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Reconstruction and the Black Liberation Rule of Law

FORTY ACRES AND a mule. It was a demand, a rallying cry, and a persistent legacy – even as far into the future as the Great Depression, elderly former slaves bitterly remembered the broken promise of forty acres.¹ At the end of the Civil War, property rights briefly appeared to be turning from a tool of oppression to a tool of liberation for Black Americans.

In January 1865, at the urging of a group of Black Georgians, General Sherman issued Special Field Order no 15, which set aside a substantial swathe of land along the coast from South Carolina to Florida for the use of freed slaves, allocated as ‘not more than forty acres’ to each family, and ‘in the possession of which land the military authorities will afford them protection until such time as they can protect themselves or until Congress shall regulate their title’.²

On 3 March 1865, Congress enacted the Freedmen’s Bureau Act, which provided that up to forty acres of confiscated land could be allocated to freed slaves, to be rented for the first three years and then sold at market rate.³ Congress’s intention to promote full participation by the freed in the market economy can also be seen in the fact that the very same day it also chartered a bank to take their deposits and make investments on their behalf.⁴

In these efforts there was more than a hint of the classical republican conception of citizenship. Among the Radical Republicans in Congress, the most vigorous land reformer was probably George W Julian, and in a speech of 1874,

¹ J Kerr-Ritchie, ‘Forty Acres, or, An Act of Bad Faith’ (2003) 5 *Souls* 8, 20.

² L Cox, ‘The Promise of Land for the Freedmen’ (1958) 45 *The Mississippi Valley Historical Review* 413, 429; P Finkelman (ed), *Milestone Documents in African American History: Exploring the Essential Primary Sources* (Schlager Group, 2010) 607.

³ An Act to Establish a Bureau for the Relief of Freedmen and Refugees, 38 Cong ch 90, 13 Stat 507 (3 March 1865).

⁴ An Act to incorporate the Freedman’s Savings and Trust Company, 38 Cong ch 92, 13 Stat 510 (3 March 1865). Consistent with the longtime connection between property and responsible independent citizenship, General Rufus Saxton reported that an earlier bank for freed slaves which he had established by military command had received substantial deposits, and that this was to be taken as evidence that the freed were at least as capable of intelligent activity as the whites who had so long disdained them, quoted in WEB Du Bois, *Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (Harcourt, Brace & Co, 1935) 74.

Julian explicitly connected land reform to the idea of completing the work of the abolitionist movement via ensuring that freedpeople could achieve citizenship as independence:

The abolition of negro slavery was a grand work, but it was the abolition of one form of servitude only. Others remain to be abolished. Among these is that system of agricultural serfdom which we call land monopoly. A government which allows the land to become the patrimony of the few can not be democratic, can not be free. Land monopoly is one form of slavery, and, indeed, the underlying foundation of all slavery, because freedom must have its roots in the soil. The fact will not be disputed that the land owners of every country are its masters, and I repeat what I have so often said, that under our popular form of government we must have small farms, thrifty tillage, compact communities, free schools, respect for honest labor, and equality of political rights. We may as reasonably attempt to make brick without straw as to build our free institutions on any narrower foundation. On the other hand, if we journey on as we have started towards the policy of large estates, widely-scattered settlements, slovenly agriculture, the decline of education and the arts, contempt for honest labor, and a pampered aristocracy lording it over the poor, then the epitaph of our vaunted free government may be written, for it can not stand.⁵

Land ownership was the key signifier of independent American citizenship. Northern abolitionists like Julian knew this as did freedpeople themselves. And they were right to be particularly concerned about landownership for the recently freed: in terms of economics alone, secure land ownership perhaps could have protected at least some of the freedpeople from their return to near slavery under the Black Codes, convict leasing, sharecropping, and other tools of economic oppression that were soon to be deployed against them.

The failure of the promise of forty acres amounted to a failure to confer on the freed the full status of American citizenship in its intertwined legal, political, economic, and social senses. Patricia Williams aptly summarised the resulting state of incomplete liberation:

Blacks went from being owned by others, to having everything around them owned by others. In a civilization that values private property above all else, this effectuates a devaluation of humanity, a removal of blacks not just from the market, but from the pseudospiritual circle of psychic and civic communion.⁶

From the government's perspective, the failure of this programme can be summarised in one question: where was the land to come from? Congress had earlier passed a series of bills providing for the confiscation of rebel lands, but only for the life of the rebel.⁷ There was a plausible constitutional basis for that

⁵ GW Julian in G Julian Clarke (ed), *Later Speeches on Political Questions With Select Controversial Papers* (Carlon & Hollenbeck, 1889) 60.

⁶ P Williams, 'Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism' (1987) 42 *University of Miami Law Review* 127, 148.

⁷ Cox (n 2) 432–34; E Cary Royce, *The Origins of Southern Sharecropping* (Temple University Press, 1993) 88.

limitation: the Treason Clause provides that ‘no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted’, and Lincoln was planning to veto any broader confiscation on that basis.⁸ Such life estates would obviously not be sufficient to provide a secure economic footing for freed slaves.

The federal government had seized firmer title to some land under tax and abandoned property statutes, and a paltry 2,500 acres of it actually ended up in the hands of Black people in 1864.⁹ Unfortunately, the bulk of the seized land, many thousands upon thousands of acres, was under the control of the Freedmen’s Bureau only briefly: in May 1865, Andrew Johnson used the pardon power to return it all to its former owners.¹⁰ Even those of the freed who had taken possession of the lands under General Sherman’s order were evicted.¹¹

In part, rule of law-related incentives participated in the resistance to land reform. Northern economic interests were reluctant to countenance land redistribution – there was an established economy of trade between North and South, and the plantation system was part of that economy; breaking up the plantations and replacing them with Black-owned subsistence farms would disrupt that arrangement and disrupt the investments Northerners had made in those plantations.¹² This is also the root of a familiar rule of law objection to property expropriation, appearing in contemporary law in the form of the Takings Clause doctrine according to which a regulation of land is more likely to be treated as expropriation, and hence as requiring compensation, if it upsets the ‘investment-backed expectations’ of the landowner.¹³ Moreover, at least some opponents of distribution were heard to worry that it would promote more general land confiscations/land reform – even reaching people who had not forfeited their land in rebellion.¹⁴ Julian’s rhetoric about the dangers of ‘large estates’ illustrates where these fears could have come from.

⁸He prepared a veto message for an anticipated broader bill. Lincoln’s Message to the House of Representatives of 17 July 1862, in *A compilation of the messages and papers of the presidents, prepared under the direction of the Joint Committee on Printing, of the House and Senate, pursuant to an act of the Fifty-second Congress of the United States* (with additions and encyclopedic index by private enterprise), vol VIII, Bureau of National Literature, 1817, pp 3286–88. Cf Oubre, *Forty Acres and a Mule: The Freedman’s Bureau and Black Land Ownership* (Louisiana State University Press, 1978) 3, has a discussion. See also DW Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (University of Chicago Press, 2014) 75–76, 154–55.

⁹Royce (n 7) 88–89.

¹⁰*ibid* 89–91.

¹¹*ibid* 92–93; WEB Du Bois, *The Souls of Black Folk: Essays and Sketches*, 4th edn (AC McClurg & Co, 1904) 32.

¹²Royce (n 7) 94–99. As usual, Du Bois (n 4), was decades ahead of white scholars in seeing this: his entire analysis of the failure of Reconstruction centers around Northern industry switching sides after the war in order to prevent what he called a ‘dictatorship of labor’ – Du Bois was a Marxist, this was a term of praise – from arising from ‘abolition democracy’.

¹³*Penn Central Transportation Co v New York City* 438 US 104, 124 (1978).

¹⁴Royce (n 7) 98.

The problem of the lands of enslavers and the ability to deliver what Du Bois called 'a sort of poetic justice' to the freed also reveals a fundamental challenge to the rule of law, one which was to reappear almost a century later at the Nuremberg Trials: what is a legal system to do when addressing the wrongs done by a system of lawlessness written into law itself?¹⁵ The freed had an undoubted claim of justice to the lands of their enslavers. But at the same time, plantation owners did have vested, real, legal interests in their land. To divest them of those interests ran into two serious legal obstacles.¹⁶ First, as noted above, the Constitution limited the forfeiture of lands for treason to the life of the traitor.¹⁷ Secondly, the real underlying crime, namely, the enslavement of their fellow humans, wasn't actually a crime under the positive law of the period.

So how could the government more generally get at the property of the enslavers without retroactively making enslavement a crime? To some extent, this challenge could be raised against the Thirteenth Amendment itself,¹⁸ but it seems to me to be perfectly reasonable to justify the Thirteenth Amendment from a rule of law standpoint by resting on the underlying constitutional theory articulated by Frederick Douglass, Lysander Spooner, Gerrit Smith, and others.¹⁹ Such a theory would suggest that the ownership of property in persons had

¹⁵ Poetic justice: Du Bois (n 11) 24.

¹⁶ The government had some legal options. Some Civil War forfeitures were legal under Supreme Court rulings allowing the government to treat property seized during the active conflict as legally equivalent to prizes of an enemy sovereign at sea under the laws of war rather than the criminal punishment of domestic traitors. *Miller v United States* 78 US 268 (1870). For an extensive discussion of this theory, see Hamilton (n 8) 32–33, 51–53, 62–64, 150–54. It is not clear, however, just how much property would have been available under this theory had Johnson not given it all back. Such confiscations had happened during the Revolutionary War, and arguably they would be consistent with the broader republican conception of property that attached the rights of propertyholding to citizens, insofar as avowed Confederates denied just that citizenship.

¹⁷ There's something deeply bizarre about this limitation in the contemporary world. Under the power of civil asset forfeiture, people's homes can be seized for minor drug crimes of which they aren't even individually guilty – for example, the seizure of the parents' home because the child sold 40 dollars worth of heroin. P Brown, 'Parents' House Seized After Son's Drug Bust' (*CNN Digital*, 8 September 2014) www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure/index.html. And this vicarious liability attached to family members – what in the treason context might be called 'corruption of blood' – has been accepted in the civil asset forfeiture context: in the words of the Supreme Court, 'the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense'. *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663, 683 (1974)). Memo to small-time criminals: instead of selling weed, try betraying your country – your property will be safer. Formally speaking, the theory of contemporary forfeiture rests on the involvement of the property itself in crime, as opposed to the kind of general forfeiture of the guilty traditionally associated with treason. But aggressive lawyers could arguably have used the contemporary theory against Confederates too – did they permit troops to cross the land? Were the products of the land used to supply the traitor armies? Maybe even (most aggressively): were the treasonous acts committed to preserve the economic value of the land by securing enslaved labor for it?

¹⁸ *c.f.* Hamilton (n 8) 9–11.

¹⁹ See F Douglass, 'The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? 1' in P Sheldon Foner and Y Taylor (eds), *Frederick Douglass: Selected Speeches and Writings*, 1st edn (Lawrence Hill Books, 1999); L Spooner, *The Unconstitutionality of Slavery* (Burt Franklin, 1860); RE Barnett, 'Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation' (1997) 28 *Pacific Law Journal* 977.

been void *ab initio* just because property interests in persons were inconsistent with the entire rest of the constitutional structure of the United States – with ideas such as the writ of habeas corpus and the protection of liberty in the Due Process Clause of the Fifth Amendment. Such an argument is more than sufficient to explain why emancipation could be conducted consistent with the rule of law without compensation. But holding a void property interest is not the same as committing a crime, and saying that some act is a crime – and hence warrants a broader forfeiture of land – even though it was sanctioned by nominal law is traditionally considered far more troubling from the standpoint of the rule of law. The Latin jargon for the principle is *nullum crimen sine lege*. Perhaps the United States could have pioneered the legal theory that ultimately only came into existence in the Nuremberg Trials, namely that some acts are so patently and obviously criminal that the principle of *nullum crimen sine lege* does not apply to them.²⁰

Although the land was never delivered, the demand for forty acres can stand as one of the first goals of post-emancipation Black liberation. As the rest of the chapter details, the freed had many other demands, and their activism became the foundation of the rule of law for all Americans.

BLACK AUTHORSHIP OF THE RECONSTRUCTION AMENDMENTS

The primary act of Black constitutional authorship and the core of the American rule of law is the trifecta of Reconstruction Amendments. From the perspective of the freed, the Thirteenth Amendment ought to be seen as far more important – and many Black Americans were arguing that the condition of slavery was all that stood in the way of their enjoyment of the status of full citizens. But white resistance required that citizenship to be reconfirmed in the Fourteenth and the Fifteenth.

For present purposes, the Fourteenth Amendment is most important, because it is the core textual instantiation of foundational rule of law principles in the United States. Only with the Fourteenth Amendment did the United States have a written commitment to comply with the rule of law principle of general law, in its Equal Protection Clause. And only with the Fourteenth Amendment did the federal government commit to requiring states to comply with the rule of law obligations of procedural justice, through its application of the idea of due process to the states – a change that also promoted a flowering of the idea of due process on the federal level that permitted substantially greater doctrinal

²⁰ It might have been more difficult to apply that argument to enslavement than it was to Nazi genocide. Arguably, the Nuremberg trials avoided *nullum crimen sine lege* because genocide was clearly rejected by all other nations. See discussion in C. Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830, 835–37. But slavery still existed in other places, such as Brazil and the Caribbean, when American slaves were liberated.

developments, for example, including the ‘reverse incorporation’ of the idea of equal protection into due process, and hence a prohibition on federal government discrimination, in *Bolling v Sharpe*.²¹

Of course, the claim that Black Americans authored the Reconstruction Amendments may be controversial. And I certainly do not claim that Black Americans authored those amendments alone – their actual text was written by white Radical Republicans, such as John Bingham (the primary author of the Fourteenth Amendment), and they were pushed through Congress by other white Radical Republicans. But Black Americans nonetheless deserve a substantial amount of the credit, and, for the reasons given in the introduction to this volume, that credit should be emphasised in order to pave the way toward correcting the racist history of misunderstandings of the Black constitutional role and the Black rule of law role.

The canonical American vision of the end of slavery and the rise of Reconstruction has long tended, with a handful of exceptions such as the hagiography of Frederick Douglass, to focus on white agency – on Northern Quakers, Radical Republicans in Congress, Lincoln, and so forth. Erased in that narrative are the many Black hands and Black minds that shaped first abolition, then the Civil War, then Reconstruction. As Manisha Sinha details at length, slave resistance and rebellion, as well as white encounters with free Black communities, fed the growth of the early white antislavery movement in the colonies. Northern emancipation was driven in part by self-assertion by the enslaved, including by the bringing of freedom suits that shaped the legal doctrines of Northern freedom.²² Free Black leaders in Northern Masonic and religious communities came up with early versions of the constitutional case against slavery.²³ Unsurprisingly, Black women’s leadership in the abolition movement has been even more neglected, even though they occupied many important leadership roles and challenged depoliticised conceptions of gender as well as the oppression of slavery.²⁴ And the enslaved continued to articulate their cause not merely with their words but also with their bodies, most famously in the great nautical revolts of the *Amistad* and the *Creole*, which helped radicalise the abolitionist movement and accelerate the crisis that ultimately led to war and liberation.²⁵

As WEB Du Bois first recognised, the enslaved engaged in a project of self-liberation at the start of the Civil War, walking off the plantations and depriving the Confederacy of the labour needed to support their military enterprise.²⁶ A full 180,000 ended up serving in the Union Army, and hence deserve direct credit

²¹ *Bolling v Sharpe* 347 US 497 (1954).

²² M Sinha, *The Slave’s Cause: A History of Abolition* (Yale University Press, 2017) 68–70.

²³ *ibid* 139.

²⁴ *ibid* 267–78.

²⁵ *ibid* 406–20.

²⁶ Du Bois (n 4) 55 et seq; S Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South, From Slavery to the Great Migration* (Belknap Press of Harvard University Press, 2003) 67 et seq.

for their participation in the victory that led to their own freedom and thereby to the Reconstruction Amendments.²⁷ About 400,000 deprived the Confederacy of their labor by taking shelter behind union lines.²⁸ Others who remained in Confederate-controlled territory nonetheless took advantage of the shift in power to impose burdensome demands on their masters, and some gave valuable intelligence to the Union army.²⁹ We can also not ignore the propaganda effect in the North and the demoralising effect in the South of masters being abandoned by their slaves.³⁰

Moreover, their military experience provided valuable education, social contacts among the Black community, and experience in organising – even at one point organising while still at arms to demand fairer pay from the Union army itself.³¹ Before the Fourteenth Amendment even appeared on the horizon, Black Americans understood their military contributions as entitling them to the rights of citizens, including suffrage and equal legal status.³²

Radical Republicans in Congress recruited Black voters in order to get the Fourteenth Amendment ratified: in the first Reconstruction Act, Congress placed the South under military rule and required that Southern states, to be readmitted to the Union, (a) hold constitutional conventions with an electorate for delegates that included freedmen; (b) adopt a new constitution guaranteeing suffrage to freedmen, and (c) ratify the Fourteenth Amendment.³³ Hahn argues that this transition from ‘Presidential Reconstruction’ to the military enforcement of ‘Radical Reconstruction’ was occasioned by Black agitation for land reform, and by the violent Southern response to that agitation.³⁴ And, of course, it was Black votes that provided the electoral weight that put the ratification over the top – before Radical Reconstruction every Southern state except Tennessee had refused to ratify the Amendment.³⁵ Nor was Black voting easy: there was, unsurprisingly, resistance to Black suffrage, and the freedmen overcame that resistance and showed up to the polls en masse, even adopting forms of military organisation to register and vote.³⁶

Accordingly, we must count Black self-assertion in the demand for equal legal rights and full citizenship as instrumental in the enactment of the Fourteenth

²⁷ E Foner, ‘Rights and the Constitution in Black Life During the Civil War and Reconstruction’ (1987) 74 *The Journal of American History* 863, 864.

²⁸ Hahn (n 26) 82.

²⁹ *ibid* 84–89.

³⁰ J Oakes, ‘The Political Significance of Slave Resistance’ (1986) 22 *History Workshop Journal* 89.

³¹ Foner (n 27) 864; Hahn (n 26) 95–96.

³² Hahn (n 26) 106–09, 121–22; Foner (n 27) 864–65.

³³ An Act to provide for the more efficient Government of the Rebel States, 14 Stat 428–430 (1867), s 5.

³⁴ Hahn (n 26) 157–59.

³⁵ E Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, 1st edn (WW Norton & Company, 2019) 90–91.

³⁶ Hahn (n 26) 193–94, 204–05.

Amendment from start to finish – from well before the Civil War through ratification.

Moreover, even after the enactment of the Reconstruction Amendments, Black Americans have been leaders in the development of the ideas in those texts. There is a vast literature in disciplines such as political science and sociology on the role of Black liberation movements and Black agency in achieving the discrete outcomes of post-Reconstruction legal inclusion.³⁷ The most obvious example is the defeat of state-sponsored segregation in *Brown v Board of Education* – a clear victory for the principle that law must be general. *Brown* and other civil rights cases have been credited not to some kind of persuasion of whites as to the moral rightness of the cause, but as a remedy for Soviet cold-war propaganda which highlighted America's racial oppression.³⁸ But the reader should not be misled into thinking that this research questions the role of Black self-liberation movements in these victories. Quite the contrary, this line of scholarship recognises that the Soviet propaganda would not have been available had civil rights activists not made the plight of Black Americans salient, both domestically, by incorporating the international relations consequences of Jim Crow into their advocacy, and internationally, by seeking foreign attention for the oppression they suffered at home – up to the point of petitioning the United Nations for a remedy.³⁹ Equally importantly, the particular remedies achieved could not have been secured without the courage of those activists to demand them and (as with the bravery of the children who desegregated their schools) to put their bodies on the line in order to bring them to fruition – and of course, the litigation efforts of Thurgood Marshall and many less famous Black Americans.

³⁷ See eg, T Lee, *Mobilizing Public Opinion: Black Insurgency and Racial Attitudes in the Civil Rights Era* (University of Chicago Press, 2002); AD Morris, 'A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks' (1999) 25 *Annual Review of Sociology* 517; S Mazumder, 'The Persistent Effect of U.S. Civil Rights Protests on Political Attitudes' (2018) 62 *American Journal of Political Science* 922; KT Andrews, 'The Impacts of Social Movements on the Political Process: The Civil Rights Movement and Black Electoral Politics in Mississippi' (1997) 62 *American Sociological Review* 800; JW Button, *Blacks and Social Change*. (Princeton University Press, 1989); DQ Gillion, 'Protest and Congressional Behavior: Assessing Racial and Ethnic Minority Protests in the District' (2012) 74 *The Journal of Politics* 950; L Guinier and G Torres, 'Changing the Wind: Notes toward a Demosprudence of Law and Social Movements' (2014) 123 *Yale Law Journal* 2740; KT Andrews, 'Social Movements and Policy Implementation: The Mississippi Civil Rights Movement and the War on Poverty, 1965 to 1971' (2001) 66 *American Sociological Review* 71; M Biggs and KT Andrews, 'Protest Campaigns and Movement Success: Desegregating the U.S. South in the Early 1960s' (2015) 80 *American Sociological Review* 416; WA Santoro, 'The Civil Rights Movement's Struggle for Fair Employment: A 'Dramatic Events-Conventional Politics' Model' (2002) 81 *Social Forces* 177; J Chernega, 'Black Lives Matter: Racialised Policing in the United States' (2016) 14 *Comparative American Studies An International Journal* 234; O Wasow, 'Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting' (2020) 114 *American Political Science Review* 638; RL Goluboff, 'The Thirteenth Amendment and the Lost Origins of Civil Rights' (2001) 50 *Duke Law Journal* 1609.

³⁸ ML Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press, 2011); DA Bell Jr, 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93 *Harvard Law Review* 518, 524.

³⁹ Dudziak (n 38) 29, 43–45.

Martin Luther King Jr, Rule of Law Theorist

In describing the outcome of the general strike of the enslaved in the Civil War, Du Bois highlights the importance of achieving the protections of law and the rudiments of the rule of law by raising it to a level on the par with escaping the master's whip itself: 'Yet the Negroes had accomplished their first aim in those parts of the South dominated by the Federal army. They had largely escaped from plantation discipline, were receiving wages as free laborers, and had protection from violence and justice in some sort of court.'⁴⁰ Yet even as Black Americans fought for their inclusion in the protections of law, the invocation of rule of law values against Black liberation activists has been a persistent theme through American history. We've already seen the example during slavery, but the same was true during Reconstruction, when some Southern polemicists equated federal judicial efforts to protect Black citizens from redeemer terrorism to despotic show trials.⁴¹ A century later, the literature of the Civil Rights Movement is replete with sanctimonious scolding of activists for doing things like sit-ins and unpermitted marches. Justice Black, for example, accused participants in a lunch counter sit-in of attempting to 'substitute rule by force for rule by law'.⁴²

Perhaps the most important rule of law debate in the Civil Rights era came in conjunction with Martin Luther King Jr's decision to defy an injunction against his Birmingham Campaign. The Supreme Court upheld punishment of the protesters for that defiance, and, in doing so, declared that the rule of law and indeed the entire structure of constitutional government was on the line:

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.⁴³

Martin Luther King Jr responded to this kind of critique in his letter from the Birmingham jail.⁴⁴ Much of that letter articulates an alternative conception of the rule of law bringing together two ideas. The first is a natural law theory

⁴⁰ Du Bois (n 4) 79.

⁴¹ GC Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* (University of Georgia Press, 2007) 107.

⁴² *Bell v Maryland* 378 US 226, 346 (1964) (Black, J dissenting).

⁴³ *Walker v City of Birmingham* 388 US 307, 320–21 (1967). For an apt defenestration of this ruling and defence of civil disobedience, see D Luban, 'Difference Made Legal: The Court and Dr. King' (1989) 87 *Michigan Law Review* 2152, 2173–86.

⁴⁴ But not the Supreme Court's specific articulation of it: King wrote the letter before the ruling.

of civil disobedience, according to which ‘an unjust law is no law at all’, and hence obedience is not required (indeed, disobedience is positively demanded). The second is somewhat more interesting: where classical rule of law values come in, for King, is in the identification of those laws that are unjust and hence disobedience-apt.

King clearly recognises that he can’t just say that segregation laws are unjust because they violate his naked moral judgment (although he certainly makes moral arguments as well), for that would leave him vulnerable to precisely the charge the Supreme Court ultimately levied of proposing to be a judge in his own case. Instead, he needs to articulate an agent-independent ground for identifying unjust and disobedience-apt laws. So he does: for those who disagree with his moral judgments, we can identify unjust laws with respect to their legal as well as democratic failures. The key two paragraphs of the letter:

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.

Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state’s segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?⁴⁵

The first of those paragraphs articulates the self-application conception of the rule of law principle of general law – the principle that the rule of law requires the lawmakers to apply the laws to themselves. As discussed in chapter 1, such a principle was deeply rooted in American constitutional theory: it could have been ripped directly from the pages of Federalist 57 – and just like Madison, King ties the institutional instantiation of the self-application principle in the American rule of law to democracy. Recall that I read Madison to argue that Congress would be resistant to the temptation to exempt itself and its members’ friends from its own laws because of the broader capacity of the form of government to resist faction: if no faction can capture Congress, then no faction can get laws passed which are so blatantly rigged in their favour.

Alas for Madison, the system was established with the ultimate factional division, namely that of race, built right into the machinery. And that takes us to King’s second paragraph, which he importantly describes as ‘another explanation’ of the first: the persistence of that founding faction is the source of the

⁴⁵ Martin Luther King, *Why We Can’t Wait*, Signet Classics edn (New American Library, 2000) 71.

lawlessness of the laws he broke. Because the redeemers seized political control of the South back for white supremacy after the fall of Reconstruction, Black Americans had been systematically disenfranchised; that disenfranchisement permitted Southern legislatures to enact discriminatory and oppressive laws, and hence to violate the rule of law requirement of generality. Therefore, the failure of democracy enabled the failure of the rule of law, and provided for an *objective* criterion by which we could identify disobedience-apt laws rather than merely relying on King's moral judgment. King brilliantly establishes that he could conduct civil disobedience against the laws of Jim Crow without in any way acting as judge in his own case.

DUE PROCESS AND EQUAL PROTECTION

With the enactment of the Fourteenth Amendment, and, in particular, its Equal Protection and Due Process clauses, the Constitution gained a textual memorialisation of both sides of the rule of law: its procedural side (which already appeared in the Fifth Amendment, but only for the federal government), as well as its demand for substantive equality. King and other civil rights leaders filled out its interpretation, but, to fully understand the context in which they worked, we must back up and consider the general approach of those two clauses and their history.

Due Process: The Protections of Judicial Procedure

The Due Process Clauses are derived from Chapter 39 of Magna Carta (29 in the 1297 version), traditionally given as:

NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.⁴⁶

The first use of the term 'due process' that I can find in English (although I am no historian, so there may be earlier) is from a statute from the 28th year of Edward III in 1354, which re-enacts Magna Carta, and which (in the modern English form) rephrases that chapter as 'That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process

⁴⁶ This version as given in English by the British National Archives, www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/XXIX.

of the Law.’ And that idea captures the natural linguistic meaning of the Due Process Clauses: that the government will not impose punishments on people or take away their goods or liberty without first giving them legal process to defend themselves. In other words, the rule of law ideal of a right to access to the courts, and to the law, and the capacity to put on a defence – to not be subjected to irregular procedure or the sheer arbitrary use of power.

In contemporary American constitutional law, that implementation of the Due Process Clauses is called ‘procedural due process’, the area of law that encompasses the identification of those interests that count as ‘property’ or ‘liberty’, and then the identification of the procedural protections that a person must receive before being deprived of such interests by individualised government action, such as on the basis of an accusation of misconduct. And the currency of due procedural process is the stuff of standard judicial and quasi-judicial procedures: typical issues in procedural due process cases include, for example, whether or not the individual is entitled to a hearing before the interest in question (like welfare benefits) is taken, whether at that hearing they are entitled to compulsory process to subpoena witnesses, and so forth. As such, the doctrine of procedural due process represents a core principle in the American rule of law.

The Due Process Clause also draws on the other element of the core idea of the rule of law, the requirement that law be general. As Justice Oliver Wendell Holmes explained in the landmark *Bi-Metallic* case, in a decision ‘in which all are equally concerned’ (ie, a general enactment), what due process amounts to is the political process itself.⁴⁷ Because, in the case before the Court, there was merely ‘a general determination dealing only with the principle upon which all the assessments in a county had been laid’, the plaintiffs had no right to demand individualised process to resist the tax increase in question. Put differently, the American rule of law, as captured by our Due Process doctrine, bars the government from directly targeting individuals with arbitrary seizures of property, but does not prevent legislative change altering the general framework for property ownership, like the rate of taxation.⁴⁸

Holmes’s opinion in *Bi-Metallic* also indirectly reveals an idea that Chapman and McConnell defend at length on historical grounds as well – the relationship between procedural due process and separation of powers. By resting on a distinction between individualised deprivation of property or liberty and the enactment of general legislation, procedural due process also marks out the respective territory of legislatures and judges.⁴⁹ Acting on its own, a legislature can only act on

⁴⁷ *Bi-Metallic Investment Co v State Board of Equalization* 239 US 441 (1915).

⁴⁸ Takings Clause doctrine does, however, bar some legislative changes that the Supreme Court has interpreted as retroactive deprivations of property through overly restrictive land use rules, which go under the name ‘regulatory takings’.

⁴⁹ NS Chapman and MW McConnell, ‘Due Process as Separation of Powers’ (2012) 121 *The Yale Law Journal* 1672.

the people in general, not on individuals (at least not to harm them – the tradition of private bills in a person's favour remains undented by this principle). In order to directly apply coercive force to individuals, the judiciary must be involved. This separation of powers principle is also captured in other constitutional provisions like the prohibition on ex post facto legislation and bills of attainder which reinforce the limitation of the legislative power to general law.

Abstractly, such a division of authority can be seen as directly restraining the arbitrary use of power by barring the legislature from lashing out at individuals and requiring the executive to go through a court to do so. This restrains the state's overall capacity to upset individuals' pre-existing legal expectations even if some judges are also motivated to act oppressively, insofar as the structural limitations on judicial power (such as the case or controversy requirement, which keeps judges from roaming the streets, gavel in hand, adjudicating at people) entail that any imprisonment or expropriation has to recruit the cooperation of both the executive to initiate a case and a judge to adjudicate it – and those officials may have different incentives.

Pushing the Bounds of What We Call 'Property'

For present purposes, the most interesting part of the doctrine of procedural due process is that its actual application rests on the contested terrain of what sorts of things count as 'property.' Recall that in chapter one, I described the republican side of the centrality of the property to the rule of law as focused on the idea of economic independence as critical to full citizenship. In the twentieth century, this ideal would be turned to the defence of those who specifically *lacked* independence. In the landmark case of *Goldberg v Kelly*, the Supreme Court recognised that welfare benefits and other government-provided entitlements were, in the words of a famous article by law professor Charles Reich, 'The New Property'.⁵⁰

Reich directly invoked the republican conception of independence: the worry associated with not treating such benefits as property, and hence subjecting them to administrative discretion, was that it made individuals dependent on government and subjected their wills to those of bureaucrats. In that way, the relationship of property to the rule of law became almost completely inverted from the founding period: it was the propertyless and those who were dependent on the government who were to be protected by the law *in virtue of* that dependence, and as a way to cure it, rather than being deprived of its protections for that reason. As the Court said in *Goldberg*:

From its founding, the Nation's basic commitment has been to foster the dignity and wellbeing of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against

⁵⁰ CA Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733.

the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.⁵¹

Clearly, the historical claim that starts that quotation was false: the nation had to get through slavery before it could use property to ‘foster the dignity and wellbeing’ of Black Americans. But historical fidelity isn’t necessarily a virtue for lawyers (as Edward Coke teaches us): the Court in *Goldberg v Kelly* seems to be reappropriating the republican ideology of property to turn it toward greater inclusion and toward independence for all, much as Coke reappropriated Magna Carta for the sake of Parliamentary power. From a republican ideology in which the poor were viewed as dependent and for that reason denied a full civic status, Reich and the Supreme Court developed a theory according to which the poor were to be supported in order to permit them to be independent, and hence to fully exercise their civic role.

This development, too, cannot be cleanly separated from Black activism. Black civil rights organisations at least from the 1930s have had a welfare rights agenda that has focused on providing a universal social safety net. These efforts included an initially unsuccessful campaign to secure inclusion of household and agricultural workers (ie, most Black workers) in the social security system in the 1930’s followed by successful inclusion in 1950; and federal control over the welfare system, to prevent state discriminatory administration, especially in the South.⁵²

Of course, the welfare rights movement encompassed a much broader constituency than simply Black Americans. However, some of the distinctive rule of law wrongs associated with the welfare system were undoubtedly racialised. In particular, scholars have written extensively about the harms inflicted by broad executive discretion – probably the most well-understood rule of law problem – vested in state-level welfare officials, and how that discretion was used, for example, to police the reproductive choices of poor women, and exclude black women altogether, or provide lower benefits to Black families on the grounds that ‘blacks needed less to live on than whites’.⁵³ The same is true of works programmes, which were administered in a discriminatory fashion by Employment Service offices.⁵⁴ When Martin Luther King Jr. gave his legendary ‘I have a dream’ speech, it was at the ‘March on Washington for Jobs and Freedom’, a march that heralded the demand not just for political rights but for

⁵¹ *Goldberg v Kelly* 397 US 254, 264–5 (1970).

⁵² D Cooper Hamilton and CV Hamilton, ‘The Dual Agenda of African American Organizations Since the New Deal: Social Welfare Policies and Civil Rights’ (1992) 107 *Political Science Quarterly* 435, 27–32, 87.

⁵³ E Roberts, ‘Welfare and the Problem of Black Citizenship’ (1996) 105 *Yale Law Journal* 1563, 1568–71; JS Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (Oxford University Press, 1996) 130.

⁵⁴ Quadagno (n 52) 32.

economic rights – a demand to which President Johnson responded with universalistic programmes in an attempt to take away administrative power, and hence administrative discretion, from the racist welfare agencies of the states, and divert them to the federal government as well as to neighbourhood-based agencies that hopefully could avoid the state racial hierarchies.⁵⁵ Hence, we ought to read the Due Process victories associated with the expanding conception of property and the federalisation of welfare – and hence the victories for legal process over discretionary process – as in significant part associated with Black activist movements.

The Problem of Substantive Due Process

Yet due process is also supposed to have a ‘substantive’ aspect. Recall that in chapter one I noted that that scholars and justices have supposed that the Taney Court applied such a notion of ‘substantive due process’ when it invalidated the Missouri Compromise. Substantive due process’s first modern flowering was around the turn of the twentieth century when the Supreme Court used it to invalidate economic regulation in the infamous ‘Lochner era’. Its second phase began with *Griswold v Connecticut*, when the Court began to use it to protect a variety of intimate and familial rights.⁵⁶ In either iteration, the doctrine prohibits both state and federal governments from infringing specific but unenumerated individual rights which are interpreted to be part of the ‘liberty’ protected by the Fifth and Fourteenth amendments. This is the constitutional source most prominently of today’s right to choose abortion (unless by the time this book reaches print the Supreme Court removes it).

On some readings of the Constitution, substantive due process is just that set of doctrines that the Supreme Court has developed to address its negligent misreadings of other provisions of the Constitution. The Fourteenth Amendment’s Privileges and Immunities Clause ought to be the textual source for the incorporation of the Bill of Rights against the states, but the Supreme Court mistakenly ruled to the contrary in the *Slaughter-House* cases, so when they realised their mistake, respect for stare decisis and a certain unwillingness to admit systematic judicial error drove them to find it in substantive due process.⁵⁷ Likewise, the constitutional protection of unenumerated rights could have been found in the Ninth Amendment, but, for inexplicable reasons, the Court chose to find it in the Fifth and Fourteenth.

On another reading, the origin of substantive due process can be traced back to procedural due process, and to the priority in American law of protection of property. According to Orth, the paradigm role for substantive due process at its

⁵⁵ *ibid* 40–52.

⁵⁶ *Griswold v Connecticut* 381 US 479 (1965).

⁵⁷ *The Slaughter-House Cases*, 83 US 36 (1873).

birth in the latter part of the nineteenth century was in finding a constitutional source for the principle that the legislature cannot rob Peter to pay Paul – that is, directly use legislative action to expropriate people.⁵⁸ On Orth's account, the subsequent industrialisation and commercialisation of the American economy and the resultant shift in economic emphasis from property law to contract law carried this substantive doctrine with it. That transition ushered in the *Lochner* era with the idea of extending to contractual rights the same status as property rights.

Yet, if Orth's story is right, this merely reemphasises that substantive due process is a mistake. Protection against expropriation seems like a poor fit for the notion of substantive due process for several reasons. First, and most plainly, the Fifth Amendment's Takings Clause (which would have been available for incorporation via the Fourteenth by the period Orth discusses) can easily be read to directly prohibit robbing Peter to pay Paul by imposing public use and just compensation requirements on any such legislative property transfer – no due process needed. But, perhaps more foundationally, once we understand that *procedural* due process in part demarcates the line between the legislative power to enact general laws and the judicial power to apply those general laws to individual cases, we can see why the prohibition on robbing Peter to pay Paul is inherent in the structural provisions of the Constitution, buttressed by ideas like procedural due process and the prohibition on bills of attainder and ex post facto laws – rather than requiring the discovery of a discrete unenumerated individual constitutional right.⁵⁹ Put differently, the courts could have easily interpreted procedural due process, as such, to require the judicial adjudication of individual rights *under a general law* before permitting Peter's property to be whisked away, and thus forbidden expropriation without inventing the notion of substantive due process.

This is a broader problem with the insistence on labelling core rule of law ideas like not expropriating property as the textually dubious 'substantive due process'. If we reduce 'procedural due process' to the simple idea expressed by *Matthews v Eldridge* that before striking at a person's legal interests, the government must provide them with sufficient procedural protection to avoid an unfair risk of error, then everything else that we might ascribe to 'due process' must be 'substantive'. But this is clearly incorrect. We draw on the broader idea of due process as basic legal justice all the time in our law.

⁵⁸ JV Orth, *Due Process of Law: A Brief History* (University Press of Kansas, 2003) 9–13.

⁵⁹ Here is another story about an initial judicial misreading leading to endless doctrinal complexities and compounding errors down the road, one in which the Court misreads the ex post facto clause to only apply to criminal law, *ibid* 45, and hence gets ultimately thrown into the lap of substantive due process. Incidentally, Orth's, *ibid* 44–50, general discussion of the alternative pathways to preventing expropriation is very useful; and as he, *ibid* 91–93, details, our judiciary eventually did manage to fit expropriation into the Takings Clause – although it only took about a century after cooking it up as a matter of substantive due process to get there.

For an important example, a criminal statute is ‘void for vagueness’ if the law does not give individuals sufficient guidance that they may obey it and avoid punishment. This, of course, is a classic rule of law principle – the key objections the Supreme Court has articulated to vague laws include the idea that ‘ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement’ – in other words, avoiding boundless law enforcement discretion.⁶⁰ This isn’t the same thing as notice and opportunity to be heard, the *sine qua non* of what we traditionally call ‘procedural due process’, and it doesn’t follow from the *Matthews* test. But it obviously isn’t ‘substantive due process’: it hardly represents the kind of ‘unenumerated fundamental right’ like abortion, or the incorporation principle, to which ‘substantive due process’ typically refers.

Yet the void for vagueness doctrine is unquestionably due process – the Supreme Court always identifies the source of this principle as the Due Process Clauses. Moreover, history strongly suggests that the vagueness doctrine ought to be included: it’s no coincidence that the law is so often used to strike down laws about things like ‘vagrancy’ or ‘loitering’, such laws that were pioneered in the postbellum Southern Black Codes as an excuse to subject Black workers to the control of the state, and, ultimately, back to the control of planters.⁶¹ Of course the doctrine that struck those laws down should be seen as the core of the due process protected by the Fourteenth Amendment.

The ordinary linguistic meaning of ‘due process of law’ could easily encompass void for vagueness doctrine without making it into ‘substance’. We could observe, for example, that a person charged with a vague crime is stymied by that vagueness in the effort to defend themselves in court. Or we could adopt a broad view of what ‘process’ means to include pre-judicial stages in interacting with the law, such as learning what the law is and conforming one’s behaviour to it, so that laws that are not compatible with these steps in the organisation of the legal regulation of behaviour cannot support the subsequent deprivation of a person of life, liberty, or property.

Equal Protection and General Law

If the Due Process Clauses stand for rule of law requirements rooted in what we might call ‘bare legality,’ ie, the requirement that the state go through courts and public laws rather than through arbitrary commands enforced by goons when it wants to lock people up and take their stuff, the Equal Protection Clause corresponds to the broader egalitarian requirement that law be general. That is,

⁶⁰ *Kolender v Lawson* 461 US 352 (1983).

⁶¹ E Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877*, updated edn (Harper Perennial, 2014) 200–205.

the Supreme Court has interpreted the Equal Protection Clause to require that law – and government action in general – treat people equally. Equal protection scrutiny is triggered whenever the government treats people differently than one another. Typically (though not always), this will come in the form of a law or an executive practice that identifies, formally or informally, categorical divisions in the coverage or application of some law – for example, a law limiting voting to people over 18 (or to property-holders), or a police policy or informal practice of preferentially engaging in traffic stops against people of particular races.⁶² Hence, the Equal Protection Clause is fundamentally an antidiscrimination rule.

Of course, some kinds of discrimination are permissible, even unavoidable. For example, a decent society probably ought to provide parking spaces that are reserved for people with mobility impairments. Hence, the courts must differentiate between those categorical distinctions that are pernicious, and those that are justified by legitimate public policy purposes. This is essentially the same problem that King faced in deciding which laws were disobedience-apt: how can we tell which laws are discriminatory in a non-general way, ‘difference made legal?’ From the judicial side, Equal Protection doctrine contains a two-step process of review, where the court first identifies the category along which legal distinctions have been drawn (disability, race, etc), and then, depending on how pernicious that category is seen as, demands a greater or lesser government reason to justify it – in the terms of other legal systems, a kind of proportionality review.

The Anti-Classification Response to the Problem of Generality

Constitutional law scholars have, for decades, seen two possible theoretical bases for the identification of Equal Protection violations. These theories are known as anti-subordination, according to which the government violates the Equal Protection Clause when it treats people differently in a way that creates or reinforces relationships of hierarchy and subordination; and anti-classification, according to which the government violates the Equal Protection Clause when it creates legal classifications that rest on particular pernicious categories of group difference (race, sex, etc), regardless of whether the particular government act in question advances or impairs social equality.⁶³ In most cases, these theories do not come apart, but there are socially important areas of law where they

⁶² Equal Protection doctrine also covers nominally universal policies adopted for the purpose of targeting particular groups. For example, the Fourth Circuit in *NAACP v McCrory* 831 F3d 204 (4th Cir 2016), ruled that supposedly universal changes to voting rules, such as to the hours of voting, had actually been adopted for the purpose of reducing Black voting, and hence struck the changes down.

⁶³ RB Siegel, ‘Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown’ (2004) 117 *Harvard Law Review* 1470, has a good summary of the fundamentals of the debate and its history. ML Barnes and E Chemerinsky, ‘The Once and Future Equal Protection Doctrine’ (2011) 43 *Connecticut Law Review* 1059, have a strong and concise critique of the anticlassification approach.

potentially lead to opposite results; the most prominent is in state-sponsored affirmative action. Under an anti-subordination theory, affirmative action to, for example, promote the hiring of public employees from subordinated racial groups would not provoke any particular constitutional alarm, since such an initiative would be oriented toward remedying racial hierarchy rather than reinforcing it. By contrast, on an anti-classification theory, the mere fact that such a law requires government to treat people with different racial ascriptions differently vests it with a presumption of constitutional impermissibility, represented doctrinally in the idea of ‘strict scrutiny’ which requires any such government action to be carried out in pursuit of a ‘compelling government interest’ and to be ‘narrowly tailored’, ie, based as little on race as possible to achieve that compelling interest.

Formally speaking, US constitutional law has adopted an anti-classification theory (though not in those explicit terms): government affirmative action is in fact subject to strict scrutiny like any other use of race. The core rationale for this doctrine seems to rest on some scepticism about the reliability either of the government’s efforts to correctly determine which race-based acts are actually counter-hierarchical, or of the court to evaluate such acts after the fact. Would an anti-subordination theory merely care about the government’s intent (itself notoriously hard to measure, especially in multimember legislative contexts where there may be no coherent intent), even if that intent leads to unintended consequences? Would it merely care about the effect of a government action? Would the expressive meaning of a government action be inquired into? In the context of affirmative action in particular, a number of critics have argued that it actually exacerbates stigmas attached to subordinated racial groups by leading others to believe that employees or students of colour are not qualified for the permissions they occupy.⁶⁴

Yet read that way it’s not obvious that the normative foundations of anti-classification and anti-subordination theory are fundamentally different. If the anti-classification approach is justifiable, it is justifiable only for anti-subordination reasons, in other words, based on the claim that certain kinds of classifications by the government are likely to be pernicious whether or not they are so intended, and that the pursuit of anti-subordination is likely to be systematically unreliable.

Understood from the rule of law perspective, we can see the anti-classification approach as a way of responding to a technical difficulty in achieving the regulation of citizens by general law. As I have argued, the fundamental problem

⁶⁴See eg Justice Thomas’s concurrence in *Fisher v Texas* (*Fisher I*) 570 US 297, 328 (2013) where he claimed that ‘the University’s [affirmative action] program is instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities’, which he equated to ‘[s]laveholders argu[ing] that slavery was a “positive good”’ and claimed ‘taints the accomplishments of all those who are admitted as a result of racial discrimination’.

with the idea of general law is that the identification of which laws are general and which laws are not, which is most plausibly captured within contemporary theory in the idea of ‘treating like cases alike’, requires some more-than-merely-formal relevance criterion for identifying which cases are alike – and such a criterion can only be defined with respect to the values underling the requirement of general law itself.⁶⁵ In other words, the criteria along which the benefits and the burdens of a given law or other government act are allocated must in some sense be relevant to the underlying policy consideration – race is not relevant to the amount of taxes one ought to pay, while income clearly is – but that relevance judgment is ineluctably normative.⁶⁶ In that earlier article I suggested, but did not develop in detail, the idea that the American doctrine of suspect classifications and levels of scrutiny serves the function of resolving the problem of generality in the distinctive American historical context.⁶⁷

To fill in the idea somewhat: no court can substitute its overall policy judgment for that of a legislature while carrying out its judicial review functions. But an unbounded application of a kind of general law relevance test – in which every distinction between persons written into law is reviewed for the extent to which that distinction is relevant to the underlying legitimate policy goals of the enactment – would capture something like a coherent idea of general law, but only at the expense of subjecting every act of legislation to an overall proportionality review incompatible with a strong judicial review system such as the one in the US.

Almost all laws make fairly basic distinctions between persons – there is a certain age at which one is permitted to get a driver’s licence; one’s property tax rate and the school to which one’s children are assigned depends on the location of one’s residence; we can proliferate examples endlessly. Moreover, some behavioural rules can safely be treated as *de facto* legal categorisations; consider, for example, the position of a poor person who is told that there is an unaffordable fee for access to the courts, an example of which the Supreme Court struck down as early as 1956 on the grounds that it effectively excluded the poor from appellate review of their cases.⁶⁸ So, are all of these things to be subjected to an unbounded proportionality review by a federal court with the power to strike down a law if it thinks that the distinction is not justified by the legislative purpose? If, for example, a litigant can show that there is no strong statistical difference between 17 year old drivers and 18 year old drivers, may they

⁶⁵ P Gowder, ‘Equal Law in an Unequal World’ (2014) 99 *Iowa Law Review* 1021, 1031–32.

⁶⁶ The Supreme Court endorsed such an idea as early as 1921: ‘Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation, but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand.’ *Truax v Corrigan* 257 US 312, 337–38 (1921).

⁶⁷ Gowder (n 64) 1046, 1049, 1079.

⁶⁸ *Griffin v Illinois* 351 US 12 (1956).

have a federal court strike down a legislative judgment that the drivers' licences of those under 18 come with additional restrictions? To permit that would be, most Americans would probably think, wildly undemocratic – it would amount to substituting judicial policy judgments about minutiae such as drivers' licences for the judgments of elected officials.

To resolve this dilemma, given America's distinctive history with some particularly pernicious forms of discrimination – and especially with race discrimination – it appears to have seemed natural to the Court to adopt a system of categorical review. In rule of law terms, this amounts to a kind of presumption of irrelevance for certain categories of legal distinction: if the government distinguishes among people by race, or a handful of other 'suspect classifications' such as religion, it is assumed by the courts that the distinction is not relevant to some legitimate policy outcome. Hence, a heavy burden is imposed on the government to come forward with evidence that the distinction is relevant. By contrast distinctions with a less tainted history like age are presumed to be relevant, and hence a challenger typically must meet a heavy judicial burden in order to prove that a legislature had no rational reason to treat people of different ages differently. Such a system represents a reasonable heuristic that balances the importance of judicial scrutiny of potentially non-general laws with the need to preserve the policy autonomy of democratically elected officials. It also represents an acknowledgment of the historical fact that the core purpose of the Reconstruction Amendments was to wipe out the stain of slavery and regularise the legal status of Black Americans – and thus state-sponsored race discrimination stands as a distinctive wrong which ought to be treated differently from other forms of legal discrimination.

Once a categorical approach is adopted, however, there's a kind of practical pressure toward taking an anti-classification approach rather than an anti-subordination approach toward reviewing acts within a given classification. Having decided that state-sponsored race discrimination, for example, is particularly unlikely to be relevant to any legitimate state purpose, to say that race-based legislation loses its presumption of impermissibility depending on which racial groups are 'advantaged' or 'disadvantaged' has a kind of feeling of inconsistency to it.

However, anti-subordination purposes could be accommodated within the anti-classification framework. Consider affirmative action again: under current law, educational diversity is a compelling interest; hence, if a public university can prove that its 'race discrimination' (by which we mean putting a slight thumb on the scale in the aggregate in favour of admitting subordinated minorities) is necessary to achieve a diverse educational environment, a policy can stand. But the Supreme Court could rule that remedying the effects of underlying social and economic race discrimination or even underlying significant racial inequality is a compelling interest too.

In the context of affirmative action qua private employment 'discrimination' the Court has in effect done as much, ruling that affirmative action is permissible

under Title VII of the Civil Rights Act to ‘eliminate manifest racial imbalances in traditionally segregated job categories’ in *United Steelworkers v Weber*.⁶⁹ It isn’t a much larger step to recognise that the same policy – to remedy broader economic exclusion – could be a compelling interest in public education, especially when we consider that the Black framers of the Fourteenth Amendment were also demanding broader economic inclusion at the time of enactment.

Process and Protection Together: The Path Not Taken

One major problem that freedpeople faced during Reconstruction was that Southern courts typically were unwilling to entertain testimony from Black witnesses. Intuitively, this refusal offends against core rule of law ideals, for it rendered Black victims of crime, fraud, and dispossession unprotected by the law. In response to this problem, the Freedmen’s Bureau attempted to set up its own system of adjudication to supply what were, effectively, military tribunals to provide basic legal justice to the freed in place of the ordinary courts.⁷⁰

The refusal to entertain Black testimony, particularly as victims in prosecutions or civil suits against private persons who attacked them, also poses a challenge for our conventional interpretations of the Due Process and Equal Protection clauses of the Fourteenth Amendment. Supposing that the testimonial bar had continued after the enactment of that Amendment, what would it violate? One naturally has the urge to say ‘the Due Process Clause’, for due process is the traditional site of our demands to things like access to the courts and the resolution of disputes by law rather than by force. But it’s somewhat awkward to fit this particular legal abuse under the formulaic mode of modern conventional procedural due process doctrine, (although much easier under the reinterpretation of doctrines like void for vagueness which I articulated above), in which we must first identify some discrete ‘life, liberty, or property’ interest of which the government is depriving a person – unless testifying itself is the liberty interest, it would seem like the actual deprivation was carried out by the Klan or similar private oppressor. Even if testifying itself is the liberty interest, how could it also be the ‘process that is due?’ It doesn’t quite work, at least not without resorting to the much-maligned concept of ‘substantive due process’.

A more obvious route under contemporary doctrine is to focus not on the substance of the wrong but on its discriminatory allocation. Under the law as it

⁶⁹ *United Steelworkers v Weber* 443 US 193 (1979). There is, however, some reason to think that precedent is in danger. DC Malamud, ‘The Strange Persistence of Affirmative Action Under Title VII’ (2015) 118 *West Virginia Law Review* 1.

⁷⁰ DG Nieman, *To Set the Law in Motion: The Freedmen’s Bureau and the Legal Rights of Blacks, 1865–1868* (KTO Press, 1979); BB Donald and PJ Davis, ‘To This Tribunal the Freedman Has Turned: The Freedmen’s Bureau’s Judicial Powers and the Origins of the Fourteenth Amendment’ (2018) 79 *Louisiana Law Review* 1.

stands today, this is how such a case would most easily be disposed: it's a facial race classification, and there isn't a compelling government interest to justify it, so it must be struck down. Yet this really seems to miss the point: while the refusal to entertain Black testimony in court certainly is wrong in the same way that things like segregated schools are wrong, it also seems to be wrong in an additional and distinct way in virtue of its utter exclusion of a class of persons from access to the judicial process, and a simple race discrimination theory fails to capture that.

There's a way to read the Due Process and Equal Protection clauses together that seems to more closely track the problem, however, and one that also provides a little bit more linguistic respect to that word 'protection' in the latter clause.⁷¹ One can imagine an alternative history in which the notion of protection, interpreted as something like protection from violence and predation, and in particular against the susceptibility to private arbitrary violence that went along with slavery, became the core of the doctrine surrounding the Equal Protection Clause. In that counterfactual legal history, the Due Process Clause works hand in hand with the Equal Protection Clause to identify that a primary (although not exclusive) mechanism through which protection is to be delivered is through guaranteeing access to the courts. Such a view has a distinctive historical fidelity: as Robin West has aptly explained, if we understand slavery as the creation of a kind of 'dual sovereignty' in which the slave is under the rule not just of the state (and its laws) but also of the master – the latter enforced by arbitrary violence – then the 'protection' of the Fourteenth Amendment can be seen as continuing the abolitionist work of the Thirteenth by committing the government to tearing down not just the juridical face of slavery in the form of the chattel principle but also its factual face in the form of the capacity of some to engage in untrammelled violence against others.⁷²

In such a world, it is not obvious that Black Americans would be worse off than today. While that parallel universe Equal Protection Clause would not have been available as a legal tool to end *de jure* segregation starting with *Brown v Board of Education*, Black activists may have been able to use it to force the states to prevent the racist mob violence that scourged the nation from the end of Reconstruction to the Civil Rights Movement. If the Equal Protection

⁷¹ Evan Bernick has a wonderful working paper called 'Antisubjugation and the Equal Protection of the Laws' (currently available at papers.ssrn.com/sol3/papers.cfm?abstract_id=3664925) which captures a compelling version of this idea. This paper, incidentally, also serves as a sterling example of what originalism can be when it takes Black Americans seriously as constitutional authors. Other important discussions of the idea of Equal Protection as protection include R West, 'Toward an Abolitionist Interpretation of the Fourteenth Amendment' (1991) 94 *West Virginia Law Review* 111; SJ Heyman, 'The First Duty of Government: Protection, Liberty and the Fourteenth Amendment' (1991) 41 *Duke Law Journal* 507; CR Green, 'The Original Sense of the (Equal) Protection Clause: Pre-Enacting History' (2008) 19 *George Mason University Civil Rights Law Journal* 1, among many others (Green and Bernick combined cite most of the literature).

⁷² West (n 70) 129–32.

Clause had been interpreted to entitle Black Americans to protection from racist violence in the first instance, and if the clause had actually been enforced, we may not have needed *Brown v Board of Education*: as discussed in the next chapter, it was lawless violence that stole political power away from freed slaves in the South; genuinely politically empowered Black citizens might have been able to secure things like equal access to education without the intervention of the Warren Court and many decades beforehand. And as Derrick Bell suggested, real political power may have achieved educational equality for Black schoolchildren much more reliably than court-ordered integration.⁷³

Moreover, the notion of *actual protection* could, at least in principle, be deployed to combat the cruel dilemma that so many Black communities face today. Scholars have long observed that Black Americans are simultaneously underprotected from crime but overpoliced in a dehumanising and intimidating fashion.⁷⁴ Perhaps a constitutional right to real protection on the terms extended to whites – not merely *by* police but also *from* police – could also have been used as leverage to promote the development of solutions to crime that do not merely add oppression.

This interpretation made an important appearance in the middle of the twentieth century. In *Monroe v Pape*, the Supreme Court dusted off 42 USC 1983, originally enacted as part of the Civil Rights Act of 1871 (17 Stat 13), better known as the ‘Ku Klux Klan Act’ because of its purpose to suppress that organisation.⁷⁵ In explaining the origins of this act, the Court first observed that part of its purpose was to provide access to the federal courts for Black Americans who had been deprived of the right to testify in state courts in the South:

it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio: ‘... it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.’⁷⁶

⁷³ D Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (Basic Books, 1989) 111–13.

⁷⁴ R Kennedy, *Race, Crime, and the Law*, 1st Vintage Books edn (Vintage Books, 1998); see also J Forman, *Locking Up Our Own: Crime and Punishment in Black America*, 1st edn (Farrar, Straus and Giroux, 2017); G Prowse, VM Weaver and TL Meares, ‘The State from Below: Distorted Responsiveness in Policed Communities’ (2019) 56 *Urban Affairs Review* 1423.

⁷⁵ Again, credit allocation is important. Manifestly, much of the motivation for Republican legislators to enact this bill was a desire to prevent the Klan from suppressing enough Black voters in the South to forcibly elect Democrats – ie, to protect their partisan interests. AW Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction*, Louisiana paperback edn (Louisiana State University Press, 1995) 388–89. But, of course, those interests in turn depended on protecting the suffrage of Black voters, and it was the suffrage of Black voters and the motivation of Black voters to use that suffrage in defence of their liberty which provoked the Klan terrorism in the first place. More immediately, Black petitioners helped persuade Congress to actually act to enforce the Fourteenth Amendment. Foner (n 35) 116–19.

⁷⁶ *Monroe v Pape* 365 US 167, 173–74 (1961).

The Court goes on to explain the broader purposes of the Act in fulfilling the duty to secure Equal Protection to Black Americans:

Mr. Beatty of Ohio summarized in the House the case for the bill when he said: 'certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. ... Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down, and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.'⁷⁷

The deployment of section 1983 to permit civil suits against police on the basis of a statute enacted in part to make up for the Southern failure to use their law enforcement apparatus to protect Black Americans from private terrorism illustrates that the protection conception of Equal Protection maintained its salience well into the twentieth century and could licence the demand both for protection by police and protection from police, just as I argue.

Still, that conception of Equal Protection is almost entirely unused today. The protection interpretation of Equal Protection would have, were it more firmly embedded into our doctrine, borne a complex relationship to the idea of rule of law. Had the clause been consistently read that way, we might fairly have said that it represented a kind of peace and order conception of the rule of law, one in which law is widely obeyed and creates a kind of social as well as merely governmental fixed point through which private lives may be organised. Ironically, in contemporary American discourse, such a conception of the rule of law seems to be most prominent in anti-egalitarian movements, paired with calls for more vigorous policing against protesters who call for legal reform.⁷⁸

This challenge – how to actually deliver legal protection to Black Americans – turned out to frame the entire post-Reconstruction period, for, as we shall see, whites immediately resorted to terrorist violence to overturn the result of the Civil War. That violence largely succeeded for many decades, in part because the law found itself unsuited to protect the freed. As it turned out, Black Americans had to protect themselves, and ultimately to force the courts and the political system to do their jobs.

⁷⁷ *ibid* 175.

⁷⁸ For example, conservative commentator D French, 'Anti-Cop Rioters Don't Care about 'Justice'' (*National Review*, 21 September 2016) www.nationalreview.com/2016/09/black-lives-matter-rioters-rule-law-under-attack/) claimed that Black Lives Matter protests (including, to be fair, protests that on his account turned violent) have 'moved from attacking the police, to attacking the rule of law itself' and 'represent an oppressor criminal class rising against the rule of law and against the very value of human life'.