

Ohio Congressman Joshua Giddings, a primary author of the 1856 due process plank who was later excluded from the 1860 platform committee, had a procedural understanding of due process: "[T]rial before a court of competent jurisdiction, by a jury of his peers."<sup>170</sup> Indeed, the federal judiciary had long said that the principle of Magna Carta would be satisfied in the event of judgment by jury.<sup>171</sup> Moreover, the Constitution explicitly guaranteed a jury for both criminal and civil trials.<sup>172</sup>

A pro-slavery government could easily finesse the procedural problem identified by Giddings, for example by allowing a futile jury trial in which a slave could vainly attempt to prove that he was not a slave.<sup>173</sup> Giddings likely saw a jury trial as an opportunity for anti-

<sup>167</sup> McLean, *supra* note 132, at 2. This is the same enumerated powers argument that McLean later made in *Dred Scott*. See *supra* text accompanying note 84 (quoting McLean).

<sup>168</sup> See FEHRENBACHER, *supra* note 77, at 143.

<sup>169</sup> McLean, *supra* note 132, at 2.

<sup>170</sup> See GEORGE WASHINGTON JULIAN *supra* note 121, at 383; see also Joshua Giddings, *Mr. Giddings to Gov. Corwin*, THE LIBERATOR, Oct. 29, 1858, at 1 (noting "trial and conviction before some tribunal having jurisdiction of the offense"); see also, *infra* note 206 (exclusion of Giddings from 1860 platform committee). Cf. *supra*, note 121 (Giddings generally believed that unjust laws are not laws at all).

<sup>171</sup> See, e.g., *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 828 (C.C.D.N.J. 1830). Justice Baldwin stated that providing a jury is sufficient but not necessary to guard the principle of Magna Carta. *Id.* In 1855, Justice McLean also likened due process to a jury requirement. See *Russell v. Barney*, 21 F. Cas. 38, 40 (C.C.N.D. Ill. 1855).

<sup>172</sup> See U.S. CONST. art. III, § 2 (jury in criminal cases); U.S. CONST. amend. VII (jury in civil cases).

<sup>173</sup> See Williams, *supra* note 21, at 475 n.3 (noting that "few . . . challenges would have succeeded without some substantive limits"). See generally GILDER & FISH, *infra* note 178 (Lincoln discussing how to decide if a person is a slave).

slavery jurors to nullify slavery statutes, and he had already endorsed jury nullification of statutes designed for catching fugitive slaves in northern states.<sup>174</sup> But Lincoln prevented the 1860 platform from calling for repeal of any fugitive slave laws,<sup>175</sup> much less calling for jury nullification, and most Republicans including John McLean deplored jury nullification.<sup>176</sup>

Giddings' interpretation of "due process" can be added to the views of Bingham, McLean, and many others to collectively explain why the due process plank was vague about which provisions of the Constitution were applicable. The plank's main message was that the Due Process Clause (together with fresh Supreme Court precedent) forbade the federal government from taking any measures to circumvent constitutional prohibitions against pro-slavery laws.<sup>177</sup>

It is possible that some Republicans could have seen the plank's recitation of the Due Process Clause as simply a call for procedural safeguards (such as a jury trial) to ensure that free African-Americans would not be misidentified and treated as slaves, quite apart from the plank's assertion that Congress had no authority to give legal existence to slavery in federal territories.<sup>178</sup> However, there appears to be no evidence for that interpretation, and there would have been no reason for the plank to discuss that flavor of due process in the territories but not in the District of Columbia.

#### VI. ABOLITIONISTS' CRITICISMS OF THE 1860 PLATFORM

There is no chance that omission of the District of Columbia from the 1860 due process plank was accidental, or that it was misunderstood. The 1860 platform only mentioned the District in a completely different context (i.e., corruption in the "federal metropolis").<sup>179</sup>

The plank's omission of the District was sufficiently obvious that abolitionists like Frederick Douglass quickly seized upon it.<sup>180</sup>

<sup>174</sup> See CONG. GLOBE, 31st Cong., 2nd Sess. 15–16 (1850) (Rep. Giddings).

<sup>175</sup> Letter from Abraham Lincoln to Salmon P. Chase (June 20, 1859) in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 386 (Roy P. Basler ed., 1953).

<sup>176</sup> See CLAY CONRAD, JURY NULLIFICATION 82–83 (1998).

<sup>177</sup> See *supra* text accompanying note 30 (quoting *Murray's Lessee*).

<sup>178</sup> In his first inaugural address, Lincoln sought "all the safeguards of liberty known in civilized and humane jurisprudence" to protect non-slaves from slavery. GILDER & FISH, *supra* note 10, at 172. In that speech he did not, however, equate those safeguards to "due process." *Id.*

<sup>179</sup> See PORTER & JOHNSON, *supra* note 1, at 32 (sixth resolution).

<sup>180</sup> Douglass protested the omission of the District from the 1856 platform. See

Abolitionist William Lloyd Garrison also criticized that omission from the 1860 platform:

It will be seen that it takes no issue with the *Dred Scott* decision, or with the Fugitive Slave Law, or with slavery as it exists in the District of Columbia; and, by omission at least, surrenders its old nonextension of slavery policy, and this virtually endorses the “popular sovereignty” doctrine of Stephen Arnold Douglas, so far as admission of new states into the Union is concerned.<sup>181</sup>

Like Douglass, Garrison was one of the country’s foremost abolitionists, and Garrison analyzed the Constitution as written, without trying to insert anti-slavery meanings that did not originally exist.<sup>182</sup> Garrison’s colleague, Wendell Phillips, explained that, “[t]he Constitution will never be amended by persuading men that it does not need amendment.”<sup>183</sup> Garrison’s analysis of the 1860 platform was equally realistic, and there were also realistic reasons for the other omissions that Garrison identified in the 1860 platform.

By saying that neither Congress, nor a territorial legislature, nor any individuals could give legal existence to slavery, the 1860 platform conspicuously left the United States Supreme Court off that list.<sup>184</sup> Garrison was correct that the 1860 platform did not explicitly mention the Supreme Court or *Dred Scott* by name, but the platform did at least imply that the *Dred Scott* doctrine was “a dangerous political heresy.”<sup>185</sup> That was more diplomatic than a frontal attack on the Court.

As for omission of the District from the due process plank, there was no consensus among Republicans in the 1850s that slavery there was unconstitutional.<sup>186</sup> The faction that agreed with John Bingham that it was unconstitutional failed to put a noticeable dent in the platform. And as a policy matter, Republicans wished to emphasize

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FONER, *supra* note 90, at 80. *See also* FONER, *supra* note 8 (Douglass registered the same objection about the 1860 platform).

<sup>181</sup> *See* Lockwood, *supra* note 8. *See also* BURLINGAME, *supra* note 103, at 612.

<sup>182</sup> *See* MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 13 (2001).

<sup>183</sup> PHILLIPS, *supra* note 45, at 4. *See generally* ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 154–57 (1984) (quoting Garrison’s statement that, “[t]he important thing is not the words of the bargain, but the bargain itself”).

<sup>184</sup> PORTER & JOHNSON, *supra* note 1, at 32 (eighth resolution). The word “individuals” in the due process plank could include judges. *See generally* *The Courts at Bar*, 8 GREEN BAG 381 (1896).

<sup>185</sup> PORTER & JOHNSON, *supra* note 1, at 32 (seventh resolution).

<sup>186</sup> *See, e.g.*, STRINER, *supra* note 101, at 79 (Lincoln’s view).

containment of slavery rather than abolition.

Likewise, Garrison's criticism about the 1860 platform's omission of the Fugitive Slave Act of 1850 did not arise from drafting error.<sup>187</sup> Lincoln had made clear in 1859 that he objected to including a plank in the 1860 platform calling for repeal of the Fugitive Slave Act, predicting that a plank like that would "explode the convention and the party."<sup>188</sup> Later, in his first inaugural address, Lincoln urged implementation of the Constitution's Fugitive Slave Clause, even though he abhorred it.<sup>189</sup> Mentioning fugitive slaves in the 1860 plank was considered and rejected.

Another of Garrison's objections (quoted above) was to the platform's silence about popular sovereignty. In 1860, the term "popular sovereignty" meant leaving the matter of slavery entirely to local control within the federal territories.<sup>190</sup> Some historians have contended that the 1860 due process plank was basically urging congressional elimination of territorial slavery, contingent upon local authorities failing to eliminate it themselves.<sup>191</sup> In that way, Garrison's goal would be achieved with a minimum of fuss at the federal level. Indeed, Republicans in Congress did not feel obliged by the 1860 platform to ban territorial slavery.<sup>192</sup> The 1860 platform did mention popular sovereignty, explicitly accusing Congress of committing "deception and fraud" by reneging on an implied promise to leave the matter entirely under local control.<sup>193</sup>

Whatever the moral dimensions of letting citizens of the District decide about emancipation themselves, that was the course

<sup>187</sup> Act of Sept. 18, 1850 ("Fugitive Slave Act"), ch. 60, 9 Stat. 462 (1850).

<sup>188</sup> 3 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 175, at 386.

<sup>189</sup> GILDER & FISH, *supra* note 10, at 169.

<sup>190</sup> See generally JUNIUS P. RODRIGUEZ, SLAVERY IN THE UNITED STATES 419 (2007).

<sup>191</sup> See, e.g., DON FEHRENBACHER, LINCOLN IN TEXT AND CONTEXT 56 (1987).

<sup>192</sup> See JETER ISELEY, HORACE GREELEY AND THE REPUBLICAN PARTY 289 (1947). The platform committee rejected "the requirement that Congress shall positively prohibit Slavery in every territory whether there be or be not a possibility of its going thither." Accordingly, during the waning days of the Buchanan administration, Republicans in Congress passed bills to organize new territories without banning slavery in them, because they deemed slavery there unlikely. *Id.*

<sup>193</sup> From the 1860 platform:

That in the recent vetoes by the federal governors of the acts of the Legislatures of Kansas and Nebraska, prohibiting slavery in those territories, we find a practical illustration of the boasted democratic principle of non-intervention and popular sovereignty, embodied in the Kansas-Nebraska bill, and a demonstration of the deception and fraud involved therein.

PORTER & JOHNSON, *supra* note 1 (tenth declaration of platform).

recommended by Abraham Lincoln during debate with Stephen Douglas in 1858.<sup>194</sup> Lincoln's recommendation was not consistent with any alleged consensus among Republicans that federal protection for slavery violated "substantive due process."

#### VII. HORTATORY RATHER THAN MANDATORY LANGUAGE IN THE PLATFORM

Shortly after the 1856 plank was adopted, radical Republican George Julian (a once and future Indiana congressman whose father-in-law was Congressman Joshua Giddings), claimed that some hortatory language in the 1856 due process plank—about the "ulterior design" of the Constitution—signified that slavery in the District of Columbia was unconstitutional.<sup>195</sup> However, that 1856 language was removed from the 1860 due process plank.<sup>196</sup> All the same, Republicans agreed with Julian that the Constitution, including the Bill of Rights, applied to the District.<sup>197</sup>

But there was still some hortatory language left in the 1860 due process plank, which used the word "should" instead of "shall," saying that no person "should" be deprived.<sup>198</sup> Although the difference between "shall" and "should" may seem slight, modern scholars credit the First Congress with "changing the flaccid verb 'ought' to 'shall'" in the Bill of Rights.<sup>199</sup> It is tempting to criticize the 1860 platform committee for not repeating the word "shall" that appears in the Fifth Amendment. Certainly they were not entitled to misuse quotation marks, but they *were* entitled to employ the word "should" to indicate a hortatory rather than mandatory meaning, thereby dispelling any whiff of substantive due process.

<sup>194</sup> STRINER, *supra* note 101, at 80.

<sup>195</sup> See FONER, *supra* note 9, at 80. Julian said this in a speech on July 4, 1857 in Kaysville, Indiana. See GEORGE W. JULIAN, SPEECHES ON POLITICAL QUESTIONS, 1850–1868, at 146 (1872). He also equated due process with "trial by jury." *Id.* at 72, 159. Julian believed that enforcement of the Due Process Clause "would annihilate our Fugitive Slave Act," apparently via jury nullification. *Id.* at 145. The 1856 plank, containing the "ulterior design" language, can be seen in the text accompanying *supra* note 65.

<sup>196</sup> The removal of language in the 1860 due process plank created a storm at the 1860 convention (Giddings was against removal), and that language was partially restored elsewhere in the platform. See Kasson Papers, *supra* note 98. See also BURLINGAME, *supra* note 103, at 612 (noting that Giddings stormed out).

<sup>197</sup> See CURRIE, *supra* note 7.

<sup>198</sup> See PORTER & JOHNSON, *supra* note 1, at 32 (eighth resolution).

<sup>199</sup> LEONARD LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY 272 (1995).

A draft of the 1856 platform used the word “shall,”<sup>200</sup> but that word was subsequently changed to “should” in that same 1856 platform, either by error or design.<sup>201</sup> Perhaps the word “should” was used in 1856 in recognition that the clause did not compel Congress to stop slavery that was being conducted privately without any governmental role or action. After the 1856 convention, platform committee member Joshua Giddings gave conflicting indications about that word of the platform,<sup>202</sup> but by 1860 no one questioned or objected to use of the word “should.”

In 1857, Justice Curtis wrote in his *Dred Scott* dissent that the issue of needfulness under the Territories Clause was discretionary rather than mandatory (“it is necessarily left to the legislative discretion to determine whether a law be needful”). That is an additional reason why the 1860 convention would have retained (from 1856) the hortatory rather than mandatory language in the due process plank.

While Congress *should* do whatever the Constitution says it *shall* do, merely saying that Congress *should* do something is only an exhortation, “which Congress could heed if it felt like doing so, or trample underfoot without the least probability of being restrained by the judges.”<sup>203</sup> The 1860 convention was evidently unwilling to associate the word “shall” with an application of “due process” that might potentially have been misconstrued (e.g., substantively).<sup>204</sup>

From start to finish, the word “should” was used instead of “shall” while drafting the 1860 platform, without any apparent objections from anyone.<sup>205</sup> The use of “should” instead of “shall” was

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<sup>200</sup> The draft 1856 platform has been preserved. See Platform Adopted by the Republican Party in convention at Philadelphia, June 17–19, 1856 (unpublished manuscript) (on file with U.S. Miscellaneous Subjects, Manuscripts and Archives Division, New York Public Library). Like the final version of the 1856 platform, this draft did not use any internal quotation marks.

<sup>201</sup> *Republican National Convention*, *supra* note 65; THE TRIBUNE ALMANAC AND POLITICAL REGISTER FOR 1857, at 42 (Horace Greeley ed., 1857); THE TRIBUNE ALMANAC AND POLITICAL REGISTER FOR 1858, at 33 (Horace Greeley ed., 1858).

<sup>202</sup> See, e.g., CONG. GLOBE, 34TH CONG., 3D SESS., 79 (Dec. 10, 1856) (Giddings uses “shall”); GIDDINGS, HISTORY OF THE REBELLION, *supra* note 66, at 397 (Giddings uses “shall”); CONG. GLOBE, 35TH CONG., 2D SESS., 345 (Jan. 12, 1859) (Giddings uses “shall”). Cf. *The Republican Platform*, *supra* note 52 (Giddings uses “should”).

<sup>203</sup> IRVING BRANT, THE BILL OF RIGHTS 37–38 (1965).

<sup>204</sup> See, e.g., *Culbert v. Young*, 834 F.2d 624, 628 (7th Cir. 1987) (“The word ‘should,’ unlike the words ‘shall,’ ‘will,’ or ‘must,’ is permissive rather than mandatory.”).

<sup>205</sup> The draft 1860 platform has been preserved. See Kasson Papers, *supra* note 98. John Kasson was the lead author. See SMITH, *supra* note 88, at 18.

certainly not an inadvertent error in 1860. Joshua Giddings was one of the authors of the 1856 platform, which also used the word “should,” and Giddings was an influential delegate at the 1860 convention as well, if not a member of the 1860 platform committee.<sup>206</sup> Like David Wilmot, Giddings was a lawyer. He knew what the Fifth Amendment said, and he always quoted it accurately.<sup>207</sup> Of course, even if the platform had said “shall” instead of “should,” still the plank referred to due process in a way that did not challenge government-supported slavery in the District of Columbia, either rhetorically, substantively, or otherwise.

Here is a marked-up version of the 1860 plank, to summarize some of the intricacies described above, including the should/shall distinction:

That the normal condition of all the territory of the United States is that of freedom [*this refers in present tense to territory in 1860 that had not yet reached statehood*]; That as our Republican fathers, when they had abolished slavery in all our national territory [*this refers to the Northwest Ordinance re-enacted by Congress August 7, 1789 pursuant to the Territories Clause which the plank did not explicitly mention*], ordained that “[*this misplaced quote mark belongs later in the sentence*] no person should [*repeating hortatory word from the 1856 platform instead of the mandatory word in the Fifth Amendment*] be deprived of life, liberty or property, without due process of law,” [*the Fifth Amendment was proposed September 25, 1789 at which time slavery had been abolished in the Northwest Territory, but not abolished on other federal property, or in the area that would become the District of Columbia*] it becomes our duty, by legislation, whenever such legislation is necessary [*this phrase gave Congress flexibility*], to maintain this provision of the Constitution against all attempts to violate it [*the Supreme Court said in 1856 that the Due Process Clause is violated whenever anyone is deprived of liberty in conflict with another clause of the Constitution*]; and we deny the authority [*either moral or legal*] of Congress, of a territorial legislature, or of any individuals [*the 1856 platform had additionally listed any “association of individuals” which would have clearly included tribes*], to give legal existence to slavery [*this excludes areas like the District of Columbia where slavery already had legal existence*]

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<sup>206</sup> Giddings failed to get onto the 1860 platform committee. GIDDINGS, HISTORY OF THE REBELLION, *supra* note 66, at 444–45.

<sup>207</sup> See, e.g., Giddings, *supra* note 170; CONG. GLOBE, *supra* note 202 (Jan. 12, 1859).

in any Territory [*this redundantly excludes the District of Columbia*] of the United States.<sup>208</sup>

This plank was the result of intensive editing by many Republicans over the course of four years, from 1856 to 1860.

#### VIII. CONCLUSION

Ultimately, the barbaric and execrable institution of slavery was banned nationwide in 1865 by the Thirteenth Amendment, although Congress did not fully implement the ban until 1951.<sup>209</sup> The historical record of the political battle against slavery illuminates the meaning of all three of the Civil War amendments.<sup>210</sup> Of particular interest here, the Republican Party's 1860 platform addressed slavery in a way that illuminates how they understood the concept of due process.

The 1860 due process plank did not endorse substantive due process, even though Republicans of that era knew well that slavery was not compatible with liberty. Most Republicans thought government-supported slavery in the District of Columbia was

<sup>208</sup> See PORTER & JOHNSON, *supra* note 1, at 32 (eighth resolution).

<sup>209</sup> U.S. CONST. amend. XIII. Congress finally criminalized all forms of slavery in 1951. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 381 (2008).

<sup>210</sup> The Civil War amendments include the Privileges or Immunities Clause. See U.S. CONST. amend. XIV. Recently, that clause was the basis for the deciding vote to apply gun rights vis-a-vis the states. See *McDonald v. Chicago*, 561 U.S. 3025, 3059 (2010) (Thomas, J., concurring in part and concurring in the judgment) (disclosure: I wrote an *amicus* brief). See generally *supra* note 120 (meaning of "privileges and immunities" in Art. IV). In contrast to the right at issue in *McDonald*, a right cannot plausibly be among the privileges or immunities of citizens of the United States if it is located nowhere else in the Constitution. See *Dred Scott*, 60 U.S. at 449 ("The powers of the [federal] Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself."); *id.* at 580 (Curtis, J., dissenting) ("[T]he privileges and immunities of general citizenship, derived from and guaranteed by the Constitution, are to be enjoyed by....citizens of the United States."). The Court's first major opinion about the Privileges or Immunities Clause took no notice of that consensus in *Dred Scott*. See *In Re Slaughter-House Cases*, 83 U.S. 36 (1872). The right at issue in *Slaughter-House* (to engage in a trade or profession) was nowhere else in the Constitution, and so the Court correctly declined to enforce that right. But the *Slaughter-House* Court went much farther, eviscerating the clause with help from two bogeymen: (1) that Congress might "control" states by legislating rights that owe "their existence" not to the Constitution but merely to federal statutes; and (2) that the Court itself might enforce rights against the states merely because such non-constitutional rights "existed at the time of the adoption of this amendment." See *id.* at 78–79. Correcting *Slaughter-House* has precedent, and perhaps that precedent can inspire adherence. See *United States v. Wong Kim Ark*, 169 U.S. 649, 678 (1898) (correcting *Slaughter-House* Court's interpretation of "jurisdiction").

constitutional, though awful and subject to abolition by Congress, and even those who thought it was unconstitutional usually relied on more than just the Due Process Clause standing alone.

The 1860 due process plank made a strong statement about the rightful authority of Congress, and about the evils of slavery, but it did not employ substantive due process, did not endorse it, did not attribute it to the Constitution, and did not sympathize with it. Six long years later, the Fourteenth Amendment used similar language. The most obvious purpose of the clause in the Fourteenth Amendment was to copy the original non-substantive meaning in the Fifth Amendment, rather than to silently import a relatively new and analytically different concept that was foreign to the 1860 platform.

The Republicans' 1860 due process plank reflected common ground among the various differing opinions at the national convention, at which virtually no one favored applying due process in a substantive way. Consistent with that plank, Abraham Lincoln—along with many others—denied that the Fifth Amendment in and of itself barred federal maintenance of slavery within exclusively federal jurisdictions like the District of Columbia.

The plank's use of due process was essentially remedial or dependent, rather than substantive. That is, if another provision of the Constitution were violated by some statute or other governmental action, then the remedy for that violation would include preservation of life, liberty, and property. Using this non-substantive principle, the 1860 convention was able to invoke the nation's fundamental charter without having to list all of the relevant substantive constitutional provisions, which were numerous, complex, and disputed.

The due process plank is consistent with the recent conclusion of Nathan Chapman and Michael McConnell:

Due process was not at all about judicial creation of fundamental rights outside the reach of legislative amendment. . . . Fundamentally, it was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute. . . .<sup>211</sup>

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<sup>211</sup> Nathan Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1807 (2012). I do not entirely agree with all of the conclusions reached by Chapman and McConnell. For example, Chapman and McConnell write that due process requires legislatures to enact deprivations only by "general rules for governance of future behavior." *Id.* But people like Alexander Hamilton did not believe that the principle of due process forbade *ex post facto* criminal laws, and he

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The antebellum history of due process is an important part of the larger Fourteenth Amendment puzzle, and the due process plank confirms how to put some of the pieces of that puzzle together. If this plank is any indication, the Fourteenth Amendment did not embody substantive due process any more than the Fifth Amendment did.

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supported an explicit prohibition of *ex post facto* laws as a security for liberty. See Williams, *supra* note 21, at 443. The authors of the Virginia Declaration of Rights (including Patrick Henry and George Mason) had a similar understanding of due process. They deleted a clause barring *ex post facto* deprivations, because they felt retrospective criminal punishments were sometimes useful, while at the same time the Virginia Declaration of Rights included the “law of the land” clause from Magna Carta. See JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* 85 (2006). There are nontrivial arguments against the position of Hamilton, Henry, and Mason regarding due process, but the weight of evidence indicates their position was prevalent during that era. In England prior to American independence, *ex post facto* laws “were never regarded as inconsistent with the law of the land.” *Hurtado v. California*, 110 U.S. 516, 531 (1884).