

FELLOW CITIZENS

*James W. Fox Jr.**

The idea of equal citizenship did not descend from heaven, Monticello, or the belltower of Liberty Hall. As Martha Jones, Derrick Spires, and other scholars have shown, the idea of equal citizenship so central to the reconstructed Constitution originated in the crucible of African American experience and was framed by the Black abolitionist movement of the antebellum North.¹ David Walker's seminal 1829 *Appeal to the Coloured Citizens of the World* addressed itself to his "fellow citizens," a radical statement of status and belonging at a time when legal concepts of citizenship were becoming increasingly exclusionary.² The Black Convention Movement repeatedly addressed its collective documents to "fellow citizens" and articulated concepts of equality and freedom necessary to that status.³ Then, as the country moved through the Civil War and toward Reconstruction, Black speakers and legislators sought to create the bases for equal citizenship in law. These efforts are essential to understanding the potential meaning of all three Reconstruction amendments and to seeing how they can animate the Fourteenth Amendment.

* Professor of Law, Stetson University College of Law.

1. See generally MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); DERRICK R. SPIRES, *THE PRACTICE OF CITIZENSHIP: BLACK POLITICS AND PRINT CULTURE IN THE EARLY UNITED STATES* (2019).

2. DAVID WALKER'S *APPEAL TO THE COLOURED CITIZENS OF THE WORLD* 3 (1829) (Peter P. Hinks ed., 2000) ("My dearly beloved Brethren and Fellow Citizens"). On antebellum ideas of citizenship, see JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* (1978); SPIRES, *supra* note 1, at 18-26.

3. See, e.g., *Minutes and Proceedings of the First Annual Convention of the People of Colour*, 12 (June 6-11, 1831) ("Respected Brethren and Fellow Citizens"); *Minutes and Proceedings of the Second Annual Convention for the Improvement of the Free People of Color in these United States*, 32 (June 4-13, 1832) ("Fellow Citizens"). These conventions, and the others cited in this essay, can be accessed at the wonderful resource established by the Colored Convention Project at <http://coloredconventions.org/>. On citizenship and the Black Convention Movement in the 1840s, see SPIRES, *supra* note 1, at 79-120. For an outstanding set of essays on the Black Convention Movement, see the just-published *THE COLORED CONVENTION MOVEMENT: BLACK ORGANIZING IN THE NINETEENTH CENTURY* (P. Gabrielle Foreman, Jim Casey & Sarah Lynn Patterson eds., 2021).

This essay identifies some of the key concepts of this mid-nineteenth-century African American Constitutionalism. These ideas were partially encompassed by Henry Highland Garnet in his stirring sermon delivered in the halls of Congress in February 1865 celebrating the passage of the Thirteenth Amendment, where he explored three key aspects for full citizenship for Black Americans: “Emancipate, Enfranchise, Educate.” In many ways, these core principles would become the mission of Black Reconstruction as Black leaders and their white allies sought to secure civil freedom, free labor, equal suffrage and political power, and access to education and economic and social advancement. In particular, I will explore two primary source materials that exemplify a dynamic and vibrant public discourse by African Americans on the nature and meaning of equal citizenship before ratification of the Reconstruction amendments, and then briefly consider congressional speeches on what would become the Civil Rights Act of 1875. As we will see, the rights embodied in the three Reconstruction amendments were seen not as discrete texts for judicial parsing and doctrinal boundary-drawing, but as an interrelated set of core principles essential to the very ideas of freedom and equal citizenship, ideals that were meant to motivate and guide political and economic action. I will also briefly suggest how the limitations of these amendments opened paths for failures of equal citizenship.

I. EMANCIPATE, ENFRANCHISE, EDUCATE

On February 12, 1865, Henry Highland Garnet delivered a sermon in the halls of Congress upon passage of the Thirteenth Amendment. Garnet was well known throughout the North as one of his generation’s great abolitionist orators, having often represented a more radical wing of abolitionism than many of his peers. Garnet had been invited by the congressional chaplain to become the first African American to deliver a speech in the building, and his biracial audience included members of Congress and other government leaders as well as residents of the District.⁴

Addressing specifically the attending members of Congress, Garnet called on them to “Emancipate, Enfranchise, Educate.” This, in three words, was a program of Reconstruction, forged in an abolitionist Black

4. HENRY HIGHLAND GARNET, A MEMORIAL DISCOURSE DELIVERED IN THE HALL OF THE HOUSE OF REPRESENTATIVES, WASHINGTON CITY, D.C. ON SABBATH, FEBRUARY 12, 1865, available at <https://archive.org/details/memorialdiscourse00garn?ref=ol&view=theater> [hereinafter “MEMORIAL DISCOURSE”].

public sphere and now pressed upon a white leadership.⁵ Not just freedom from bondage, but full suffrage and substantial public education. By grouping the three “Es” Garnet was creating a secular trinity for democratic citizenship, emphasizing the indispensable connections among the three ideals.

To make this point Garnet knew that he first had to answer the claim made by whites, including Republicans, that Black activists should be satisfied with the formal end of slavery. Garnet responded with a summary of the meaning of the end of slavery that wove together a range of requirements for achieving full citizenship for Black Americans. First, he emphasized the need for full equality across law, politics, and employment, framed as an answer to the question of when Black leaders’ claims would be satisfied:

When all unjust and heavy burdens shall be removed from every man in the land. When all invidious and proscriptive distinctions shall be blotted out from our laws, whether they be constitutional, statute, or municipal laws. When emancipation shall be followed by enfranchisement, and all men holding allegiance to the government shall enjoy every right of American citizenship. When our brave and gallant soldiers shall have justice done unto them. When the men who endure the sufferings and perils of the battle-field in the defence of their country, and in order to keep our rulers in their places, shall enjoy the well-earned privilege of voting for them. When in the army and navy, and in every legitimate and honorable occupation, promotion shall smile upon merit without the slightest regard to the complexion of a man’s face. When there shall be no more class-legislation, and no more trouble concerning the black man and his rights, than there is in regard to other American citizens. When, in every respect, he shall be equal before the law, and shall be left to make his own way in the social walks of life.⁶

Note how Garnet—preaching to white Republicans about to consider Reconstruction legislation—attacked a range of inequalities, many of which were integral aspects of northern Jim Crow societies as well as southern slavery. He called for the elimination of “invidious and

5. Similar versions of this trinity appeared in other African American documents of the period. See, e.g., *Proceedings of the Convention of the Colored Citizens of the State of Arkansas* (Nov. 30 to Dec. 2, 1865) reprinted in 1 PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865-1900 193 (Philip S. Foner & George E. Walker, eds, 1986) (“Emancipation, Enfranchisement and elevation of our race”); *Proceedings of the National Convention of Colored Men*, 15, 44 (Oct. 4, 1864) (“complete emancipation, enfranchisement, and elevation of our race”), available at <https://omeka.coloredconventions.org/files/original/91057571556d503505e8e86e8474d923.pdf>.

6. MEMORIAL DISCOURSE, *supra* note 4, at 85-86.

proscriptive distinctions” at all levels of government, rejecting states-rights federalism as a possible defense against the priority of liberty and equality. He emphasized that enfranchisement must follow emancipation and declared voting a right of American citizenship, a point on which white leaders temporized. Moreover, by asserting that “all men holding allegiance to the government shall enjoy every right of American citizenship,” Garnet was inserting the Black abolitionists vision of equal citizenship—which included full political participation and a range of other rights in civil society—into his argument about the meaning of freedom and the Thirteenth Amendment. He was also echoing the common claim of Black Americans that contrasted their own allegiance to the government—a government that had historically supported their enslavement—to that of rebel whites, who argued that their own rights, including political rights, be restored to them despite their violent rebellion. It was an especially strong claim because, as Garnet highlighted, those who risked death to preserve their leaders and government had a right, in any just understanding of democracy, to choose those leaders.

Garnet then began to shift his emphasis from voting and equal legal rights to other aspects of civil society. We see this towards the end of the above quote, where he addresses the importance of full merit-based equality in the “honorable professions,” not just the military. The problem of what we now call glass ceilings in the military was a keen issue in the war; by asserting a similar right to and need for career promotions Garnet was pressing for the extension of rights claims to non-governmental employment and thus moving toward a critique of civil society, and especially of labor and employment as a source of both equality and caste.

The above passage ends with a statement that with such guarantees of equality, society could move to a more hands-off approach and the Black (male) citizen “shall be left to make his own way in the social walks of life.” On the one hand this showed an embrace of an equal opportunity-based nineteenth century liberal individualism. It also sought to assure whites that even Garnet, one of the more radical Black abolitionists, did not seek government regulation of purely social and private interactions. Were this where Garnet stopped with the analysis, one might even see this as a relatively moderate vision.

But Garnet did not end there. In his next passage he called on a metaphor to depict the longer-term needs for achieving full freedom:

We ask, and only ask, that when our poor frail barks are launched on life’s ocean, “[b]ound on a voyage of awful length [a]nd dangers little known, that, in common with others, we may be furnished with rudder,

helm, and sails, and charts, and compass.” Give us good pilots to conduct us to the open seas; lift no false lights along the dangerous coasts, and if it shall please God to send us propitious winds, or fearful gales, we shall survive or perish as our energies or neglect shall determine. We ask no special favors, but we plead for justice. While we scorn unmanly dependence; in the name of God, the universal Father, we demand the right to live, and labor, and enjoy the fruits of our toil. The good work which God has assigned for the ages to come, will be finished, when our national literature shall be so purified as to reflect a faithful and a just light upon the character and social habits of our race, and the brush, and pencil, and chisel, and Lyre of Art, shall refuse to lend their aid to scoff at the afflictions of the poor, or to caricature, or ridicule a long-suffering people. When caste and prejudice in Christian churches shall be utterly destroyed, and shall be regarded as totally unworthy of Christians, and at variance with the principles of the Gospel. When the blessings of the Christian religion, and of sound, religious education, shall be freely offered to all, then, and not till then, shall the effectual labors of God’s people and God’s instruments cease.⁷

Garnet artfully drew a distinction between claims of “special favors” and “justice,” between “unmanly dependence” and “the right to live and labor and enjoy the fruits of our toil.” It was a common claim made by opponents of Black Reconstruction that civil rights laws were “special favor[s].”⁸ Knowing this, Garnet did not dispute the idea that no one should be specially favored in law, but he did seek to reframe the idea and claim the mantle of justice and equal rights for civil rights laws and politics.

Here we see an early formulation of the important difference between laws and policies that foster equality given a societal baseline of inequality and those that maintain equality once it exists. Garnet emphasized that the provision of the essential building blocks of citizenship—its rudder, helm, sails, charts, compass and pilots—were a precondition for equality in fact and for the exercise of full freedom. He also implored whites to aid, not impede, this progress (“good pilots” and no “false lights”). And where would these false lights likely come from?

7. *Id.* at 86-87.

8. See for instance Justice Bradley’s claim when overturning the Civil Rights Act of 1875 that Black people stop trying to be “special favorites” of the law:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.

Civil Rights Cases, 109 U.S. 3, 25 (1883).

Not just the state, but across the range of civil society, from employment to education to the Christian churches. The point here was that the full implementation of freedom and equal rights would require the eradication of race prejudice across a wide range of institutions, not just the formal elimination of race in law. Garnet was resisting the claim that the mere legal end of enslavement—the ratification of the Thirteenth Amendment—would be sufficient for realizing the ideals behind the amendment. And while these passages do not address the methods for implementation and what the relative role was for state-based or community institutions, his ideal society, a society where Black Americans had their full share of participation and power politically and throughout civil society, suggested a more dynamic relationship between state, communal, and private institutions than many white Americans would have assumed.

II. ADDRESS FROM THE COLORED CITIZENS OF NORFOLK

A few months after delivering his sermon at the Capitol, Henry Highland Garnet was invited to join African Americans of Virginia in Norfolk meeting to discuss freedom, rights, and citizenship, and he would help draft the formal Address from the Colored Citizens of Norfolk.⁹ Unlike their peers in Pennsylvania or New York or Massachusetts, Black residents of Virginia did not have a recent history of abolition conventions or any other mass meetings on issues of freedom, rights, citizenship, and community. Garnet and other African American leaders worked together with the people of Norfolk, including those recently enslaved, and produced a powerful set of documents setting forth extensive political and constitutional arguments on suffrage and equal rights.¹⁰ Like other Black conventions before it, the Norfolk meeting grounded its demands in citizenship: “[the people of the United States should] concede to us the full enjoyment of those privileges of full citizenship, which, not only, are our undoubted right, but are indispensable to that elevation and prosperity of our people.”¹¹ The authors here nicely wove together their call for suffrage and rights with the desire for racial uplift (“elevation”), putting

9. Philip Foner and George Walker, in their pathbreaking compendium of African American convention materials, described the document set as “one of the most moving documents ever issued by an assembly of southern blacks.” Foner & Walker, *supra* note 5, at 81.

10. *Equal Suffrage, Address from the Colored Citizens of Norfolk, Va., to the People of the United States. Also an Account of the Agitation Among the Colored People of Virginia for Equal Rights, With an Appendix Concerning the Rights Of Colored Witnesses Before the State Courts, June 5, 1865, reprinted in Foner & Walker, supra note 5, at 83 [hereinafter “Norfolk Address”].*

11. *Id.*

the obligation on all Americans and making the full rights of citizenship a prerequisite for economic and social success.

If the Norfolk Address followed some of the same themes as had similar meetings in the north, it was also more direct in its criticism and more radical in both tone and substance. The Address pointedly attacked white supremacy. It noted that equal rights were “inconsistent with the existence of slavery,” and asserted that with slavery gone no pretext remained for discrimination other than the racist claim that America was a “white man’s country.”¹² The Address combatted these assumptions of white supremacy with an alternative history from the Black public sphere, a history that valorized labor and national loyalty as central values of Black citizenship.¹³ In particular the Address stressed the labor that enslaved Black workers had expended to build the nation’s wealth:

Every school-boy knows that within twelve years of the foundation of the first settlement at Jamestown, our fathers as well as yours were toiling in the plantations on the James River, for the sustenance and prosperity of the infant colony. Since then in New England, New York and the middle Atlantic States, our race has borne its part in the development of even the free North, while throughout the sunny South, the millions upon millions of acres, in its countless plantations, laden with precious crops, bear witness to the unrequited industry of our people. Even our enemies and old oppressors, themselves, used to admit, nay, contend for, the urgent necessity of our presence and labor to the national prosperity. . . .¹⁴

This passage made at least three important points. First, it argued that simply in terms of historical connectedness, Black people had as great a claim to American citizenship as did white people. Indeed, we see here the very same point made recently by Nikole Hannah-Jones and others at

12. *Id.*

13. *Id.* at 83-84. The re-telling of American history to center the contributions of African Americans was one important technique Black writers used to claim full citizenship in the mid-nineteenth century. *See, e.g.*, WILLIAM COOPER NELL, *THE COLORED PATRIOTS OF THE AMERICAN REVOLUTION* (1855); WILLIAM WELLS BROWN, *THE BLACK MAN: HIS ANTECEDENTS, HIS GENIUS, AND HIS ACHIEVEMENTS* (1863). On antebellum African American historical writing and consciousness, *see generally* STEPHEN G. HALL, *A FAITHFUL ACCOUNT OF THE RACE: AFRICAN AMERICAN HISTORICAL WRITING IN NINETEENTH-CENTURY AMERICA* (2009).

14. Norfolk Address, *supra* note 10, at 83.

the New York Times with the 1619 Project:¹⁵ the founding of America was as much a founding in slavery as a founding in liberty, and because of this the history of Americans of African descent is central to the American project. Second, the address made labor the currency of citizenship: Black workers no less than white workers had built American wealth, yet they had received no compensation, no share in that bounty. This claim to citizenship stood as a claim for both something earned and something owed. Third, the passage linked slavery and Black labor to “national prosperity.” Slavery, as a national economic system, had created national wealth. The reward for this contribution, therefore, should also be national, in citizenship and nationally protected rights. The Address then extended this point by highlighting the contributions of Black soldiers from the Revolution through the recent Civil War battles.¹⁶ These military contributions, they argued, showed a national loyalty and courage that exemplified citizenship—and contrasted starkly with the disloyalty of southern whites.

Having established their claim to full citizenship based on history, labor, and loyalty, the authors of the Address then exposed northern whites to a detailed list of the racist laws and practices of the post-war white governments in the South. This document was one of the first reports to Republicans, and others in the North, from Black residents in the South about the Black Codes, describing how southern whites saw emancipation as merely the end of bondage, not an establishment of equal citizenship. Importantly, the denial of basic civil rights of the type to be included in the Civil Rights Act of 1866 figures prominently in this section, reflecting a range of activities central to civil society and full citizenship, including the denial of literacy, denial of marriages, prohibition from occupations, restrictions on movement and travel, restrictions on economic transactions, the denial of contract rights or rights to testify, and (unlike those rights covered by the Civil Rights Act of 1866) the lack of suffrage.

The Address authors, however, did not intend to leave the impression that mere changes in law would be sufficient, because the core cause of these inequalities was a deep-seeded racism: “[Whites] have returned to

15. THE 1619 PROJECT, THE NEW YORK TIMES MAGAZINE (Aug. 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (“The 1619 Project is an ongoing initiative from *The New York Times Magazine* that began in August 2019, the 400th anniversary of the beginning of American slavery. It aims to reframe the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.”).

16. Norfolk Address, *supra* note 10, at 84.

their homes, with all their old pride and contempt for the Negro transformed into bitter hate for the new-made freeman.”¹⁷ Whites were enforcing even these oppressive laws unjustly in their effort to retain as much of racial slavery as they could. The Address then listed common practices, from mass arrests of 800 men for violating pass laws, to the removal of Black people from cities, to the control of labor through employer conspiracies and violence against non-conforming (white) employers, to the killing of workers who left plantations, to the refusal to pay contracted wages, among other practices.¹⁸ The point here was that in the face of such recalcitrance, in the face of a deeply racist and violent culture, no mere legal declaration, whether by Presidential Proclamation or Constitutional amendment, could secure full freedom and equal citizenship. This is why, even though the Norfolk authors recognized the immediate value of even the most basic civil rights laws, they did not here call for passage of a federal civil rights bill; they instead demanded suffrage. Only with full political power across the South could Black Americans fully realize these ideals of freedom and equal citizenship on the ground, in the legal and political control of daily activities of labor, education, and access to civil society.

The Address presented a layered argument for suffrage. Not only had they set up the argument with a summary of the history of the loyalty and contributions of Black Americans, and not only had they portrayed the deep hostility being enacted on the ground by the new white governments, they also set forth both practical and legal reasons to persuade white Republicans of the necessity of suffrage. Having shown “the necessity of the recognition of the right of suffrage for our own protection” (to secure just laws and elected officials), they then showed that it was in the interest of northern Republicans as well.¹⁹ They prophetically pointed out that, “without the existence of a larger loyal constituency” of Black voters, “a military occupation will be absolutely necessary” both to protect Black people and to protect pro-Union whites and federal officers.²⁰ Moreover, with the loss of the Three-Fifths Clause, once whites regained control of the state they would have more power in the national government than before the war. Not only would this threaten Republicans, it would also lead to “political distractions of an embarrassing Negro agitation” arising among over four million discontented and oppressed Black Americans including “200,000 colored

17. *Id.*

18. *Id.* at 84-85.

19. *Id.* at 86.

20. *Id.* at 85.

soldiers, whom you have drilled, disciplined, and armed, but whose attachment to the State you have failed to secure by refusing them citizenship[.]”²¹ Without Black suffrage, not only would Republicans lose the South politically to former Rebels, they would have a real danger of causing a new civil war in the South that the formerly enslaved would now be willing and able to fight.

This was a bold and assertive claim to full citizenship, one which situated the claims of Black citizens as plainly superior to those of white rebels, and which suggested that resistance to continued oppression, including armed resistance, would be a potential consequence of a post-slavery society without constitutional and legal protections for suffrage. In this way, the Norfolk convention brought together the more traditional egalitarian claims with the more assertive and proactive ideas of citizenship fostered by military service. It also began to combine the more moderate aspects of race-equality ideology expressed by many abolitionists with a streak of Black militancy that Henry Garnet and others had long embraced.²²

Having primed the argument with this dose of realism, the Address then presented its constitutional arguments. These arguments would have been familiar to their audience, having been honed by antislavery advocates and abolitionists, including by Justice Curtis in his dissent in *Dred Scott*,²³ and reflected how constitutional argument was a shared activity in the public sphere. The Address pointed out that the Articles of Confederation had explicitly rejected the effort to exclude Black people from citizenship.²⁴ This meant that in 1787 Black Americans were part of “the people” in the Constitution’s Preamble and therefore were entitled to a “republican form of government” in each state under Article IV.²⁵ It

21. *Id.* at 86.

22. Garnet had advocated forcible resistance to slavery, and his “Address to the Slaves” speech at the Buffalo National Convention in 1843 was widely regarded as a leading text in radical abolition resistance. See Henry Highland Garnet, *An Address to the Slaves of the United States of America*, First Read at the National Convention of Colored Citizens, Buffalo, New York (Aug. 16, 1843), available at <http://digitalcommons.unl.edu/etas/8/>.

23. *Scott v. Sanford*, 60 U.S. 393, 564 (1857) (Curtis, J., dissenting). See generally WILLIAM M. WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (1977); DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

24. Norfolk Address, *supra* note 10, at 86.

25. *Id.*; The Guarantee Clause, or Republican Form of Government Clause was a common source for abolitionists to argue that slavery was unconstitutional; after the war Black activists and their white supporters then used the clause to argue for universal suffrage. See U.S. CONST. art. IV § 4 (“The United States shall guarantee to every state in this union a republican form of government. . .”).

also meant, they argued, that suffrage was a privilege of citizenship under Article IV.²⁶ This was especially so since many states, including Georgia and Virginia, had constitutional provisions connecting suffrage with citizenship. Moreover, since all disabilities based on color, including political disabilities, only existed as an aspect of racial slavery, they all were invalid once slavery ended.

Finally, the Address authors identified a range of activities that Black Virginians should engage in to foster their full citizenship. The Address stressed that African Americans in Norfolk had already fully embraced education and that the schools they had established were filled with thousands of children and hundreds of adults at night. The authors also stressed that “the colored man knows that freedom means freedom to labor, and to enjoy its fruits.”²⁷ At first glance this statement reflected the free labor ideology of citizenship that was familiar to northern whites. But they also stressed that Black workers could not obtain “fair wages and fair treatment” from white employers, and they could not even be sure of basic security outside the protection of Union forces.²⁸ So, while labor was a critical component of citizenship, a range of supports were essential for labor to be meaningful, including physical security, freedom of movement, fair wages, and fair treatment while employed.

Similarly, the authors also argued in favor of labor unions. White employers, they pointed out, were forming cartels and associations to fix wages and restrict hiring; “Labor Associations” were necessary for Black workers to gain any leverage against such tactics and secure any meaningfully free labor.²⁹ Similarly, whites were also preventing Black Virginians from purchasing and owning property. The Address authors recognized land ownership as a critical component of freedom, and so they also advocated the formation Land Associations to help Black residents purchase land.³⁰

In both of these claims—labor rights and property ownership—the convention expressed two important themes. First, they asserted freedom and citizenship claims beyond suffrage that extended into a wide range of civil society, not merely through access to legal right (rights to contract and to own and transfer property), but also in actual access to the things themselves, wages and land. Second, they recognized that such claims were best made collectively. In this way, they embraced a version of

26. Norfolk Address, *supra* note 10, at 86.

27. *Id.* at 87.

28. *Id.*

29. *Id.* at 88.

30. *Id.*

nineteenth century collectivism and showed a merging of collectivist and individualist ideas that was much less obvious in the dominant public sphere of white Republicans.

Ultimately the members of this Norfolk meeting set forth a full-throated claim to citizenship rights that emphasized a strong and active claiming of rights by Black citizens. While it paralleled the rights definitions and claims that were seen in many abolitionist and wartime African American conventions in the North, the urgency of the situation in the South, the confrontation with unbridled violence, the tremendous needs of the freedmen, and their great desire for rights and the means essential to enjoy those rights, all combined to make the Norfolk Address more direct and more concrete. In particular, the Norfolk Address showed how the horrors of slavery would continue if freedom were merely a nominal declaration of law and not something supported on the ground with troops and votes.

III. RECONSTRUCTION: PROMISE AND REPUDIATION

As Reconstruction progressed, African Americans continued to press hard on the right of suffrage as the primary essential right of citizenship. Frederick Douglass famously criticized Congress for failing to protect suffrage in the Fourteenth Amendment.³¹ In Massachusetts, Charles Mitchell and Edwin Walker, who in 1867 became the first African Americans elected to a state legislature, voted against ratification precisely because the amendment refused to embrace suffrage, effectively leaving “a place in the constitution large enough, and wide enough, for [white southerners] to say that the black man shall take no part in legislation.”³² The temporizing on suffrage essentially guaranteed the perpetuation of racial caste in the South, and plausibly also in the North where Black suffrage was still very much contested. For activists like

31. See DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 483 (2018) (Douglass joined with other abolitionists, Gerrit Smith and Wendell Phillips, in opposing the amendment in 1866 because it failed to secure Black suffrage).

32. STEPHEN KANTROWITZ, *MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829-1889*, at 324-25 (2012) (quoting Edwin Walker). Walker was the son of David Walker and was one of the first Black lawyers in Massachusetts. See *id.* at 319, 324-26.

Walker, Mitchell, and Douglass, citizenship without suffrage was no citizenship at all.³³

But for African Americans in the South, the choice was more stark. While suffrage continued to be an essential goal, the dangers and harms of the Black Codes were all too real. And African Americans across the region were able to demonstrate the importance of suffrage in the very act of ratifying a Fourteenth Amendment that did not protect that suffrage. As we so often fail to recognize, the amendment had actually been defeated by early 1867, with all southern states except Tennessee rejecting it.³⁴ Only with the Reconstruction Act of 1867 and its requirement of Black suffrage in the South, enforced by the military, did ratification get a “redo” and obtain the required three-quarters support of the states in 1868, with Black male voters and their representatives in the South changing the course of constitutional history.³⁵ And while the views of leaders like Douglass and Walker were certainly important, it was the perspective of Black people in the south that determined the importance of the protection of the Fourteenth Amendment and the hope of connecting it to full suffrage protections. In this way, the Fourteenth Amendment can be seen as part of a process of constitution-making rather than a discrete endpoint.

As Reconstruction proceeded, the biracial governments of the South began exploring a new era of governmental supports for equal citizenship. They engaged in an impressive program of funding and lawmaking for public schools, public health, and public accommodation civil rights laws.³⁶ In doing so, they implemented Henry Highland Garnet’s call for Emancipation, Enfranchisement, and Education, and helped expand this call into broader support for full access to civil society. They also showed

33. *E.g.*, GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 245 (2006) (quoting Frederick Douglass’s argument in July 1866 that “to tell me that I am an equal American citizen, and, in the same breath, tell me that my right to vote may be constitutionally taken from me by some other equal citizen or citizens, is to tell me that my citizenship is but an empty name.”). *See also* JAMES M. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 355 (2014 re-publication of 1964 edition) (also quoting Douglass and identifying the source as the National Anti-Slavery Standard, July 7, 1866).

34. *See* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* 269 (1988) (noting that the ten southern states that considered the amendment between October 1866 and January 1867 rejected it).

35. *See* DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA* 215-229 (2014) (discussing politics of ratification of Fourteenth Amendment and role of Black activists and politicians).

36. *See* FONER, *supra* note 34, at 364-79 (discussing program and achievements of biracial Republican state governments during Reconstruction).

the importance of Republicans securing suffrage rights. Once Congress followed suit with the Fifteenth Amendment in 1870, the question of equal citizenship then focused on the twin needs of a nationalized right to access to the public sphere and physical and legal protections against violence.

On each of these points African Americans again pressed their white colleagues and representatives. The white Democratic response to biracial Republican democracy in the South soon centered on terrorism as its main tool.³⁷ The violence of white supremacist terrorist groups such as the Klan, the Red Shirts, and the White Leagues became a major threat to sustaining the fragile civil and political equality created by the amendments and enforced by a dwindling military.³⁸ African Americans in the South continued to press for federal protection—Tunis Campbell travelled from Georgia to Washington to personally lobby President Grant for the Ku Klux Klan Act and its enforcement in the South, and Congressman Jefferson Long spoke movingly to his white colleagues about the violence perpetuated by Klan members and the lack of protection from law or courts³⁹—and for a brief moment in 1872-73 the combined efforts of the newly formed Department of Justice and the military succeeded in ending Klan violence in South Carolina.⁴⁰ For Black citizens, such efforts represented a basic aspect of citizenship and implementation of the promise of the Fourteenth Amendment for “equal protection.” The inability of the Grant administration to sustain that protection, and refusal of later administrations and Congresses to attempt it, would show how elusive and thin such a parchment shield could be.

Along with the demand for physical safety as a component of the protection prong of equal citizenship, Black leaders also pressed for protection in civil rights and access to the public sphere. Well before Reconstruction, Black activists in the North had been demanding access to public facilities like streetcars, inns, and theaters, and had initiated boycotts and litigation to secure equal treatment.⁴¹ Early Black conventions articulated this as an effort to seek “political and social

37. See EGERTON, *supra* note 3535, at 284-320 (detailing white Democrats violent resistance to Reconstruction); FONER, *supra* note 34, at 425-44 (same).

38. In one of America’s deep ironies, the cavalry fighting white supremacy in the South was removed to implement white supremacy against Native American tribes on the plains. EGERTON, *supra* note 35, at 313.

39. *Id.* at 278, 299. Jefferson Long’s brief speech in 1871 was the first congressional speech by an African American member of congress. He spoke in opposition to a bill to relax the test oath that required former rebels to swear loyalty to the Constitution. CONG. GLOBE, 41st Cong., 3d Sess. 881-82 (1871).

40. FONER, *supra* note 34, at 457-58.

41. See, e.g., BLAIR L. M. KELLEY, *RIGHT TO RIDE: STREETCAR BOYCOTTS AND AFRICAN AMERICAN CITIZENSHIP IN THE ERA OF PLESSY V. FERGUSON* 15-32 (2010).

rights.”⁴² These actions and this new framing moved some white abolitionists to begin including what they also termed “social rights” and “social privileges”—that is, equal access to the sites of public and economic life—as part of the project of freedom.⁴³ This project expanded during Reconstruction, as Black citizens continued to boycott and protest against segregated transportation and Black state legislators pressed for passage of new laws. Remarkably, Texas, Florida, Louisiana, South Carolina, and Arkansas all passed public accommodations civil rights laws by 1873.⁴⁴ Thus Charles Sumner’s Civil Rights Bill, first introduced in 1870, was part of a larger civil rights movement in which Black activists had played a major role in framing equality in public accommodations as one of the central projects of the equal citizenship principles of the Reconstruction amendments.

Importantly, this background complicates a common idea that the post-bellum understanding of civil rights divided rights into three categories—civil, political, and social—with public accommodations and school desegregation deemed social rights and outside the purview of federal power.⁴⁵ This traditional framing was not how many Black and white activists prior to the 1870s spoke about civil rights. They understood social rights and privileges as central aspects of both freedom and equality, and public accommodations laws, school desegregation, and other protections for equal participation in society and social and economic advancement were important actions for all levels of government whether local, state, or federal. According to this view, Sumner’s bill simply allowed the federal government to implement this aspect of the privileges of citizenship and equal protection of law established in the Fourteenth Amendment, and to secure them, both outside the South and against a return of white retrenchment in the South itself.

As opposition to Sumner’s bill increased and some white Republicans drifted away from their civil rights commitments, criticism

42. *Report of the Proceedings of the Colored National Convention held at Cleveland, Ohio, on Wednesday, September 6, 1848*, at 17, available at <https://omeka.coloredconventions.org/items/show/280>.

43. See, e.g., James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 494 (1965) (quoting Theodore Tilton and John T. Sargent arguing that the end of slavery necessarily encompassed “social equality” and “every social privilege” for Black citizens).

44. A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53, 58 (2005).

45. For one of the most insightful discussions of the origins of and tensions within the nineteenth century tripartite rights concept, see Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777 (2008).

of the bill focused on the claim that it advanced social equality, which, for white people, was code for interracial marriage (or, as opponents labelled it, miscegenation). Proponents of public accommodations laws found they had to counter this racist attack.⁴⁶ To do so, they developed a rhetorical framework that defined public accommodations and desegregation laws as “public” rights rather than “social” rights.⁴⁷ African Americans and their white allies in Louisiana had already navigated this minefield and used the term “public rights” in their Reconstruction state constitution in 1868.⁴⁸ This approach gained steam, and by 1874 Black members of Congress used language to support Sumner’s bill against the growing white supremacist attacks, including by Alexander Stevens, the former Vice-President of the Confederacy and recently-elected Congressman from Georgia. Robert Elliott, in a powerful speech countering Stevens’ opposition, referred to the rights of public accommodations and school desegregation (the latter of which was still part of the bill) as the “equal rights and equal public privileges for all classes of American citizens.”⁴⁹

By 1874, Elliott was battling not only the resurrected rulers of the confederacy, but also the Supreme Court’s decision in *The Slaughterhouse Cases*,⁵⁰ which declared that general citizenship rights and privileges, potentially including access to public accommodations, were not a protected federal citizenship privilege. He and other supporters found themselves running up against a counter-interpretation of citizenship, one that sought to remove from federal protection much of the basic rights long sought by Black activists. Elliott did so by shifting his argument to equal protection and citing extensively the portions of Justice

46. David Upham has argued that interracial marriage was in fact supported as a basic right of citizenship by at least some Black and white abolitionists, and may have been generally understood by those who voted for the Fourteenth Amendment as a protected citizenship privilege. See David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303 (1995). Regardless of how the drafters and other Republican supporters of the amendment may have viewed the issue, they did not feel strongly enough to support rights of interracial marriage when it was used as the primary argument against the extension of civil rights in the 1870s, and they generally dodged the topic as a distraction asserting “social,” not “civil,” rights. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 3253 (1872) (Senator Wilson dismissing democratic suggestions that the Civil Rights Bill would require interracial marriage was and arguing that interracial sexual relations were less common under post-slavery freedom).

47. See generally Scott, *supra* note 45.

48. *Id.* at 783-790.

49. CONG. GLOBE, 43d Cong., 1st Sess. 407 (1874) (speech of Rep. Elliott).

50. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

Miller's opinion that contended that the amendment specifically protected Black Americans and equal rights.⁵¹

James Rapier, Congressman from Alabama, similarly rejected the claims that the bill enforced "social equality" and instead described it as protecting "public rights."⁵² Rapier, in particular, described how discrimination in public accommodations deeply harmed basic equality by treating even those African Americans serving in Congress as a separate caste: "I am subjected to far more outrages and indignities in coming to and going from this capital in discharge of my public duties than any criminal in the country provided he be white. Instead of my position shielding me from insult, it too often invites it."⁵³ As he said, "I am degraded as long as I am denied the public privileges common to other men, and that the members of this House are correspondingly degraded by recognizing my political equality while I occupy such [a] humiliating position."⁵⁴ Rapier presented a forceful argument that the rights of equal treatment in travel (inns, railroads) were fundamentally those rights protected by both the Fourteenth Amendment and Article IV's Privileges and Immunities Clause, and had long been recognized as basic rights for whites. "[E]very lawyer knows if any white man in antebellum times had been refused first-class passage . . . a suit would have been brought for denial of rights, and no one doubts what would have been the verdict. White men had rights then that common carriers were compelled to respect, and I demand the same for the colored men now."⁵⁵

As these passages show, African American political leaders and activists labored hard to ensure that the ideal that had long been seen as defining of full citizenship within Black communities would also become part of the implementing laws of the Reconstruction amendments. When faced with shifting definitions of civil rights, equality, and citizenship, they articulated a strong case for full access to civil society as being just as central to equal citizenship as rights of contract and property and the rights of suffrage and public office.

51. CONG. GLOBE, 43d Cong., *supra* note 49. South Carolina Congressman Alonzo Ransier described the rights protected by the bill as the "rights and privileges attaching to all freemen and citizens of our country." *Id.* at 1314.

52. *Id.* at 4782.

53. *Id.*

54. *Id.* at 4783.

55. *Id.* at 4782.

IV. CONCLUSION

As this brief look at these materials suggests, to account for the perspectives of African Americans during Reconstruction we need to think of the process of constitution making as broader than legal drafting. Much of the focus on the legal history of the Reconstruction amendments has been on the congressional drafters, which sees only the compromises across a range of white Republicans—conservative, moderate, and radical—that led to the amendments. With our vision so limited we often see the amendments, especially the Fourteenth and Fifteenth, as the achievement of the moderate Republicans.⁵⁶ By this account, each amendment reflects the limits of the possible within Congress at that particular moment and views each amendment as a distinct enactment isolated from and exclusive of each other. Suffrage is viewed as the province almost entirely of the Fifteenth Amendment (despite the fact that it was addressed expressly in Section 2 of the Fourteenth), citizenship and equal rights the province of the Fourteenth, and the end of slavery the subject of the Thirteenth.

This view of the amendments cloaks what was self-evidently important in the Black public sphere: suffrage and equal access to education and civil society were intimately entwined with liberty as the foundational rights of an equal, free citizenship. To Henry Garnet, speaking in February 1865, the proposed amendment abolishing slavery carried within it all the principles of Reconstruction. Each amendment, and each congressional and state enactment implementing them, were part of an ongoing process at once constitutionalizing *and* constituting freedom and equal citizenship.

Yet, even if we can expand our vision of the possibilities contained in a historically reconstructed equal citizenship constitutionalism, that frame itself contains dangers. Discussions of the new citizenship envisioned by Black activists and white Republicans often cast citizenship

56. See, e.g., KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501 (2012).

as an aspect of manhood.⁵⁷ Given the freshness of the war, the embrace of a gendered, martial concept of citizenship was to be expected, but it was deeply problematic both at the time and thereafter. The famous split within first wave feminism over suffrage was a critical cleavage for rights-activists, and it placed Black women in a difficult position.⁵⁸ As Francis Ellen Watkins Harper recognized, the fight for the ballot for women too often ignored the daily battles of Black women who still fought to ride the streetcars,⁵⁹ but at the same time, the law and economics of patriarchy consigned her and her children to destitution when her husband died.⁶⁰ A rhetoric of manhood citizenship was not going to address this kind of intersectional citizenship claim.

Similarly, as progressive as birthright citizenship was for the inclusion of Black Americans as full members of society, and as difficult as it was for that goal to be realized, the focus on nativity itself was simultaneously creating fissures in equality and law. For immigrants from Asia, the problems of citizenship, equality, and suffrage had their own complicated connections with and retreat from Reconstruction. To the

57. *E.g.*, Syracuse Convention, in Foner & Walker, *supra* note 5, at 42 (“That, as natives of American soil, we claim the right to remain upon it: and that any attempt to deport, remove, expatriate, or colonize us to any other land, or to mass us here against our will, is unjust; for here were we born, for this country our fathers and our brothers have fought, and here we hope to remain in the full enjoyment of enfranchised manhood, and its dignities.”). On the construction of a specifically African-American idea of manhood, see generally 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).

58. See Nell Irvin Painter, *Voices of Suffrage: Sojourner Truth, Francis Watkins Harper and the Struggle for Woman Suffrage*, in VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED (Jean H. Baker ed. 2002). On the split between the American Woman Suffrage Association and the National Woman Suffrage Association, see TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 11-15 (2016).

59. Francis Harper, *We are All Bound Up Together*, speech delivered to the Eleventh National Women’s Rights Convention in New York City, May 1866 (“You white women speak here of rights. I speak of wrongs. I, as a colored woman, have had in this country an education which has made me feel as if I were in the situation of Ishmael, my hand against every man, and every man’s hand against me. Let me go to-morrow morning and take my seat in one of your street cars-I do not know that they will do it in New York, but they will in Philadelphia-and the conductor will put up his hand and stop the car rather than let me ride.”).

60. *Id.* (“About two years ago, I stood within the shadows of my home. A great sorrow had fallen upon my life. My husband had died suddenly, leaving me a widow, with four children, one my own, and the others [sic] stepchildren. I tried to keep my children together. But my husband died in debt; and before he had been in his grave three months, the administrator had swept the very milk-crocks and wash tubs from my hands. I was a farmer’s wife and made butter for the Columbus market; but what could I do, when they had swept all away? They left me one thing-and that was a looking glass! Had I died instead of my husband, how different would have been the result! By this time he would have had another wife, it is likely; and no administrator would have gone into his house, broken up his home, and sold his bed, and taken away his means of support.”).

extent that claims of full citizenship used immigrants as a foil, race and alienage would continue to dominate equality in law and practice.⁶¹ And nativity did little to help Native Americans, as the expansive demands for land ownership among European Americans used the assimilationist thread of nineteenth-century liberal citizenship as a weapon against tribal ownership and freedom.⁶² Even a well-realized expression of equal citizenship ideals would have been hard-pressed to counter the social, economic, and political changes taking place on the ground across a vast and expanding country.

Nevertheless, the vision expressed among many African American writers, legislators, and speakers in this period deserves our attention today. Reflecting on the words of Henry Highland Garnet's sermon to Congress from 1865, some 150 years later, I am struck by how they still resonate. What of Garnet's vision of the necessities of freedom remain unmet? Judging from recent Supreme Court cases and political battles, the questions of enfranchisement and education are as real today as they were for Garnet in 1865.⁶³ Even after the civil rights revolution of the 1960s, where voting rights and educational opportunity were central legislative achievements, we remain embroiled in fights over equal and adequate access to the ballot, access to higher education, access to quality primary and secondary education, and a continued and seemingly intractable racial disparity in opportunity and achievement across the nation. Even if we take Garnet's sermon as a bare minimum of meaning behind the Reconstruction amendments, his call to action remains unfulfilled.

61. See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN AM. L. J. 55 (1996) (discussing how anti-Chinese sentiment have influenced Reconstruction-era citizenship concepts). An important exception to this was Frederick Douglass's Reconstruction-era speech opposing restrictions on immigration from China and anti-Chinese sentiments. See David W. Blight, *Frederick Douglass's Vision for a Reborn America*, THE ATLANTIC (Dec. 2019), <https://www.theatlantic.com/magazine/archive/2019/12/frederick-douglass-david-blight-america/600802/>.

62. See, e.g., FONER, *supra* note 34, at 462-63 (discussing Grant administration's Indian policy); ROGERS SMITH, CIVIC IDEALS 318-20 (1997) (same).

63. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 579 U.S. ____, 136 S. Ct. 2198 (2016); *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).