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# 140th Anniversary Symposium: Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere

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## FOURTEENTH AMENDMENT CITIZENSHIP AND THE RECONSTRUCTION-ERA BLACK PUBLIC SPHERE

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All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>1</sup>

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1. U.S. CONST. amend. XIV, § 1. The first sentence is commonly known as the Citizenship Clause and the first part of the second sentence as the Privileges or Immunities Clause. For background on the framing and initial treatment of these clauses, see Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 290-300 (2006).

Consider the first sentence of section one of the Fourteenth Amendment. The non-legal reader might quite reasonably say that such an introductory and framing sentence indicates that the Amendment is about citizenship. Such a reading would be reinforced by moving to the second sentence, which gives lexical priority to the concepts of citizenship privileges and immunities in its list of protected areas. And the reader who bothered to go deeper into the Amendment—indeed, deeper than many lawyers and law professors ever do—would surely find confirmation of the importance of citizenship in the second section (addressing citizenship in its somewhat convoluted linkage between congressional apportionment and the voting rights of black male citizens),<sup>2</sup> and the third section (enforcing a form of citizenship allegiance by barring members of the confederacy who had previously served in the government of the United States or any state from serving in any state or federal position after the war).<sup>3</sup> The reader might even note that citizenship continues to be the topic of the ensuing amendment, ratified only two years later, which more directly prohibited abridgment on the basis of race of “[t]he right of citizens” to vote.<sup>4</sup>

But constitutional law is not a normal, reasonable enterprise. Sections two and three of the Fourteenth Amendment, being more political than legal enactments, have had essentially no judicial or legal development.<sup>5</sup> Yet even the first sentence of section one and the ensuing

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2. U.S. CONST. amend. XIV, § 2. This section was a compromise designed by congressional Republicans to prevent southern whites from denying suffrage to blacks under state laws while also gaining more seats in Congress by claiming African-Americans in the numeric calculations for apportionment, which would have resulted in *greater* southern white dominance in the House of Representatives than was true before the Civil War, when enslaved blacks counted as three-fifths of a person for apportionment purposes. Such a goal could have been achieved by simply basing representation on the number of qualified voters in each state. That, however, would have forced northern states to choose between enfranchising women and unnaturalized immigrants or having a smaller proportionate representation, especially as white men migrated west. The particularly convoluted, race-based language of the Amendment protected northern interests while preventing an immediate southern democratic resurgence. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 at 252 (1988). It also caused an almost irreparable rift between advocates of women's suffrage and the Republican party by specifying protection only for male suffrage. *Id.* at 255.

3. U.S. CONST. amend XIV, § 3. This section also enabled Congress to remove this disability by two-thirds vote. *Id.* Congress did so in 1872. See Act of May 22, 1872, ch. 193, 17 Stat. 142 (removing political disabilities imposed by the Fourteenth Amendment). This section was generally considered a mild punishment for confederates, replacing as it did a disenfranchisement of confederates through 1870. FONER, *supra* note 2, at 253-54.

4. U.S. CONST. amend. XV, §1.

5. The Supreme Court did refer to section two in *Richardson v. Ramirez*, 418 U.S. 24, 41-57 (1974) (upholding state disqualification of former felons from voting and citing section two as lending implied support for this position).

Privileges or Immunities Clause have had relatively little play in the courts. With the single exception of the 1999 case of *Saenz v. Roe*,<sup>6</sup> the citizenship language of the Fourteenth Amendment has practically no legal significance.

A few scholars have suggested ways of building some meaning around the citizenship ideas. Akhil Amar, for instance, has argued that the Citizenship Clause establishes that everyone born in the United States is “a free and equal citizen” and it helps empower the federal government “to dismantle the various nongovernmental structures of inequality that threatened the amendment’s vision of equal citizenship.”<sup>7</sup> Rebecca Zietlow, carefully developing an idea first explored by Kenneth Karst,<sup>8</sup> has argued that equal citizenship under the reconstruction amendments carries with it “rights of belonging.”<sup>9</sup> Such rights, Zietlow contends, are “more encompassing than the term ‘civil rights,’ [and] includ[e] rights that historically were not considered to be civil rights such as economic and social rights[.]”<sup>10</sup> This idea of belonging is meant to capture and help “ensure inclusion, participation, and equal membership in our diverse national community.”<sup>11</sup>

These ways of thinking about Fourteenth-Amendment citizenship do much to expand our understanding of the amendment and the

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6. 526 U.S. 489 (1999). *Saenz* may be the exception that proves the rule. In that case the Court used both the Citizenship Clause and the Privilege or Immunities Clause to ground a constitutional right to travel, specifically the right of citizens to move into another state and be treated equal to those already residing there. *Id.* at 502-03 (quoting both clauses). While courts and commentators sometimes mistakenly state that the *Saenz* Court relied on only the Privileges or Immunities Clause, the Citizenship Clause also played a significant role in the Court’s analysis. *Id.* at 506-07. First, this right was already well established. *See* *Shapiro v. Thompson*, 394 U.S. 618 (1969), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974). The *Saenz* court was simply reaffirming it and giving it specific textual grounding and so did no new work. Second, this right to equal treatment for new residents appears to be as far as the Court is willing to venture. By using the two citizenship clauses for so narrow a right, the Court in fact restricted them by narrow application even as it appeared to invigorate them. Lawrence Tribe seems to have been proven right that *Saenz* is more the limited product of a federalism-influenced Court than a well-spring for new constitutional rights. Lawrence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?*, 113 *Harv. L. Rev.* 110, 197-98 (1999).

7. AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 381-82 (2005).

8. *See* KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

9. REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 6 (2006).

10. *Id.*

11. *Id.*

potential for governmental action at all levels.<sup>12</sup> For example, a right of belonging arguably supports government programs that seek to develop and enforce a robust understanding of welfare rights, something that the more circumscribed view of traditional individual rights under due process or equal protection rubrics have failed to do.<sup>13</sup> It also refocuses constitutional thinking away from rights that are primarily individualist toward a contextualization of individual rights with a focus on inclusion in a self-defining community in which the very act of inclusion enhances rights both communal and individual.<sup>14</sup>

Still, these approaches to equal or constitutional citizenship represent a starting point, not a conclusion. Taking up the invitations of these scholars, my project is to delve more deeply into the possible meanings of constitutional citizenship, but to do so from a different angle. Somewhat in the tradition of the popular constitutionalism scholars,<sup>15</sup> I propose that the best source for meanings of constitutional citizenship will come not from traditionally originalist sources but from those who attempted to redefine citizenship in a more egalitarian and democratic manner and who established, both in word and in practice, meanings for citizenship on the ground. To do this, however, I will borrow a theoretical framework from political and social theory: the theories of civil society and the public sphere. I do so because I think they capture—in ways often missed by both legal scholars and historians—the structure of nineteenth century social experience while at the same time also connecting this experience to modern notions of politics and society. After explicating some of the main principles of civil society and public sphere theory, I will then analyze a particular

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12. By “all levels” I means to include all three branches — judicial, legislative, and executive — as well as federal, state, and local governments. One of the more important aspects of Professor Zietlow’s approach is that it gives far more legitimacy to congressional actions, and also sets far more rigorous standards for judging those actions, than do most judicentric constitutional theories. *See id.* I believe a rich theory of constitutional citizenship requires all levels of governmental activity.

13. *E.g.*, KARST, *supra* note 8, at 134-46; ZIETLOW, *supra* note 9, at 150-51.

14. KARST, *supra* note 8, at 189-216.

15. *See generally* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNETT, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Professor Zietlow’s book is in this vein as well, although she focuses mainly on congressional speakers. *See ZIETLOW, supra* note 9, at 9, 145-59. For examples of historical legal scholarship that looks beyond governmental actors, see WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); William Forbath, *The New Deal Constitution in Exile*, 51 *DUKE L.J.* 165 (2001); James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 *COLUM. L. REV.* 1 (2002).

form of civil society and the public sphere that I think reveals important aspects of democratic citizenship—the black convention movement. As we will see, this movement both enacted citizenship on the ground and engaged in a discourse about citizenship in the public sphere that presented alternative visions of citizenship. Ultimately this experience shows how one essential aspect of citizenship is the creations of spaces for citizenship activities and engagement with the democratic public sphere.

### I. CIVIL SOCIETY, THE PUBLIC SPHERE, AND COUNTERSPHERES

Originating simultaneously in Tocquevillian ideas of voluntary associations and Hegelian critiques of market capitalism, modern ideas of civil society stress the public yet non-governmental character of civil society.<sup>16</sup> Robert Post and Nancy Rosenblum, in an analysis of modern ideas of civil society, have defined it as the realm of social life characterized by “plural and particularistic identities[,]”—“a zone of freedom for individuals to associate with others and for groups to shape their norms” and determine their own goals and operations.<sup>17</sup> Whether the focus is primarily on non-profit, communal voluntary associations, or on other types of association, ranging from familial to economic associations, the core idea is that civil society provides an activity-based, non-governmental arena for citizenship and provides “seedbeds” for a fully engaged citizenship.<sup>18</sup> Civil society theory—even in its very divergent manifestations<sup>19</sup>—provides important insight on how

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16. On the diverse aspects of civil society evident in Tocqueville and Hegel, see JOHN EHRENBERG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* 121-32 (discussing Hegel), 160-69 (1999) (discussing Tocqueville); JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 91-116 (1992) (discussing Hegel); JEFFREY C. ALEXANDER, *THE CIVIL SPHERE* 99-101 (2006) (discussing Tocqueville). Hegel’s analysis of civil society arises mainly in G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* §§ 182-256 (Allen W. Wood ed., H. B. Nisbet trans., 1991). Tocqueville discusses aspects of civil society throughout both volumes of *DEMOCRACY IN AMERICA*. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 205-223, 590-616 (Arthur Goldhammer trans., 2004).

17. Nancy L. Rosenblum & Robert C. Post, *Introduction to CIVIL SOCIETY AND GOVERNMENT* 1, 3 (Nancy L. Rosenblum & Robert C. Post eds., 2002). Their definition is structured as a contrast to government, which is “a domain of common purpose and identity.” *Id.*

18. Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI-KENT L REV 301, 309 (2000) (citing, inter alia, COUNCIL ON CIVIL SOCIETY, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998); *SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* (Mary Ann Glendon & David Blankenhorn, eds. 1995)). See also Rosenblum & Post, *supra* note 17.

19. Linda C. McClain & James E. Fleming, *Foreword: Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI-KENT L. REV. 289, 292 (2000) (discussing the variety of views of civil society).

democratic citizenship can exist and develop outside the immediate relations to the state, and thus permits us to see the overlapping nature of the different aspects of citizenship, whether they be legal status (e.g., a person is a citizen of the U.S.), political activity (e.g., a person acts as a citizen when voting), or social (e.g., being a “good citizen” by contributing to the common good in a tolerant and civil manner). Civil society theory also has the benefits of being based on a concept reasonably well known at the time of the initial implementation of the Reconstruction Amendments—Tocqueville’s *Democracy in America* was one of the more popular works of the 1850s<sup>20</sup>—and as we will see, it helps frame a better understanding of how citizenship was thought to exist contextually in the nineteenth century. The history of civil society therefore provides some opportunity to think more fully about democratic citizenship in law and culture and to investigate the ways in which freedom and equality can—and cannot—develop outside and alongside relations to the state.

Yet its strength is also its weakness: the concept of civil society often bends too far away from the state, becoming seemingly oblivious to the government’s role as a representative and agent of the citizenry. It is therefore also important to attend to the intersections between state and civil society, for it is here, most of all, where people are *citizens*. Just as civil society theory provides a necessary corrective to ideas of citizenship by orienting us away from the thin conceptualization of citizenship currently associated with constitutional law, public sphere theory provides an essential perspective to civil society theory by orienting us back to the relationship both civil society and the citizen necessarily have with the state. As Jean Cohen has argued, the concept of civil society often presumes a focus on the voluntary associations of private life and omits any consideration of the public sphere or the integrated relations of government and civic life.<sup>21</sup> Theories of the public sphere correct this omission by centering themselves on precisely the points where government and civic life intersect. As described by Jürgen Habermas, the public sphere consists of all places in our society where “something approaching public opinion can be formed,” whether in the media, through elections, or in public fora,<sup>22</sup> and many of the

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20. MATTHEW MANCINI, ALEXIS DE TOCQUEVILLE AND AMERICAN INTELLECTUALS: FROM HIS TIMES TO OURS ix-x (2006).

21. Jean L. Cohen, *American Civil Society Talk*, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL 55-56 (Robert K. Fullinwider ed., 1999).

22. Jürgen Habermas, THE PUBLIC SPHERE: AN ENCYCLOPEDIA ARTICLE, *reprinted in* CRITICAL THEORY AND SOCIETY: A READER 136 (Stephen Eric Bronner & Douglas MacKay

actors in such are themselves organizations and structures of civil society.

As we will see in the ensuing discussion of the battles over freedom and citizenship in the South after the Civil War, and as is also evident from the history of the women's suffrage movement, it is in the public sphere where claims are made for citizenship, claims made by the excluded, often using the structures of civil society, who were seeking to implement and re-define Reconstruction. It is in the public sphere where individuals come together in groups seeking recognition and rights as citizens, where the democratic benefits of civil society can be articulated to the legal and political spheres, where democratic critique can be maintained, and where political, economic, and social transformations can take place. While it may be civil society that provides the seedbeds for citizenship, citizenship qua citizenship can only bloom in the public sphere, for it is there that people assert their inherent equality and their status as full citizens, engaged in commerce, entertainment, and public activity on par with all others. This is why the public sphere was so hotly contested, defended by whites against claims of equal access by blacks, delimited by men against the incursions of women, and was generally the site of battle for equal and free citizenship in the decades after the Civil War.

Still, despite its more democratizing character, the concept of the public sphere has been shown to itself be problematic. To the extent that the concept derives from Habermas' early construction of a bourgeois public sphere which prized open debate among social equals and which assumed a possibility of universalizing as an ideal for democratic society and democratic discourse, Nancy Fraser has argued persuasively that this form of public sphere is elitist and exclusionary and certainly not an adequate site for democratic critique of governmental, economic, or social subordinations.<sup>23</sup> Instead, Fraser and others have pointed to the need to account for oppositional discourse and activity in the public spheres constructed within excluded or subordinated communities. With

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Kellner eds., 1989) (1964). See also JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., Massachusetts Institute of Technology 1989) (1962).

23. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992). As Robert Asen and Daniel Brouwer have aptly stated, this bourgeois public sphere is problematic because the "homogenous class standing of the bourgeoisie engendered a shared vision of the good that blocked as potential topics of deliberation the arrangements that sustained actual exclusions from the public sphere." Robert Asen & Daniel C. Brouwer, *Introduction*, in *COUNTERPUBLICS AND THE STATE* 1, 5 (Robert Asen & Daniel C. Brouwer eds., 2001).



more historical attention to the development of social movements and subordinated groups, these scholars have identified “counterpublics” or “enclaves” in which the democratizing value of the public sphere is imagined and out of which come claims to citizenship and equality that in fact reform or transform the concepts themselves.<sup>24</sup> Under this vision, counterpublics are sites where excluded or subordinated groups can develop and refine counterdiscourses, both to maintain and develop their own meanings and identities and, importantly, to re-engage the dominant “public” sphere in a critical discourse. This approach suggests the possibility of a plural public sphere, or what Robert Asen has described as a multiplicity of public spheres.<sup>25</sup>

The move to recognize multiple publics and to validate the publics and discourses developed in reaction to exclusionary, dominant publics is critical to being able to understand discourses about democratic citizenship during and after Reconstruction. As we will see, the dominant public discourse about citizenship failed to address many of the fundamental experiences and problems of black citizens, and the need for black citizens to engage in both public sphere discourse and alternative public discourses was essential. Yet even the refinement of public sphere theory to include an essential pluralism remains troubling if it focuses solely on the externality of counterpublics. Ultimately we need to be able to follow Jeffrey Alexander and reorient ourselves back toward civil society and democratic citizenship. Alexander values the focus on alternative publics of scholars such as Nancy Fraser, but he argues that these counterpublics, in their most important manifestations as vibrant social movements, “are oriented not simply toward gaining resources and power vis-à-vis the civil sphere but to securing a respected place within it.”<sup>26</sup> The universalizing rhetoric of democratic citizenship and democratic civil society retain, for Alexander, a component of critique that is lost in an excessive focus on counterpublics as purely sites of identity and community formation for the purpose of seeking power. Alexander sees in counterpublic theory a danger of reducing

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24. See, e.g., Mary P. Ryan, *Gender and Public Access: Women's Politics in Nineteenth-Century America*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 23, at 259; Carol C. Gould, *Diversity and Democracy: Representing Differences*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 171, 172-76 (Seyla Benhabib ed., 1996); Geoff Eley, *Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 23, at 289; Catherine R. Squires, *Rethinking the Black Public Sphere: An Alternative Vocabulary for Multiple Public Spheres*, 12 COMMUNICATION THEORY 446, 466 (2002).

25. Asen & Brouwer, *supra* note 23, at 6-10.

26. ALEXANDER, *supra* note 16, at 276.

counterpublics to countercultures and of falling into the trap of instrumentalism, of seeing political discourse as a battle of interests to obtain power rather than as a dynamic process of realizing, albeit necessarily imperfectly, a universalizing potential that is democratic civil society.<sup>27</sup> What we will then need to examine are ebbs and flows of this dynamic between the universalizing character of civil society and citizenship and the particularizing aspects of the necessary and essential formations of multiple publics and multiple civil spheres.

Theories of civil society and the public sphere therefore offer a promising language for understanding the experience of constitutional citizenship in the years of and following Reconstruction, and they can themselves be rethought or refined by studying the experiences of claiming and implementing citizenship on the ground. I take up this period not because of some originalist desire to divine the understandings or intent of the framers and ratifiers of the Reconstruction Amendment (although African American understandings of citizenship are essential to any originalist project since, as Peggy Cooper Davis and others have pointed out, the Fourteenth and Fifteenth Amendments were only ratified with the political participation of black Americans<sup>28</sup>), but rather because in giving depth to the meanings of general political and cultural concepts such as citizenship one needs, I think, to explore the lived experiences of the concept. As we will see, the experiences of trying to claim, define, and implement a free and equal citizenship after the war led African Americans and some white Republicans to enact citizenship on the ground, giving detail to vague constitutional language. The ensuing battles over citizenship that took place then identified, in ways that can only happen on the ground, the key sites and experiences of citizenship, both in the assertions of citizenship by African Americans and in the denials of that citizenship by white Democrats.

## II. CITIZENSHIP CREATION DURING RECONSTRUCTION: THE LEGAL RIGHTS OF FREE LABOR

Many scholars follow historian Eric Foner's lead in arguing that Reconstruction Republicans adhered to a free labor ideology that

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27. *Id.* at 279.

28. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 221 (1997).

identified freedom primarily with the right to earn wages.<sup>29</sup> Thus in the Civil Rights Act of 1866 Republicans linked citizenship with the rights to contract and own property, and they repeatedly proclaimed the value of contract labor arrangements as the apotheosis of the new freedom and citizenship that they saw themselves granting to blacks.<sup>30</sup> While there may have been a variety of Republican views on how expansive such rights would be, the basic thrust of congressional ideas of citizenship was that (male) citizens should have governmental protection of rights to contract, to buy, sell, and hold property, and to gain access to courts to protect those rights, all of which implemented the right of citizens to earn and support themselves with their own labor.

In its specific listing of rights and privileges, the Act asserted and protected a collection of citizenship rights, including rights of contract, property, and access to the courts.<sup>31</sup> To the modern ear, these are rather routine; but in the context of post-bellum, post-slavery America their centrality to creating a fully vibrant free, civil society was more directly evident. Take, for example, the right to contract. On one level it secured simply the legal right to transact and enforce agreements. Yet, in the context of the 1860s, this freedom to contract was fundamental. The country was developing into a modern force of industrial capitalism, and contract was one of the legal engines driving this transformation. Indeed, as Morton Horwitz argued in his classic discussion of the issue, “[t]he triumph of a contractarian ideology by the middle of the

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29. See generally FONER, *supra* note 2; ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (Oxford University Press 1995) (1970); JAMES D. SCHMIDT, *FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815-1880* (1998); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998). I have previously developed this idea in James W. Fox Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 *TEMPLE POL. & CIV. RTS. L. REV.* 453, 460-66 (2004).

30. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (protecting the civil rights of United States citizens). The Act provided:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

31. See *id.*

nineteenth century enabled mercantile and entrepreneurial groups to broadly advance their own interests through a transformed system of private law.<sup>32</sup> Access to contract rights was the ticket to citizenship in the new capitalist economy. Congressional Republicans, by the very act of equating basic legal rights with freedom and racial equality, were re-defining legal citizenship in a way that incorporated some aspects of the citizenship of belonging. They were in fact re-creating a political society in which commercial norms such as free labor and free contract were the inheritance of each male<sup>33</sup> citizen regardless of race, and in opening citizenship across race, Republicans were redefining citizenship to mean inclusion in civil society.<sup>34</sup>

The Civil Rights Act of 1866 also secured property rights.<sup>35</sup> Property was integral to self-sufficiency, and the goal of free labor, ultimately, was some ownership of property, both personal and real. Yet property, as Eric Foner has observed, represented a key ambiguity during Reconstruction.<sup>36</sup> For white Republicans, property rights provided a means for securing productive, free-labor agriculture; while blacks might develop ownership of farms and plantations, the land itself was seen as primarily a productive resource that would replicate, in agricultural form, northern capitalism. For the former slaves, on the other hand, land ownership created a zone of independence and privacy, a place where they need not work for former-masters at depressed wages but could instead become self-sufficient, secure in their homes and their families, while also providing a means to bargain up wages for the labor they chose to sell.<sup>37</sup>

These differing views of property also reflected fundamental differences regarding civil society. For northern Republicans, civil society focused significantly on the steering of labor toward economic

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32. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 211 (1977).

33. It is of course vital to state that the citizen ideal was, at this point, purely masculine for the male actors of Reconstruction. Although feminists had well articulated, in the Declaration of Sentiments and elsewhere, the inherent hypocrisy and intellectual illegitimacy of making universalizing claims to a gendered definition of citizenship, such a counter-discourse was yet to affect the dominant male discourse. This topic will require a much fuller exposition in what I expect to be a book on this topic; for now I merely note its importance. On the importance of contract ideology, contract-as-metaphor, and the inherent tensions between those and gender subordination during this period, see AMY DRU STANLEY, *supra* note 29.

34. On inclusion as an aspect of citizenship, see KARST, *supra* note 8, at 189-216.

35. See Act of April 9, 1866, *supra* note 30.

36. See FONER, *supra* note 2, at 54.

37. See *id.* (discussing the dilemmas of the free labor ideology during Reconstruction).

productivity.<sup>38</sup> This vision and commitment would be sorely tested in the coming decades as labor developed its own views of civil society through labor unions and battled with many in the Republican Party, who shifted toward a predominantly industry- and business-oriented idea of civil society.<sup>39</sup> But in the 1860s it was still possible to maintain an egalitarian vision of free labor in which civil society and industrial labor were seen as unified.

For southern blacks, however, wage labor seemed anathema to democratic civil society. The civil rights of contract and property were instead means of protecting and developing counterweights in civil society to the oppressions of post-slavery economic and political structures. Through the ownership of land and protections of access to the courts and enforcement of contracts, blacks could, it was thought, carve out spheres for families and churches, benevolent and economic associations, schools and newspapers, and could generally build community supports for their newly acquired legal citizenship.<sup>40</sup>

While the visions of civil society imagined by northern whites and southern blacks varied substantially, both understood that legal rights and legal citizenship helped create the possibility of black participation in civil society.<sup>41</sup> It is important to see both the transformative and the restrictive aspects of the dominant citizenship discourse of Reconstruction. On one level Reconstruction really did present a radical transformation to ideas and realities of citizenship. The democratizing ideals of the Jacksonian era, in which white laborers had become full citizens and the right to labor, contract, and property were claimed to be open to all classes,<sup>42</sup> merged with abolitionist ideals of racial equality. Legal rights were the site of communal transformation that had not been possible before 1865 in either the slaveholding south or in the Jim Crow north.<sup>43</sup> Yet this transformation only occurred with the assurances of

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38. See *infra* note 39.

39. On these issues, see generally FORBATH, *supra* note 15; DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* (1993).

40. See FONER, *supra* note 2, at 54 ("As Northern investors understood the term, 'free labor' meant working for wages on plantations; to blacks it meant farming their own land, and living largely independent of the marketplace."). See also *id.* at 364-79.

41. See *id.* at 370-73.

42. See, e.g., Theda Skocpol, *The Tocqueville Problem: Civic Engagement in American Democracy*, 21 SOC. SCI. HIST. 455, 460 (1997) (drawing connections between Jacksonianism, expanded suffrage, and Tocquevillian associationalism).

43. On the segregationist and white supremacist nature of northern antebellum society, see LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961).

limitations. In 1866 there was no place for black suffrage in the claim to full citizenship, and certainly no space for “social” citizenship, for equal access to public spaces in a way that would accord full civil status to black citizens. For these claims to break into citizenship discourse, the dominant public sphere would need a new discourse constructed from other public spaces, spaces where subordinated black voices could use the freedoms and rights of their newly acquired first-level citizenship to press for the continued transformation of citizenship and civil society.

### III. CREATING A BLACK CIVIL SOCIETY AND PUBLIC SPHERE: THE BLACK CONVENTION MOVEMENT

Free labor citizenship was one of the dominant ideas of free citizenship present during Reconstruction, but it was predominantly an ideal advanced by northern elites (white and black) and was not necessarily the ideal for all freed blacks.<sup>44</sup> This is evident from the very start of the post-war period. African-American men had been meeting in national conventions since before the Civil War, and many black men, from both the North and the South, met at national and state conventions after the war.<sup>45</sup> These conventions were significant civic and citizenship acts on a number of levels. First, they demonstrated the remarkable commitment to active engagement with civil society in just the way that Tocqueville had identified as a crucial aspect of the American brand of democratic citizenship.<sup>46</sup> By engaging in this culturally valorized means of association and expression, black Americans enacted political citizenship through the public sphere despite their disenfranchisement throughout most of the country.<sup>47</sup> Through the type of group activity common to large associations—committee work, drafting resolutions, debating proposals, compromising, balancing competing interests, building coalitions—participants in these conventions could engage in the activities of democratic citizenship. And often the conventions

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44. See FONER, *supra* note 2, at 289.

45. Philip S. Foner and George E. Walker performed a tremendous service in compiling the materials from the state and national black conventions of the 19th century. See 1 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865 (Philip S. Foner & George E. Walker eds., 1979) [hereinafter 1 PROCEEDINGS, 1840-1865]; 1 PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865-1890 (Philip S. Foner & George E. Walker eds., 1986) [hereinafter 1 PROCEEDINGS, 1865-1890].

46. See, e.g., TOCQUEVILLE, *supra* note 16, at 215-23 (discussing political associations), 604-609 (discussing civil and political associations).

47. Of course first generation feminists had also invoked this social/political practice, most prominently in the 1849 Seneca Falls Convention that produced the Declaration of Sentiments.

produced formal political activity by sending petitions to Congress, the President, or to the general citizen.<sup>48</sup> These conventions reveal how important the overlapping nature of citizenship can be, and how important the public sphere and civil society are for the engagement in and claim for full citizenship status. The very act of claiming citizenship through public discourse in voluntary associations itself defined the nature of that citizenship and helped eventually to transform that citizenship into a recognition of political citizenship more broadly by the dominant society.

This final point bears emphasis. When the citizenship activity of Reconstruction is viewed primarily as that of congressional actions, as the writing of legislation or the drafting of constitutional amendments, then citizenship remains passive. It is a thing granted, not claimed or asserted. While the egalitarian nature of this grant was indeed radical for the time and essential to any future development of full democratic citizenship, it was the claiming of citizenship by African Americans that reveals the full potential of citizenship activity.<sup>49</sup> The state and national conventions of African Americans thus represent a crucial and defining aspect of a more vibrant, active, and realizable citizenship.

African American conventions also defined citizenship through their specific articulations of the meaning of citizenship and freedom. In numerous meetings and conventions of freedmen meeting at the end of the Civil War, black Americans expressed their own understandings of freedom and full citizenship by stating their expectations and demands of whites in what would be, they hoped, a new country.<sup>50</sup> Full access to American citizenship meant something very real and specific. Freed blacks certainly wanted access to the basic legal rights such as contract and property ownership; the free labor ideal of legal citizenship held a prominent place in African American articulations of citizenship, especially in the earlier conventions of 1865 and 1866 which were dominated by men who had been free before the war and possessed some property.<sup>51</sup> Yet even in the early conventions the citizenship claims were more encompassing and fuller.

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48. Eric Foner, *Rights and the Constitution in Black Life during the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 867-69 (1987).

49. See ELIZABETH REGOSIN, *FREEDOM'S PROMISE: EX-SLAVE FAMILIES AND CITIZENSHIP IN THE AGE OF EMANCIPATION* (2002).

50. See generally 1 PROCEEDINGS, 1840-1865, *supra* note 45; 1 PROCEEDINGS 1865-1890, *supra* note 45.

51. FONER, *supra* note 2, at 112.

Just as critical to the claim of citizenship through civil rights of contract and property were the uniform arguments of black conventions to assert a right to the franchise as fundamental to any meaningful citizenship or freedom.<sup>52</sup> Congress had famously temporized on black suffrage in the debates over the Fourteenth Amendment, as Radical Republicans did not appear to have the votes to achieve it.<sup>53</sup> Each convention focused on calls for Congress to grant and protect the right of black citizens to vote, often pointing out that their citizenship-claim to suffrage, as loyal citizens who fought for the Union, were plainly greater than those of the former Confederate soldiers.<sup>54</sup> It was also clear to these convention members that the other rights could be rendered meaningless without access to political powers. For black Americans during Reconstruction, access to civil society and political activity went hand-in-hand, and unlike the progression in Congress where civil rights came first, for African Americans the ballot was seen as the more important right, on which all others could depend.<sup>55</sup> As John Mercer Langston, one of the leading African-American legal and political thinkers and activists, stated, suffrage was more fundamental than even the basic civil rights of property and contract because it was central to self-government and free institutions, and was “a constituent element of manhood; . . . it stands prominent among the chief duties of civil society to sustain and guard it.”<sup>56</sup>

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52. See, e.g., 1 PROCEEDINGS, 1865-1890, *supra* note 45, at 80 (discussing the Norfolk Convention of 1865), at 81 (discussing “Address From the Colored Citizens of Norfolk, Va., to the People of the United States”); FONER, *supra* note 2, at 180 (discussing the Raleigh Convention of 1865). See also Foner, *supra* note 48, at 872-73.

53. FONER, *supra* note 2, at 251-61; Xi Wang, *Black Suffrage and the Redefinition of American Freedom*, 17 CARDOZO L. REV. 2153, 2179-95 (1995-1996).

54. See, e.g., 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865 302 (Philip S. Foner & George E. Walker eds., 1979) [hereinafter 2 PROCEEDINGS, 1840-1865].

55. *Id.*; see also FONER, *supra* note 2, at 289.

56. JOHN MERCER LANGSTON, FREEDOM AND CITIZENSHIP 110 (Mnemosyne Publishing 1969) (1883). For Langston, and for other men advocating black rights during this period, “manhood” was often used synonymously with citizenship. E.g., *Address of the Colored State Convention to the People of the State of South Carolina*, in 2 PROCEEDINGS, 1840-1865, *supra* note 54, at 299. The fact that the idea of citizenship was so often described in expressly gendered terms reveals some of the dangers inherent in this concept, and certainly the dangers in not carefully regarding the context of historical uses of the concept. On the problem of citizenship defined as “manhood,” see NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 191-204 (1998). On the construction of a specifically African-American idea of manhood, see the essays in 1 A QUESTION OF MANHOOD: A READER IN U.S. BLACK MEN’S HISTORY AND MASCULINITY (Darlene Clark Hine & Earnestine Jenkins eds., 1999); 2 A QUESTION OF MANHOOD: A READER IN U.S. BLACK MEN’S HISTORY AND MASCULINITY (Darlene Clark Hine & Earnestine Jenkins eds., 2001).



But just as political rights were critical for the protection of civil society, so too was civil society critical in the claim for political rights. Eric Foner has observed that one of the main reasons that black suffrage was on the national agenda after the war—given that northern whites had not previously seen black suffrage as important—was the persistence and skill of blacks from New Orleans in petitioning Congress to address the issue.<sup>57</sup> In particular, the Creole community had a history of developed civil society in an enclave of freedom before the war. They had established a wide range of civil activities, from schools to orphanages to a free press to successful businesses, all of which supported a vocal and active political community. This enabled representatives of the community to present, in person, forceful arguments on behalf of black suffrage in ways that northern whites were compelled to take seriously.<sup>58</sup>

One of the most striking examples of these issues came from South Carolina Freedmen's Convention, meeting in Charleston at the Zion Presbyterian Church in November 1865.<sup>59</sup> First, the participants recognized the full breadth of the communal and personal experiences at issue when they stated that they gathered “to deliberate upon our intellectual, moral, industrial, civil, and political condition.”<sup>60</sup> Notice that this was not a matter of isolating civil rights from political rights, or civil and political from economic, education, or moral rights and duties; the type of isolated parsing of layers of citizenship that Congress would engage in early 1866 made little sense to the men who were claiming freedom and citizenship from a history of bondage.

This point was reinforced through the language the convention used to describe what had been denied in slavery and what was required in freedom: “Heretofore we have had no avenues opened to us or our

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57. Foner, *supra* note 48, at 867-69.

58. *Id.* A similar point could be made about northern free blacks who had developed a nascent, enclave-like civil society that included black churches (especially the A.M.E. Church) and a black press in the north as part of the black abolitionist movement. These civil society organizations and activities helped fuel both the abolitionist movement and the subsequent movement for black citizenship and suffrage. On antebellum northern black society generally, see PATRICK RAE, *BLACK IDENTITY & BLACK PROTEST IN THE ANTEBELLUM NORTH* (2002); JAMES OLIVER HORTON & LOIS E. HORTON, *IN HOPE OF LIBERTY: CULTURE, COMMUNITY, AND PROTEST AMONG NORTHERN FREE BLACKS, 1700-1860* (1997); LITWACK, *supra* note 43; JANE H. PEASE & WILLIAM H. PEASE, *THEY WHO WOULD BE FREE: BLACKS' SEARCH FOR FREEDOM, 1830-1861* (1974).

59. For the South Carolina Convention of 1865 discussed here, see 2 *PROCEEDINGS, 1840-1865*, *supra* note 54, at 286-304.

60. *Id.* at 298 (discussing “Address of the Colored State Convention to the People of the State of South Carolina”).

children—we have had no firesides that we could call our own; none of those incentives to work hard for the development of our minds and the aggrandizement of our race in common with other people.”<sup>61</sup> This describes not just a desire to have access to property and contract rights, but a fuller context in which those rights are implemented or denied. This is a claim not for rights in and of themselves so much as for rights as opportunities (“avenues”); not to the right of free labor for individual economic benefit but for intellectual and communal development (“development of our minds and the aggrandizement of our race”).<sup>62</sup> This latter point in particular shows how individual and communal were understood together, how they were more integrated than classical liberal ideology and free labor ideology would indicate. The desire of freed blacks to be free of white control meant that “autonomy” for blacks consisted of “autonomy both as individuals and as members of a community.”<sup>63</sup> Whereas whites often talked of autonomy or freedom in more individualized terms, there was a clear communal consciousness in claims of autonomy and freedom by blacks. In this respect, civil society and citizenship claims by blacks should be seen as much more able to unify individualistic and communal concepts.

Yet it would be a mistake to see in the communal conceptions of Reconstruction-Era blacks a rigid separatism along racial lines that inhibited understandings of broader democratic community and citizenship. In several of the black conventions, delegates debated issues of race-consciousness and separatism. For example, in Pennsylvania the delegates debated whether to condemn black merchants who do not treat black customers equally to white customers, ultimately deciding that preferential treatment of white customers was against their principle of equality, even if opposing such preferences entailed some economic sacrifice by black merchants.<sup>64</sup> Black delegates were beginning to work out an issue that they could only address fully in the black public sphere: the relative role and value of race-based community building versus race-neutral claims of individualized equality. It was these debates that helped build a base for how biracial legislatures during Reconstruction would approach issues of social equality. Separate schools were often supported by black communities and Reconstruction legislatures in states that had substantial black legislative participation during

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61. *Id.* at 298-99.

62. *Id.*

63. Foner, *supra* note 48, at 870.

64. 1 PROCEEDINGS, 1865-1890 *supra* note 45, at 147-48 (discussing the Proceedings of Pennsylvania Convention, 1865).

Reconstruction, such as South Carolina and Mississippi.<sup>65</sup> Yet these legislatures also advocated and passed laws desegregating public accommodations, and objected to laws *requiring* segregated schools.<sup>66</sup> For black leaders during Reconstruction, racial separation and race-based social communities were part of a pluralistic, as opposed to a racialized, conception of American democracy. Race mattered, and racial improvement and consciousness could be harnessed in a positive way, yet the *public* and *legal* understanding of persons, that is, *citizenship* was itself not racialized. As Eric Foner has written, “while most blacks valued [their] autonomous institutions and did not object to voluntary racial separation, they insisted the state must remain color-blind.”<sup>67</sup> This was a conception of citizenship that was at once aspirational about the promise of de-racialized equality and grounded in a recognition of the reality of racialized communities.

The South Carolina convention went on to frame these rights of citizenship in a larger context of civil society. In a statement to the United States Senate and House, the South Carolina convention listed the rights and privileges that they expected the federal government to secure, including: a right to receive protection of law and government (“the strong arm of law and order”), a right to protect laborers’ ability to sell labor just as merchants sell their goods, a right to fair consideration of their claims on the “land question” (a reference, no doubt, to General Sherman’s forty-acre-and-a-mule land grant, reversed by President Johnson<sup>68</sup>), and a right to bear arms on a basis equal to whites.<sup>69</sup> These rights themselves seem consistent with rights recognized by congressional Republicans, even if Republicans failed to secure the land grants. But the members of the convention also claimed more than these basic legal rights. Like all other black conventions of the period, they asserted a right to suffrage, citing the injustice of being taxed without representation and the need to have suffrage to protect against unjust

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65. FONER, *supra* note 2, at 365-68. Foner cites some instances, such as in New Orleans, where integrated schools were sustained for some period of Reconstruction, but for the most part he finds that African-Americans were more interested in establishing public education in the first place than in pressing for integrated education.

66. *Id.* at 368-70.

67. *Id.* at 372.

68. On the Sherman land grant and the forty-acres-and-a-mule idea, see generally CLAUDE F. OUBRE, *FORTY ACRES AND A MULE: THE FREEDMEN’S BUREAU AND BLACK LAND OWNERSHIP* (1978).

69. 2 PROCEEDINGS, 1840-1865, *supra* note 54, at 302 (discussing “Memorial to the Senate and House of Representatives of the United States, in Congress Assembled” in South Carolina, 1865).

laws, reflecting a view consistent with John Mercer Langston's articulation of suffrage as a threshold right.<sup>70</sup> Thus in South Carolina, as in Louisiana and elsewhere, blacks participating in a black public sphere responded to congressional hesitancy with their own re-definition of basic citizenship rights.

The South Carolina convention went beyond this, however, and began developing an exploration of citizenship rights even broader than one connecting suffrage and basic civil rights. In their statement to Congress the delegates also asserted a right to secure “the three great agents of civilized society—the school, the pulpit, the press[.]”<sup>71</sup> Here we see most plainly a claim to civil society—or what they refer to as civilized society—in which education, religion, and the press are as fundamental to basic citizenship and freedom as first order legal rights and suffrage. This statement echoes Tocquevillian ideas that civil society in a democracy is composed of a range of activities (rather than merely voluntary associations).<sup>72</sup> The delegates to the South Carolina convention evidently understood that they were situated within a legal, political, and civil society, and that access to all spheres of social and political engagement were important in a broad nexus of activities of civil society. This view is further evident in their assertion of a right to engage in political discourse in open-access political conventions in which all citizens could debate the fulfillment of what they describe as basic rights “to enter upon all avenues of agriculture, commerce, [and] trade; to amass wealth by thrift and industry; [and] the right to develop our whole being by all the appliances that belong to civilized society[.]”<sup>73</sup>

This final phrase—“develop our whole being by all the appliances that belong to civilized society”—aptly characterizes how the convention understood the situatedness of the individual rights. It

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70. *Id.*; see also LANGSTON, *supra* note 56, at 110.

71. 2 PROCEEDINGS, 1840-1865, *supra* note 54, at 302 (discussing “Memorial to the Senate and House of Representatives of the United States, in Congress Assembled” in South Carolina in 1865).

72. Tocqueville discusses a range of components of civil society, including press (Book I, chapter 11), political associations (Book I, chapter 12), public associations (Book II, chapter 5), and, to some extent, religion (Book II, chapters 9 & 12). See Tocqueville, *supra* note 16. On the importance of understanding that Tocqueville's analysis of civil society was both broader than voluntary associations and also somewhat critical of such associations, see Robert T. Gannett, Jr., *Bowling Ninepins in Tocqueville's Township*, 97 AMERICAN POLITICAL SCIENCE REV. 1, 1-2 (2003) and Keith E. Whittington, *Revisiting Tocqueville's America*, 42 AMERICAN BEHAVIORAL SCIENTIST 21, 21-24 (1998).

73. 2 PROCEEDINGS, 1840-1865, *supra* note 54 at 291, 302.

connects self-realization (“develop our whole being”) with the structures of civil society (“the appliances that belong to civilized society”). It also employs a double meaning that unites individual African Americans to the African American community by referring to “*our* whole being.” This message to Congress reflects a radical joining of traditionally liberal ideas of legal rights, emerging ideas of suffrage rights, and an as yet under-developed idea of the spheres of civil society—including education, commerce, labor, religion, and the press, among others—as necessary components to full development of citizenship and personhood.

In conjunction with many of the black state and national conventions, black southerners were also forming local and state Equal Rights Associations. Several of the state conventions specifically referred to the associations as the organizational arms to carry out the proposals and projects discussed and supported by the convention delegates.<sup>74</sup> Equal Rights Associations and Union Leagues took the ideals of the black conventions—the claims for equal legal rights, political activity, education, labor rights, and public welfare—to the local level. Equal Rights Associations and Union Leagues actively sought to implement black citizenship through a number of activities, ranging from advocating suffrage, to leading protests against segregated street cars, to organizing state black conventions, to assisting the poor and helping establish schools.<sup>75</sup> The Georgia Equal Rights Association had been established by the Georgia Freedmen’s Convention with the purposes of securing equal rights, aiding the poor, and promoting education for African Americans throughout Georgia.<sup>76</sup> These associations often had close ties with the Freedmen’s Bureau; Georgia’s association was headed by a former officer of the Georgia division of the

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74. In November 1865, the National Equal Rights League held its first meeting in Cleveland. *See* 1 PROCEEDINGS, 1865-1890, *supra* note 45, at 40. The Pennsylvania Convention was itself the Annual Meeting of the Pennsylvania State Equal Rights League. *Id.* at 132. In Georgia, the convention that met in January, 1866 referred in its opening to the Georgia Equal Rights Association. *Id.* at 232.

75. FONER, *supra* note 2, at 64; JONATHAN M. BRYANT, HOW CURIOUS A LAND: CONFLICT AND CHANGE IN GREENE COUNTY, GEORGIA, 1850-1885, 104-118 (1996) (discussing activities of Equal Rights Associations in Georgia). On the Union Leagues, see generally MICHAEL W. FITZGERALD, THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH: POLITICS AND AGRICULTURAL CHANGE DURING RECONSTRUCTION (1989).

76. BRYANT, *supra* note 75. Bryant depicts the efforts of the Equal Rights Association to fight violence and unjust legal treatment in Greene County and throughout Georgia after the war. *Id.* at 104-11, 113-18. *See also* FONER, *supra* note 2, at 117 (describing the “Georgia Equal Rights and Educational Association”).

Freedmen's Bureau.<sup>77</sup> Equal Rights Associations thus combined the ideals and personnel from the black conventions with the governmental support and personnel of the federal government. Such organizations, while partly political, were also general social service operations designed to implement more fully freedom and citizenship within the black communities of the South. This was, quite simply, civil society writ small, a localized and focused effort to bring political claims to citizenship down to the personal, local, and immediate level for many blacks throughout the south. What is particularly impressive about this movement is the combination of speed and breadth by which the movement made its way from national conventioning to local political and social organizing, a movement that could only happen if it was coming from the ground up as well as the top down and by a combination of political and social service activity.<sup>78</sup> The activities of Union Leagues, Equal Rights Associations, and numerous other black social groups were as much civic duties—burial of the dead, education and literacy, coordination of religious services—as they were political.<sup>79</sup>

The activities of the Associations and Leagues also achieved another function: they were a means of the type of dignity-claiming activity essential to democratic citizenship. As Michael Fitzgerald has argued, Union League activity, along with other mass actions by black citizens, “were . . . assertions of self-respect,” public statements of dignity, equality, and citizenship.<sup>80</sup> When blacks acted collectively throughout the urban centers of the south to challenge segregation in 1867—longshoremen's strikes in the port cities, other strikes in Richmond and Selma, streetcar boycotts in Mobile—there was a fundamental claim of full citizenship being made.<sup>81</sup> And for black citizens who were both claiming and re-defining citizenship, civil, political, and social equality were part of this citizenship package.

It should not be surprising that a more radical engagement with civil society took place through the Equal Rights Associations and Union Leagues than had been expressed at the black conventions of 1865 and 1866. The conventions largely advocated a moderate form of civil society and civil and political rights. While they understood the

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77. BRYANT, *supra* note 75, at 104.

78. *See, e.g.*, FITZGERALD, *supra* note 75, at 117 (noting “interconnection between political insurgency and labor concerns in League-sponsored mass activity”).

79. *See generally* 1 PROCEEDINGS, 1840-1865, *supra* note 45; 1 PROCEEDINGS, 1865-1890, *supra* note 45.

80. *Id.* at 127-28.

81. Foner, *supra* note 48, at 874.

combination of rights more organically than did congressional leaders, blacks at the conventions often echoed the free labor ideals being articulated by white Republicans in the North.<sup>82</sup> What developed more fully in the ensuing years of Reconstruction was a recognition of the active aspects of politically engaged citizenship and the need for federal and other governmental protections for the free exercise of citizenship.<sup>83</sup> That this realization took place *on the ground* indicates just how complicated and embedded the resistance to equal citizenship was; it also shows exactly why it is critical for civil society to be grounded locally as well as organized nationally. Moreover, the experiences of the associations and leagues in working with the federal government through the Freedmen's Bureau left African Americans and some local white Republicans with a firmer understanding of the importance of governmental supports for the activities of civil society and its nongovernmental associations.

The more politicized and statist understanding of civil society that arose in the black public sphere also came about because of the remarkable participation of black citizens in local, state, and federal government in the years of congressional Reconstruction, beginning in what Eric Foner has described as the *annus mirabilis* of 1867.<sup>84</sup> As African Americans gained more power, they both learned the importance of governmental action and, in the face of increased white hostility in other spheres—economic oppression, physical violence, etc.—they also recognized the essential nature of governmental power in combating racial oppression in civil society.<sup>85</sup> That is, blacks learned that the state itself was an essential instrument of equal citizenship because civil society itself allowed for the perpetuation of racial norms.

The importance of the state in black republican views of civil society was reflected in the actual activities pursued by Reconstruction legislators and governments in southern states with substantial black participation for the brief period from 1867 through 1874.<sup>86</sup> It was in this time that several southern legislatures adopted desegregation laws, asserting a right to open and equal access to public accommodations.<sup>87</sup> The effort to desegregate streetcars and public events began with black and white civil rights protests, including boycotts and sit-ins, in the

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82. *Id.*

83. *Id.*

84. FONER, *supra* note 2, at 282.

85. *Id.*

86. See *infra* notes 87-93.

87. FONER, *supra* note 29, at 878-80; FONER, *supra* note 2, at 346-92.

antebellum north.<sup>88</sup> This movement continued in the postbellum south, with streetcar lines in New Orleans and Charleston changing segregationist policies in the face of these protests.<sup>89</sup> In combination with the more radical white and black republicans of the north, particularly centered in Massachusetts, southern state legislatures followed with new laws desegregating public accommodations.<sup>90</sup> As Eric Foner observes, the effort to pass laws desegregating public accommodations, including common carriers, places of amusement, and even businesses licensed by the state, at first met with overwhelming opposition from white Republicans and failed to pass, but as blacks gained more political power and prowess, they were able to persuade enough whites to achieve passage of the laws in several southern states.<sup>91</sup> Legislatures with substantial black participation also produced an activist state in terms of the range of services provided, particularly to the poor. Legislatures funded medical care, legal assistance, orphanages, and of course schools.<sup>92</sup> Reconstruction legislatures also enacted some laws protecting laborers, including giving workers a first lien on an employer's property.<sup>93</sup> Government, under this vision, worked to produce equal citizenship both by pursuing desegregation of basic governmental functions and by providing governmental services to all races, even if often in a de facto segregated manner, in a way that began to look like the provision of social rights and privileges that would not be more fully developed, in practice and in political theory, until the 20th Century.

### III. IMPORTANCE OF THE STATE AND PROBLEMS OF A BIFURCATED CIVIL SOCIETY

Even if we can find in the Reconstruction era evidence of a black civil society and public sphere that developed citizenship ideas and practices and moved the concept of citizenship beyond the more narrow confines articulated by congressional Republicans in 1865 and 1866, the fact remains that the ideal of democratic citizenship only appeared fleetingly during that period and was violently and systematically suppressed thereafter. What are we to make, therefore, of the historical

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88. See, e.g., Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1342 (1996).

89. FONER, *supra* note 2, at 281-82.

90. Massachusetts passed the first major state desegregation law. FONER, *supra* note 2, at 28.

91. *Id.* at 370-71.

92. *Id.* at 368.

93. *Id.* at 373.



denial of equal, democratic citizenship from about 1876 through at least the 1970s, a denial whose effects are felt very profoundly still?

On one level we can see in the loss of the possibilities that began budding during Reconstruction the critical importance of federal supports for citizenship. The Supreme Court played its part in the demise of federal support for federal citizenship, with decisions such as *The Slaughter-House Cases*<sup>94</sup> and the *Civil Rights Cases*,<sup>95</sup> which converted federal citizenship into a legal chimera and incapacitated congressional authority to define and implement citizenship through very narrow and formalistic readings of the Fourteenth Amendment. Whereas occasional political will at the federal level had led to the federal suppression of the Ku Klux Klan in the early 1870s—largely through the coordinated efforts of the newly minted Department of Justice and the military—the loss of that will and the eventual acceptance by the Republican party of an accommodation with the white south effectively eliminated the main means of opposing a violent overthrow of democratic government.<sup>96</sup> The “Redemption” of the south by white Democrats shows how fragile civil and political citizenship can be when it is confronted with persistent violent opposition without the protection of the government. One of the most important basic rights cited by the South Carolina black convention was the protection by the government, both by law and by force.<sup>97</sup> Absent such protection, absent the countervailing force represented by the state, civil society simply cannot develop, at least not in an integrative and open manner. While more recent analyses of civil society in the context of twentieth century totalitarian and authoritarian states highlights the problem of the overly repressive state,<sup>98</sup> the creation of the firmly Jim Crow south reveals how the removal of state power can also destroy the freedom and other

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94. 83 U.S. 36 (1872).

95. 109 U.S. 3 (1883).

96. FONER, *supra* note 2, at 454-59. For a history of the prosecution of the Klan in this period, see William S. McFeely, *Amos T. Akerman: The Lawyer and Racial Justice*, in REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 395 (J. Morgan Kousser & James M. McPherson eds., 1982).

97. 2 PROCEEDINGS, 1840-1865, *supra* note 54, at 284-304.

98. See, e.g., David A. Crocker, *Civil Society and Transitional Justice*, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL, *supra* note 21, at 375; CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE (Muthiah Alagappa ed., 2004).

benefits of civil society, especially when practices of subordination are allowed to operate on civil society.<sup>99</sup>

However, it must also be noted that the eventual dominance of Jim Crow occurred *through* the state, that is, through the instrumentality of state and local governments. It was most clearly the desire of white Democrats to control the state apparatus; the point was to control state government and to keep the federal government from interfering on behalf of black citizens.<sup>100</sup> That this means of control could only be effectuated through the combined use of private violence and a cover of state legitimacy did not change the fact that the state was a significant player. Thus the critical problem, in the context of postwar white supremacy, was the loss of *competing* state organizations. As would be the case in the modern civil rights movement, implementation of citizenship, and the reconstruction of American civil society, required a vibrant, active, and competitive federal structure.

What happened to civil society during this period is also instructive. With the loss of state protection for black participation in and constructions of civil society, black citizens had to create more defined and cohesive enclaves of oppositional civil society.<sup>101</sup> White supremacists still strove to attack instantiations of successful black civil society—Jim Crow violence was often directed against black businesses, black property owners, black civil associations, black schools, etc.<sup>102</sup>—but the ability of black communities to sustain themselves, to educate their youth, to acquire some level of financial support, and to sustain voluntary and religious organizational structures that could support resistance is a remarkable testament to the capacity of enclaves or counterspheres to exist and develop.<sup>103</sup> The problem, however, was that the development of such enclaves, in a *closed* civil society that was rigidly bifurcated and insufficiently porous, meant that the ideals of democratic citizenship, the ideals expressed, albeit differently, in both white Republican and black ideology from Reconstruction, ideals of a

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99. For my own analysis of the operation of Jim Crow on civil society, see James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOWARD L. J. 113 (2006).

100. *Id.* at 135-37; 152-61.

101. *Id.* at 161-188.

102. See, e.g., LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW*, 150-67 (1998).

103. See, e.g., Fredrick C. Harris, *Will the Circle be Unbroken? The Erosion and Transformation of African-American Civic Life*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL*, *supra* note 21, at 317. Harris focuses more on the middle-to-late-20th century, but his analysis of the role of segregation-era black civil society applies quite well here.

more universal citizenship that allowed for open access to all the “appliances” of civil society, could not in fact take place. Instead, what developed was, on the one hand, a false universal seen in the conversion of free labor ideology to a freedom of contract regime that privileged white supremacist, male capitalism as itself a universalized reality in the public sphere,<sup>104</sup> and, on the other, an aggressively exclusionary public sphere and *uncivil* society where the borderlands were patrolled with violence against the incursion of labor, nonwhites, and women.<sup>105</sup> Jeffrey Alexander, in analyzing how Jim Crowism affected and infected the promise of civil society, argues (based in part on Houston Baker’s analysis) that white America’s creation of itself as a rational and “civil” or “civilized” society depended in fundamental ways on the simultaneous subordination of blacks and the imagining of blacks as inherently uncivil and uncivilized.<sup>106</sup> Thus white civil society itself became a distorted inversion, at once proclaiming its own universality while also depicting this universal as set against racial exclusion.

The response to this, as we have seen, was for black citizens to create a countersphere, or black civil society. Although Alexander fails, I think, to account for the development of civil society within black southern society prior to the 1920s (he focuses mainly on the development of particularly urban aspect of black civil society after World War I),<sup>107</sup> the basic point he makes that it was the discourses and institutions and cultural reproductions within black civil society that produced many of the possibilities of a unifying civil society, or what he calls civil repair is, I think, important.<sup>108</sup> Once civil society was firmly divided with the ending of Reconstruction and creation of Jim Crow by about 1900, it would be primarily through the counterspheres—spheres

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104. This, essentially, is the regime represented by the Supreme Court’s *fin-de-siècle* jurisprudence simultaneously upholding the activist state actions of white supremacy and uprooting state protections of labor in order to protect industrial capitalism. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.* 347 U.S. 483 (1954), and *Lochner v. People of the State of N.Y.*, 198 U.S. 45 (1905), *overruled in part by Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

105. Alexander sees this move to force and violence as the product of an insufficiently developed civil sphere. ALEXANDER, *supra* note 16, at 266. I would attribute it at least as much to failures of the state—in this instance the federal government—as I would to failures of either Alexander’s civil sphere or civil society more generally. I should note, however, that Alexander’s civil sphere seems to include at least portions of the state, such as law and legal systems, which bring my view closer to his.

106. ALEXANDER, *supra* note 16, at 269-73.

107. *See id.* at 293-391.

108. *Id.* at 265-385 (discussing race and civil repair).

in the black community, the women's suffrage movement, immigrant communities, and the labor movement—that a reconstruction of civil society could be fueled. In fact it is a remarkable feature of black civil society, from Reconstruction through the Civil Rights Movement, that one of the, but certainly not the only, dominant discourses was a universalizing, idealized vision of civil society and a surprisingly hopeful view of citizenship as a promise realizable through the rule of law.<sup>109</sup> As we saw above with respect to the period of Reconstruction, black civil society throughout Jim Crow contained and nurtured a discourse of civil society that was both universalizing and critical of the dominant, but uncivil white society.<sup>110</sup>

#### IV. LESSONS AND CAUTIONS

The initial experiences of African Americans in claiming and creating citizenship after the establishment of formal citizenship under the Fourteenth Amendment reveal some important aspects of citizenship, civil society, and the public sphere. First, it seems clear from the experiences of black political discourse and the communal engagement of the convention movement that an alternative public sphere, one dedicated to the participation of African Americans and to the expression and development of issues and ideas concerning black Americans was critical to the creation of some level of democratic and equal citizenship during Reconstruction. The efforts to include suffrage within a basic definition of citizenship would have been far less effective, and far easier for whites to sidestep, were it not for the persistent emphasis of blacks enacting their citizenship claims.

Furthermore, the ability of African Americans to engage in their own public spheres to develop discourse—an ability made possible, we should note, by the first-order legal rights of free assembly and free

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109. See, e.g., ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, RACE, REPARATIONS, AND RECONCILIATION* 79 (2002) (discussing the importance of law, constitutionalism, and equal citizenship in the Oklahoma black community of the 1910s). Brophy accurately depicts how this more liberal vision co-existed alongside a more militant position favoring forceful self-defense supported in part by black soldiers returning from World War I—both positions being united, in important ways, by claims of and to full citizenship. Houston A. Baker, Jr. makes a similar point about how, in his own experience, black civil society, and the black public sphere, sustained a spirit of civil repair: “[T]he Constitution of the United States and the American national flag were valued sites of patriotism and pride for the black public sphere.” Houston A. Baker, Jr., *Critical Memory and the Black Public Sphere*, in *THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK* 23 (The Black Public Sphere Collective ed., 1995).

110. On the sustaining of a constitutional discourse within one black community during Jim Crow, see BROPHY, *supra* note 109.

speech that had been denied in the antebellum South—made the discourse that took place in the authoritative public sphere, the one in which legal and policy changes are made, that much richer. This history indicates that some version of multiple or counter-spheres can be important to enriching democratic citizenship and democratic decision-making in a pluralist society. It is also important to any understanding of how people can claim and define their own citizenship and thus convert mere citizenship into *democratic* citizenship. These benefits were seen in the biracial legislatures of Reconstruction, where the discourses of multiple public spheres could engage each other in a larger public sphere and help produce a range of governmental programs and laws which accounted for a richer, more varied type of citizenship than one finds in earlier, uniraical debates even within the Republican party.

Second, black citizens' engagement with these political issues was done initially as an act of political citizenship *prior to* the formal grant of political citizenship through suffrage. While legal or civil citizenship rights, in the sense of rights to assembly and speech, may well have been necessary for the development of the black public sphere; the right to suffrage was not. Indeed, the opposite may have been true: it was the discourse developed in the black public sphere which insisted on suffrage and which helped prepare African Americans for effective political activity once suffrage came. In this sense, while the vote may well have been fundamental to retaining effective implementation of other rights—as John Mercer Langston, Frederick Douglass,<sup>111</sup> and others argued—actions within the black public sphere and civil society may themselves have been fundamental to the establishment of suffrage, even if temporarily. The relationship between black civil society/public sphere and political citizenship was symbiotic, not a progressive move through stages. Moreover, as the legislative agendas of the Reconstruction legislatures point out, even social rights—the rights to education and public services—began developing in this context as well.<sup>112</sup> Reconstruction reveals that the full citizenship develops in a more organic and less legalistic way than is conceived of by common constitutional understandings of citizenship.

Third, it is important to recognize how delegates to black conventions talked about civil society in a way at once embracing

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111. *E.g.*, LANGSTON, *supra* note 56; WILLIAM S. MCFEELEY, FREDERICK DOUGLASS 246 (1991) (discussing Douglass's support for the vote as essential for the protection of other rights); FOX, *supra* note 29, at 469-71 (discussing Langston and Douglass).

112. FONER, *supra* note 2, at 364-79 (discussing range of state-supported activities and projects initiated and developed by Reconstruction state governments).

individualized rights to labor, contract, and property consistent with white Republican ideals, *and* asserting a communal character to the establishment and development of the citizens for whom these rights were to operate. Theorists of civil society often claim as one of its virtues that it bridges the individual and communal theories of democratic society;<sup>113</sup> historically, it was in the counterspheres or alternate civil societies of the nineteenth century in which such claims were most seriously and consistently developed, as evident in the black convention movement (one can make a similar case for the women's suffrage movement of the period and, I think, for some aspects of the labor movement a few years later). Contrary to some civil society revivalists who jump directly from Tocqueville and the Age of Jackson to late-twentieth century neighborhood associations with a curious inattentiveness to what happened between,<sup>114</sup> the most instructive and constructive source for how civil society can build citizenship and engage social-moral issues comes from the social movements that sought to realize the democratic citizenship promised of the Reconstruction Amendments.<sup>115</sup>

Fourth, the broader social and cultural experience of black citizens after the war reveal aspects of civil society that are essential to account for in any decent conception of democratic citizenship. In thinking about what democratic citizenship can mean, and in thinking about how efforts were made to try to achieve it in the past, it should be remembered that full citizenship implies access to a range of social and cultural activities and communities. The statements from the South Carolina convention about needing access to all avenues and appliances of citizenship reflect an important indication of how civil society in its broadest form, from voluntary associations to families to religious communities to economic organizations, would be necessary for

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113. *E.g.*, Rosenblum & Post, *supra* note 17, at 3-4.

114. *E.g.*, Jean Bethke Elshtain, *Will the Real Civil Society Please Stand Up?*, 75 CHI-KENT L. REV. 583, 583-84 (identifying individual moral leaders in American history, but ignoring social movements in civil society). Robert Putnam is much more attentive to the historical development of voluntary associations, include within black communities. *See, e.g.*, ROBERT D. PUTNAM, *BOWLING ALONE* 390-91 (2000). However, because Putnam tends to view voluntary associationalism as something unique or separate from social movements and group political consciousness, his analysis misses the importance of the connections between civil society organizations and the public sphere. *See also* Gerald Gamm & Robert D. Putnam, *The Growth of Voluntary Associations in America, 1840-1940*, 29 J. INTERDISCIPLINARY HIST. 511 (1999). On the problem of Putnam's failure to account for the public sphere, see generally Cohen, *supra* note 21.

115. *See supra* Part I.

developing citizenship, both individually and communally.<sup>116</sup> Citizenship, as a concept, should allow for consideration of these aspects of civil society, for it is in the nongovernmental spheres of civil society where the citizen can be made and supported. This point is particularly crucial for theorists and advocates on the left, who can easily succumb to an excessive focus on state action and can see social movements as largely divorced from their communal roots, warts and all. The nongovernmental communal organizations that support civil society are also potential sources of exclusion and demarcation on their own and can replicate other subordinations and/or serve to divide social movements in ways advantageous to those seeking to deny full citizenship to subordinated groups and people. This is arguably one of the consequences of the insistence on citizenship as a male sphere, as an expression of manhood, during Reconstruction, and is a crucial lesson in the dangers of both the civil sphere and of closed counterspheres.

Fifth, it should not be forgotten that civil society and government are best seen as a two-way street. Just as black civil society fed into governmental activities and conceptions of citizenship, the state was also a necessary part of securing the vibrancy of civil society. It was, finally, the loss of governmental support, in the form of federal troops and legal actions, that made possible the end of Reconstruction and the rise of a fully bifurcated and subordinated civil society.<sup>117</sup> While the church, and family, and other aspects of black civil society could serve as sites and sources for resistance to Jim Crow, it was the absence of state support that made this enclave resistance necessary.

So where does this take us with respect to my initial questions about defining democratic citizenship and the possible ways of thinking about constitutional citizenship? One answer surely is that it is deeply problematic to think of citizenship in a restricted, legalistic manner which would search for formal definitions and content in antebellum case law and Attorney General opinions. If the experiences of the postbellum period tell us anything, they tell us that citizenship was being claimed at least as much as it was being granted. More importantly, the people claiming citizenship were not bound by classical liberal ideas of legal citizenship and legal status for individuals, although those ideas were important. Rather, they saw citizenship as a process of engagement by individuals with a variety of social, political, and legal groups or communities. The development of citizenship through the

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116. 2 PROCEEDINGS, 1840-1865, *supra* note 54, at 286-304.

117. BRYANT, *supra* note 75, at 104.

“appliances” of civilized society came to be seen as an engagement with many spheres of civil society itself, spheres ranging from legal to political to voluntary organizations to economic enterprises to education to religion to family and kinship. Legal and legislative action supporting citizenship were critical, but as the failures of Reconstruction showed, they were plainly insufficient. Voluntary and community associations provided critical loci for protest and organization, but they too were insufficient on their own. Similarly, access to education, enjoyment of religious association and exercise, and a variety of political engagements were also necessary, but not sufficient, in forming successful resistance to denials of citizenship and in efforts to claim at least some degree of full citizenship. Only through a complex engagement across all of these spheres would full democratic citizenship have had a chance to flourish; and primarily through the combined effort to destroy or constrain African Americans’ freedom across all these spheres did white supremacy retain power throughout the South.

This analysis suggests that democratic citizenship, and the citizenship of inclusion and equality being explored during the initial implementations of the Fourteenth Amendment, must contain some degree of recognition of, access to, and support for the variety of spheres of civil society. To the extent that citizenship is a developmental concept—and certainly in the transition from bondsmen to freedmen this was true—it must incorporate some ideas and policies for helping to create and sustain full citizens. The experiences of Reconstruction also reveal that this process requires both state-based supports and programs, *and* extensive networks of private communal supports. Indeed, the importance of civil society evident in this period itself indicates that the separation of state and private spheres is, as many people have argued, itself problematic, at least to the extent that it posits a hard separation of the spheres.<sup>118</sup> The advantage of civil society and public sphere theory is precisely its ability to bridge this intersection of state and private in a way that more accurately captures what happened on the ground during and after Reconstruction and also permits us to see ways of reconciling and repairing the contradictions of equal citizenship ideas.

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118. Although a topic for another day, this myth of separation of the private civil sphere from the public governmental sphere was one of the greatest legal-constitutional roadblocks to equal citizenship erected by the Supreme Court in the *Civil Rights Cases* and related opinions.



