

THE CONSTITUTION OF BLACK ABOLITIONISM: REFRAMING THE SECOND FOUNDING

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ABSTRACT

Eric Foner has observed that historians of the Thirteenth Amendment have struggled “to find ways to get the voice of African Americans into discussions of the Amendment’s original meaning, scope, and limitation.” This article is part of a project to answer Professor Foner’s challenge to recover nineteenth-century African American constitutionalism. While there are many sources for accessing the views of African American writers, speakers, and activists, this article focuses on the rich contributions of the Black Convention Movement. Despite its importance in helping to set the terms for Reconstruction, the Black Convention Movement and the Black public sphere more generally have been under-utilized and under-studied as a part of our constitutional history. The documents from the state and national conventions of African Americans that took place from 1831 through the 1860s provide evidence of how African Americans understood constitutional ideals, principles, interpretations, and text in the period of time when significant constitutional change was about to take place. As we will see, the conventions included debates and statements about a range of constitutional ideas, from the meaning of freedom in a society infused with slavery and race prejudice, to complex views about the meaning of national citizenship, to fundamental questions about the validity and morality of the constitution itself. By the 1860s, as the Civil War revealed the possibility of an America freed from slavery, African American Conventions began to present a broad vision of civil society where constitutionally protected freedom and citizenship encompassed everything from suffrage to employment to property to education. This vision, while shared intermittently by some white abolitionist allies, was both more insistent and more encompassing than those ideas of freedom most often articulated in the white public sphere. This vision, I argue, is the lost meaning of African American constitutionalism and is one well worth exploring as we consider how and whether American constitutionalism in the twenty-first century can speak to us.

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INTRODUCTION

As we struggle to apply constitutional principles to the challenges of the twenty-first century, several scholars have recently urged us to look to the freedom struggles of the nineteenth century to help rethink contemporary constitutional law. In her powerful article, *Abolition Constitutionalism*, Dorothy Roberts argues that a re-engagement with a critical perspective on contemporary applications of the Reconstruction Amendments as a source for constitutional tools for prison abolitionism and criminal justice reform.¹ According to Roberts, “[t]he abolition struggle profoundly shaped not only the specific language of the Reconstruction Amendments but also the very meaning of those constitutional principles.”² While the dominant versions of antebellum constitutionalism helped to secure slavery, abolitionism “forged a radically divergent . . . constitutionalism” and provides an “alternative public

1 Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9–10 (2019).

2 *Id.* at 54 (citation omitted).

meaning of the Constitution” for today’s efforts to reclaim principles of equality and freedom in constitutional law.³ Several other scholars, including Rebecca Zietlow, Alexander Tsesis, Lea VanderVelde, and James Gray Pope, have pressed us to consider the authors and supporters of the Reconstruction Amendments as framers of the Constitution much as we do with the Founding era.⁴

The mining of abolitionist writings has been an important step for contemporary constitutional scholarship. Nonetheless, as Eric Foner has observed in discussing the Thirteenth Amendment, historians have struggled “to find ways to get the voice of African Americans into discussions of the Amendment’s original meaning, scope, and limitations.”⁵ This is changing. The shift is partly evident in the New York Times’s 1619 Project, which seeks to “place the consequences of slavery and the contributions of [B]lack Americans at the very center of the story we tell ourselves about who we are as a country.”⁶ From the perspective of legal history, historian Martha Jones’ remarkable recent book, *Birthright Citizens: A History of Race and Rights in Antebellum America*, presents a deeply researched and vibrant exploration of the legal consciousness, activism, and meaning of African Americans in antebellum Baltimore, and reclaims ideas of constitutional and democratic citizenship from the actions and arguments of antebellum African Americans.⁷ In Jones’ telling, rights for antebellum free Black Baltimoreans were less about

3 *Id.*

4 Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 393 (2012) (describing how drafters of the Thirteenth Amendment reframed the Constitution as an antislavery document); see also Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1697 (2012) (demonstrating the antislavery constitutionalist view that slavery was unconstitutional prior to the Thirteenth Amendment because it violated constitutional provisions protecting fundamental natural rights); ALEXANDER TSEISIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 2 (2004) (arguing that the Thirteenth Amendment “changed the fundamental structure of U.S. law” by abolishing the “political structure that was linked to slavery.”); Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 173, 174 (2017) (comparing Henry Wilson’s constitutional import to that of Madison, Hamilton, and Jefferson); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474, 1474 (2010) (expanding the scope of the Thirteenth Amendment to protect labor rights); KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 2 (2014) (suggesting that the ultimate goal of the Fourteenth Amendment was “repairing and reconstructing the United States”).

5 Eric Foner, *Remarks at the Conference on the Second Founding, November 14, 2008*, 11 U. PA. J. CONST. L. 1289, 1290 (2008).

6 Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html>.

7 MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 13–14 (2018).

statutes, court opinions, and legal treatises (although those were also relevant) and more about day-to-day actions and claims—to the rights to travel, own property, sue in court, bear arms—by people asserting citizenship in the face of the formal legal denial of that citizenship.⁸

Jones' work very intentionally shifts the focus away from constitutional law to a deeper study of legal consciousness where the law functions within social and political contexts. While I agree that such a shift is critical, my goal here is to circle back to a study of what might be described as constitutional consciousness, if not precisely constitutional law. In this way, I hope we can connect some of the deeper cultural meanings for the very terms and concepts that were included in the Reconstruction Constitution. To do this, I examine another source for constitutional meaning in the antebellum freedom struggle: the Black Convention Movement. Despite its importance in helping to set the terms for Reconstruction, the Black Convention Movement and the Black public sphere more generally have been under-utilized and under-studied as a part of our constitutional history. The documents from the Black conventions provide evidence of how African Americans understood constitutional ideals, principles, interpretations, and text in the period of time when significant constitutional change was about to take place. The conventions provide sources for constitutional understandings important for anyone who considers public meanings relevant to constitutional interpretation.⁹

8 *Id.* at 14.

9 Originalism in particular has stressed evidence of public meaning, but most schools of constitutional interpretation consider it relevant. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 380–82 (2013) (highlighting a concise explanation of public meaning originalism). Evidence from the Black public sphere may be especially helpful for those who are looking for a range of possible meaning—a floor-and-ceiling approach, if you will—as opposed to a more unified fixed meaning. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *NOTRE DAME L. REV.* 1, 75 (2015) (discussing how originalism can set historically understood upper and lower boundaries on meanings of vague constitutional phrases such as “privileges or immunities”); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 *CONST. COMMENT.* 71, 91 (2016) (acknowledging that there is often “dissensus and differing understandings among the ratifying public” but arguing that a “thin” theory of public meaning that focuses on the most general level of agreement can account for such multiple meanings); James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 *ALA. L. REV.* 675, 677 (2016) (criticizing originalism for the assumption that there is a singular historical public on which to base public meaning analysis). I would add here that my own idea of public meaning assumes historical practices to be particularly relevant and likely to produce divergent and multiple meanings, and that I see semantic or lexicographic approaches to meaning as not especially useful or persuasive. But this Article is generally agnostic on these issues; I hope people of different interpretive views can find value in evidence of what past generations thought about constitutional text and background constitutional principles. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 645 (2013) (arguing that a new form of originalism

This Article approaches the Black Convention Movement as a source of constitutional meaning and constitutional history. It proceeds roughly chronologically, focusing on the main themes and key materials and ideas from each decade of the conventions from 1830 through 1866. With well over fifty conventions over this period, it is not possible to treat them comprehensively here. Rather, I focus on what I see as some of the key examples from each period to explicate the main ideas, debates, and interests. I also view the constitutional issues as developing organically out of the contexts in which they are raised and discussed. Thus, rather than using constitutional concepts or text to guide the study of the conventions, I analyze the debates and documents from the convention and then explore the constitutional issues emerging from those sources. I should also note that by focusing on the conventions I am aware that there is much more depth to the ideas, debates, and practices than I capture here. The vibrant Black press of this period, which developed in conjunction with and parallel to the Convention Movement, contained ideas about law and politics that are at least as significant as those in the conventions, and very often the ideas mentioned in convention had been argued in the press already and continued to be debated there after the conventions.¹⁰ For similar reasons of scope and focus, I do not address the connections and disjunctions between Black abolitionism and white abolitionists. Those connections are critical to getting a sense of the dynamic across different spheres of discourse and to understanding overlaps and tensions among various publics during Reconstruction played out at the time of the drafting and ratifying of the Reconstruction Amendments, and just for this reason they deserve a separate treatment.

This Article begins in Part I with an overview of the movement itself. Part II focuses on the inaugural set of conventions, the national conventions from 1830-1835 held in Philadelphia and New York. These conventions helped form a distinctively African American public sphere as a counterweight to the increasingly racist and aggressively pro-slavery dominant culture. But they also revealed some of the limitations of the approach of that leadership generation. Part III considers some of the conventions that resumed in the 1840s and continued into the 1850s. This was a very active and vibrant period that saw a transformation in the Black Public Sphere from a more conciliatory voice seen

(“framework originalism”) offers an opportunity to reassess the role of history in constitutional construction).

10 See generally DERRICK R. SPIRES, *THE PRACTICE OF CITIZENSHIP: BLACK POLITICS AND PRINT CULTURE IN THE EARLY UNITED STATES* (2019) (exploring the many ways antebellum Black public culture used print and written cultural productions, including the press, and situating the convention movement within that print culture).

in the 1830s to a range of more radical voices, from advocacy of slave rebellion to the embrace of a Black-led emigrationism, that pressed the Black Public Spheres in a more activist and radical direction. In this context constitutionalism took on a decidedly revolutionary character and set the stage for the Civil War to become the Second American Revolution. In Part IV, this Article looks at some of the pivotal convention of the late-Civil War and early Reconstruction period, the Syracuse National Convention of 1864. In many ways this convention was the culmination of the decades-long movement, and many of the ideas expressed were ones that had been refined in early conventions. But it also reflected a new stage, one where actual legal and political change was happening and one where Black activism took one a remarkably coordinated and organizationally sophisticated form through a network of Equal Rights Leagues and other similar civil society groups.

This Article ends this part of the story here, at the foothills of the new constitutionalism of Reconstruction. The Convention Movement continued, but with the creation of the (temporary) biracial democracy under the Reconstruction Act of 1867, the role of counterpublic structures changed, diminishing somewhat and refocusing their form and energy. Thus, in Part V, this Article concludes by surveying the constitutional ideas that developed over time and helped formed the constitutional milieu of Reconstruction. The conclusions here are more suggestive than definitive, indicating a need for further study but also the result of the more open-natured, rhetorical, and non-legal character of the materials themselves. Indeed, as we will see, it was an important aspect of African American constitutionalism that it be an open and regenerative process. Antebellum Black constitutionalism was at once a deeply critical project and an impressively hopeful one, both immanent critique and aspirational constitutionalism. It pointed to directions for realizing a society of full, rather than nominal, freedom and a culture of equality across all of civil and political society. Such goals were—and still are—suggestive and ephemeral but attending to the experiences and words of antebellum African Americans, whether through the Black Convention Movement or in other ways, can help us think more deeply about what those ideals meant and can mean.

I. BLACK CONVENTION MOVEMENT: AN OVERVIEW

Beginning with meetings organized in Philadelphia in 1830 and 1831, the Black Convention Movement provided a forum for African Americans in the North to oppose slavery and protect and develop their own interests as free

people of color in an increasingly hostile North.¹¹ Although the Movement was closely linked to the growing interracial abolitionist movement—white abolitionists attended and spoke at the meetings and William Garrison’s *Liberator* often published their more prominent speeches and documents—the conventions and their publications were organized and run by African Americans in order to address problems and ideas that white abolitionism sometimes ignored or minimized.¹² Perhaps because of this, the conventions were by no means solely about abolition; they also provided forums for discussion of racial prejudice in the North and explorations of what freedom meant, in theory and in practice, to free Black people.¹³ They also were a

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- 11 See 1 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865, at xi (Philip S. Foner & George E. Walker eds., 1979) (illustrating the utility of organizing at a national level in the face of the continued enforcement of Black Laws); MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS, 1830-1864, at ii (Howard Holman Bell ed., 1969) (describing national conventions motivated by the desire promote education, employment, and equal access to courts); Howard Holman Bell, A Survey of the Negro Convention Movement, 1830-1861 (June 1953) (Ph.D. dissertation, Northwestern University) (ProQuest) (pioneering survey of the national convention movement); JOHN ERNEST, A NATION WITHIN A NATION: ORGANIZING AFRICAN-AMERICAN COMMUNITIES BEFORE THE CIVIL WAR 107-138 (2011) [hereinafter ERNEST, A NATION WITHIN A NATION] (discussing the Black Convention Movement from 1830-1864); JOHN ERNEST, LIBERATION HISTORIOGRAPHY: AFRICAN AMERICAN WRITERS AND THE CHALLENGE OF HISTORY, 1794-1861, at 221 (2004) [hereinafter “ERNEST, LIBERATION HISTORIOGRAPHY”](exploring how African American writers developed their own historiography that focused on their own interests); EDDIE S. GLAUDE, JR., EXODUS!: RELIGION, RACE, AND NATION IN EARLY NINETEENTH-CENTURY BLACK AMERICA 113 (2000) (noting that racial terror in northern states sparked the call for national conventions). A truly remarkable resource for the study of the convention movement has been compiled by the Colored Convention Project and is available at <http://coloredconventions.org/>. Based on the research compiled by the Project, there were well over 100 national, regional, and state conventions held in the period from 1830-1875, and while not all produce extensive materials that are still available, there is a sizable collection of convention documents from this period. All of the conventions cited in this Article can be found at the Project’s website. Scholars at the Project currently have a book of essays in progress on the movement that should prove a pathbreaking addition to the scholarship on this important area. See THE COLORED CONVENTIONS MOVEMENT: BLACK ORGANIZING IN THE NINETEENTH CENTURY (P. Gabrielle Foreman, Jim Casey & Sarah Lynn Patterson, eds., 2021).
- 12 John Ernest captures this point nicely when he says that Black northerners felt that “white abolitionists were more concerned about the sins of slavery than about those who suffered the force of those sins, and more concerned with abstract freedom than with the recognition of humanity and fundamental equality that gave the concept of freedom meaning and purpose.” ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 118-19.
- 13 See P. Gabrielle Foreman, *The Colored Conventions Project and the Changing Same*, COMMON PLACE (Fall 2015), <http://commonplace.online/article/the-colored-conventions-project-and-the-changing-same/> (“[Convention] representatives considered resolutions to advance educational and labor rights, voting and jury representation and the role of the Black press. They debated the utility of jobs in the service sector, the power of owning one’s own land and businesses, and how to best support the self-emancipated, the still enslaved and the newly freed. They gathered and disseminated data about Black occupations, property and institutional affiliations.”).

source for developing ideas of social uplift and moral reform. In short, the state and national conventions addressed “the need to provide African Americans with uplift while countering the white community’s assumptions of [B]lack inferiority.”¹⁴ The shifting themes of the conventions, and the debates they enabled, showed the need and value in having a primarily African American forum for these discussions. In a society where white people not only dominated political and cultural fora but formally and informally excluded Black people from participation, the Convention Movement provided a space, or countersphere, for public engagement by African Americans. It was a key component, along with the Black press and Black church, of the Black public sphere that was critical to African American resistance and development.¹⁵

The Convention Movement went through phases of development from its inception in the 1830s through Reconstruction. It began as a counter to the powerful American Colonization Society (“ACS”), an organization run by white elites, most of whom opposed abolition and sought to move free Black people to Liberia.¹⁶ This early phase briefly considered Black-led alternatives to the ACS, such as the movement to build Black communities in what was then known as Upper Canada, but turned instead to a focus on moral improvement movements (similar to those advanced by Garrisonians) such as temperance, education, and benevolence societies.¹⁷ As we shall see, they also began articulating a form of constitutionalism that would develop over the next thirty years. As enthusiasm for the national conventions waned, perhaps in part because of the financial and logistical difficulties following the national economic collapse produced by the panic of 1837, the focus shifted to a series of state conventions that were both logistically easier and offered the opportunity to address more specific concerns, like opposition to state-based

14 ERNEST, *A NATION WITHIN A NATION*, *supra* note 11, at 118. Eddie Glaude describes this as the “outside-and-inside” dynamic of the Convention Movement. GLAUDE, *supra* note 11, at 114.

15 On the context of the convention movement within Black activism and activist organizations generally, see ERNEST, *A NATION WITHIN A NATION*, *supra* note 11, at 108-09.

16 See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION* 105-25 (2014) (discussing the ACS’s efforts to colonize Liberia and the inherent problems of a settler society it produced in Liberia); MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 239-40 (2016) (discussing opposition of many within the ACS to abolition and anti-slavery).

17 JANE H. PEASE & WILLIAM H. PEASE, *THEY WHO WOULD BE FREE: BLACKS’ SEARCH FOR FREEDOM, 1830-1861*, at 119-21 (1974) (describing the decline in popularity of Canadian emigration within the Black public sphere from being a “major project” to “a barely preferable alternative to the detested Liberian program of the American Colonization Society”); GLAUDE, *supra* note 11, at 115-17 (emphasizing that the shortcomings presented by Canadian emigration gave way by 1832 to moral and mental improvement efforts).

suffrage and civil rights restrictions.¹⁸ Through the 1840s and 1850s, intermittent national conventions, combined with a series of state conventions, reflected the variety of concerns, debates, and ideas circulating within the Black public sphere in the north. A recurrent theme of the conventions was the range of efforts Black communities could employ to battle what seemed a hardening of white supremacy in the north and west and the parallel efforts to support African American social, political, and economic uplift.¹⁹ As one convention put it in 1855, “the work of elevation of the Free People of Color is (so to speak) the lever by which the whole must rise, that work must now receive a vigorous and hearty support from all of those upon whom it has a claim.”²⁰ According to historians Jane and William Pease, the conventions were key to the Black abolitionist and civil rights movement, and “[m]uch if not all self-consciously [B]lack antislavery and civil rights activity either shaped or was shaped by this central institution.”²¹

The conventions also served as a form of community-building and organization, especially for states where the Black population was small and widely dispersed. As J. B. Sanderson, one of the leaders of the California state convention, put it:

We are scattered over the State in small numbers; the laws scarcely recognizing us; public sentiment is prejudiced against us; we are misunderstood, and misrepresented; it was needful that we should meet, communicate, and confer with each other upon some plan of representing our interests before the people of California.²²

Of course, doing so presented a range of difficulties, as the conventions were both forums for debate and efforts to find a unified voice. Debate, if too heated, could undermine the project; unity, if falsely obtained, could render the conventions chimerical. This delicate balance was often achieved, and the records of the conventions present evidence both of points of unity and the ranges and topics of disagreement.

As the decades progressed, the state and national conventions became more militant. Howard Bell describes the 1850s as a decade of both “growing

18 ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 111-12; *see also* PATRICK RAE, BLACK IDENTITY AND BLACK PROTEST IN THE ANTEBELLUM NORTH 31 (2002) (noting the difficulty of holding national conventions).

19 ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 118-19.

20 PROCEEDINGS OF THE COLORED NATIONAL CONVENTION, HELD IN FRANKLIN HALL, SIXTH STREET, BELOW ARCH, PHILADELPHIA, OCTOBER 16TH, 17TH AND 18TH, 1855, at 4 (1856); *see also* ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 119 (quoting the Proceedings of the Colored National Convention in 1855).

21 PEASE & PEASE, *supra* note 17, at 123.

22 ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 113.

militancy” and a renewed consideration of Black-led emigration.²³ Especially after the Compromise of 1850 established a federal regime of support for kidnapping of northern Black Americans under the Fugitive Slave Act of 1850, the calls by people such as Henry Garnet for forceful resistance swelled, and the need for political activism persuaded many Black abolitionists to abandon Garrisonianism. By the eve of the Civil War, with the “slaveocracy” apparently in significant control of the courts (*Dred Scott*) and legislature (the Kansas-Nebraska Act and the opening of new territory to slavery), even long-time opponents of emigration like Frederick Douglass and William Wells Brown had moved to the emigration camp, and it appeared the convention movement might have reached an end.

The war changed everything. With Abraham Lincoln’s reluctant but significant embrace of the end of slavery as a war goal and the grudging acceptance of Black men into the military, Black militancy had not only overcome emigrationism but had become the cause of the Union.²⁴ With the pivotal National Convention of 1864 in Syracuse, the convention movement grew into a full-blown social movement, helping to create a national organization with local and state memberships, which in turn supported and inspired state and local conventions.²⁵ Because of the base established at the state and national levels before the war, African American leaders and communities were able to organize quickly and effectively to develop a counterpublic civil society that actually saw some hopes for repairing the social rift that made them counterpublics in the first place. The post-war conventions allowed for expressions of principles and concerns of particular import for Black Americans as they confronted the possibilities and problems of Reconstruction. They also provide us with an important source for the culmination of decades of development of ideas and practices of constitutionalism and democratic citizenship and an expression of the possible direction for a new vision of American citizenship based on equality and

23 Bell, *supra* note 11, at 111. For example, Bell notes that the 1849 Ohio Convention supported distribution of David Walker’s *Appeal* and Henry Garnet’s *Address to the Slaves*, perhaps the leading written calls for forceful and violent resistance to slavery. *Id.* at 115.

24 See John David Smith, *Let Us All Be Grateful That We Have Colored Troops That Will Fight*, in *BLACK SOLDIERS IN BLUE: AFRICAN AMERICAN TROOPS IN THE CIVIL WAR ERA* (John David Smith, ed.) 1-78 (2002) (discussing the background and effects of Lincoln’s decision to issue the Emancipation Proclamation and incorporate Black soldiers into the Union army).

25 DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: A BRIEF, VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA 186-88* (2014) (describing the spread of Syracuse convention attendees to Richmond, New Orleans, and the District of Columbia); see Eric Foner, *Rights and the Constitution in Black Life during the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 866-67 (1987) (highlighting the National Black Convention in Syracuse).

liberty.²⁶ They give us views of the meaning of equality and freedom by the Americans who most deeply understood those words precisely because of the fact of their denial, and who especially understood both the difficulties inherent in realizing the ideals and the important potential for a society if it would fully commit to the them.

The conventions provide us a window into the opinions and ideas of some of the most important Black leaders and communities throughout the nation from this period. With the establishment of the Equal Rights Leagues and the eventual political participation of Black people across the country in the second half of the 1860s, a remarkable number of African Americans worked to try to build an equal and free society and create an American citizenship worthy of that name. They did so in public forums, where they disagreed, argued, debated, compromised, and eventually created documents addressed to both Black citizens and to white politicians. And in many instances those documents, discussions, and debates extended deep into local communities with the networks built through the Equal Rights Leagues. For all of these reasons, the Black Convention Movement is an important source for us to access ideas within the Black public sphere, ideas which speak to the very foundations of what we today consider to be the most valuable and salient aspects of our constitution and constitutional culture: freedom, equality, and citizenship.

II. FORMATION OF A BLACK PUBLIC: THE 1830S NATIONAL CONVENTIONS

The Black Convention Movement began in 1830 with a meeting in Philadelphia organized by Hezekiah Grice of Baltimore and Bishop Richard Allen, the then-aged founder of the AME Church, and other East Coast Black leaders.²⁷ Five of the six meetings from 1830 to 1835 took place in

26 For an excellent recent study of how antebellum Black writers and activists explored and created meanings of citizenship, see SPIRES, *supra* note 10. In particular, Spires seeks to avoid reading Black-authored texts as merely a reaction to white culture and politics and instead “base our working definition of citizenship on [B]lack writers’ texts written explicitly to and for [B]lack communities[.]” *Id.* at 2; see also ANDREW K. DIEMER, *THE POLITICS OF BLACK CITIZENSHIP: FREE AFRICAN AMERICANS IN THE MID-ATLANTIC BORDERLAND, 1817-1863*, at 5–8 (2016) (illuminating African Americans’ struggles for the rights of citizenship and challenging existing scholarship that depicted the antebellum decades as a period of withdrawal responding to rising white prejudice). These works nicely complement Martha Jones’s work on African American citizenship claiming in antebellum Baltimore. See JONES, *supra* note 7.

27 PEASE & PEASE, *supra* note 17, at 119–121.

Philadelphia, with the fifth being held in New York in 1834.²⁸ Although each convention aspired to be national, and some delegates did attend from as far away as Cincinnati, these were decidedly Mid-Atlantic gatherings. Nevertheless, the conventions provided a means for free Black people to begin constructing a national identity, and the debates at these conventions reflected this effort. This was evident in the initial conventions, which focused heavily on two conflicting topics, emigration and colonization. Indeed, the first few conventions revolved around the effort to define and negotiate a space in the Black public that supported some Black-led emigration yet also forcefully rejected the very well-funded and widely known white-led efforts to move free Black people to Liberia. In addressing these twin topics, the convention delegates asserted and created their own identity as America citizens, including their relationship to the nation and its Constitution.

The question of emigration had arisen with special urgency for Black Ohioans when, in 1829, cities and towns like Cincinnati began aggressively enforcing anti-Black laws and white residents launched violent riots against the growing Black population.²⁹ Some African Americans from Ohio began emigrating to the largely unpopulated areas of Upper Canada (outside York, now Toronto), founding the community of Wilberforce.³⁰ The necessity of aiding the Ohio emigrants and refugees and expressing public outrage over anti-Black laws and white Cincinnati's use of the laws to force Black residents to leave their native homes was a main impetus for holding the first meeting/convention in 1830.³¹

28 *Id.*; Bell, *supra* note 11, at 17-18

29 GLAUDE, *supra* note 11, at 112-13.

30 JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY: CULTURE, COMMUNITY, AND PROTEST AMONG NORTHERN FREE BLACKS, 1700-1860, at 104 (1997); SINHA, *supra* note 16, at 207-08. Nearly 2000 Black residents were forced out of Cincinnati. See NIKKI M. TAYLOR, FRONTIERS OF FREEDOM: CINCINNATI'S BLACK COMMUNITY, 1802-1868, at 20 (2005) (showing in table 1.1 the decline in the city's Black population from 2,258 in 1829 to 1,090 in 1830). On the 1829 riots and emigration to Canada generally, see *id.* at 50-79.

31 See SINHA, *supra* note 16, at 208 ("In response to the Cincinnati riot and to foster Canadian emigration, African Americans convened a national convention in 1830."); CONSTITUTION OF THE AMERICAN SOCIETY OF FREE PERSONS OF COLOUR, FOR IMPROVING THEIR CONDITION IN THE UNITED STATES; FOR PURCHASING LANDS; AND FOR THE ESTABLISHMENT OF A SETTLEMENT IN UPPER CANADA, ALSO THE PROCEEDINGS OF THE CONVENTION WITH THEIR ADDRESS TO FREE PERSONS OF COLOUR IN THE UNITED STATES 9 (1831) [hereinafter 1830 National Convention], <https://omeka.coloredconventions.org/files/original/f82c27cba074be4e09cd1aadb5aaded1.pdf> (stating that the convention was convened in consideration of the anxiety caused by laws of Ohio abridging the liberties and privileges of free people of color denying them a right of residence unless they comply with requisitions not required of white people); MINUTES AND PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, FOR THE IMPROVEMENT OF THE FREE PEOPLE OF COLOR IN

At the same time that the Ohio incidents and emigration were taking place, the American Colonization Society had become a major force nationally and was actively recruiting free Black people to move to the new colony of Liberia. The ACS had formed after the War of 1812, and had the support of many leading white politicians.³² One of the most important functions that the delegates and organizers of the first wave of Black conventions assumed was the forceful condemnation of this white-led colonization, which they saw as fundamentally pro-slavery and anti-Black. The work of the early Black conventions, along with the individual advocacy of Black leaders, to confront colonization firmly and uniformly helped convince white abolitionists, including William Lloyd Garrison and Arthur and Lewis Tappan, to oppose the ACS.³³

The Address of the 1830 Convention declared that “we who have been born and nurtured on this soil, we whose habits, manners, and customs are the same in common with other Americans, can never consent” to removal to the distant land and climate of Africa.³⁴ The following year the 1831 Convention likewise asserted nativity and citizenship to contest colonization:

[T]hey [the ACS] are pursuing the direct road to perpetuate slavery, with all its unchristianlike concomitants, in this boasted land of freedom; and, as citizens and men whose best blood is sapped to gain popularity for that

THESE UNITED STATES, HELD BY ADJOURNMENTS IN THE CITY OF PHILADELPHIA, FROM THE 4TH TO THE 13TH OF JUNE INCLUSIVE, 1832, at 16–20 [hereinafter 1832 National Convention], <https://omeka.coloredconventions.org/files/original/8d604da70a1c2f01ad867bbd5dcefd88.pdf> (summarizing, in the Committee Report on Canada, the efforts to investigate, fund, and assist emigration to Upper Canada and the difficulties involved, including hostility of local white Canadians); Nikki Taylor, *Reconsidering the “Forced” Exodus of 1829: Free Black Emigration from Cincinnati, Ohio to Wilberforce, Canada*, 87 J. AFR. AM. HIST. 283, 283 (2002) (discussing the African American exodus from Cincinnati). Taylor distinguishes between those who voluntarily emigrated to Canada and those true refugees who were forced out of Cincinnati by the riots, many of whom settled in nearby towns. *Id.* The members of the National Conventions were concerned about both groups.

32 DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 256–58 (2006) [hereinafter, DAVIS, *INHUMAN BONDAGE*]. On the complexities involved in the colonization movement across white and Black abolitionists, see DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION* 144–92 (2014) [hereinafter DAVIS, *THE PROBLEM OF SLAVERY*]. See also SINHA, *supra* note 16, at 160–82, 203–05 (discussing the ACS and the responses of African Americans, and exploring the relationship between emigrationism and colonization and the experiences of African American settlers in Liberia).

33 See DAVIS, *THE PROBLEM OF SLAVERY*, *supra* note 32, at 185–92 (describing the influence of Black abolitionist leaders on important white reformers such as William Lloyd Garrison and Arthur Tappan); SINHA, *supra* note 16, at 214–21 (discussing the influence of Black anti-colonialist activists on Garrison); DAVID E. SWIFT, *BLACK PROPHETS OF JUSTICE: ACTIVIST CLERGY BEFORE THE CIVIL WAR* 72–74 (1989) (discussing the influence of Black leaders such as Samuel Cornish and Theodore Wright on leading white abolitionists such as the Tappans and Gerrit Smith).

34 1830 National Convention, *supra* note 31, at 10.

Institution, we would, in the most feeling manner, beg of them to desist: or, if we must be sacrificed to their philanthropy, we would rather die at home. Many of our fathers, and some of us, have fought and bled for the liberty, independence, and peace which you now enjoy; and, surely, it would be ungenerous and unfeeling in you to deny us an humble and quiet grave in that country which gave us birth!³⁵

The 1831 Convention here asserted their position clearly, but, compared to subsequent conventions, somewhat tamely. By 1832 the Convention delegates felt more emboldened. Black activists had convinced some white abolitionists of the dangers of colonization and had recruited them to the anti-colonization and anti-ACS cause. It may have been that the movement of some white abolitionists to their side on the colonization issue meant the delegates felt less of a need to gently persuade anti-slavery members of the ACS and made it easier to, as they put it, *assert* their position more firmly. The 1832 Convention invited Garrison to debate, at the convention, with a representative of the ACS, and Garrison clearly had the ears and support of the delegates. The Convention concluded that:

[W]e do now *assert*, that the result of the same [the debate between Garrison and Gurley for the ACS] has tended more deeply to rivet our solid conviction, that the doctrines of said Society, are at enmity with the principles and precepts of religion, humanity and justice, and should be regarded by every man of color in these United States, as an evil for magnitude, unexcelled, and whose doctrines aim at the entire extinction of the free colored population and the riviting [sic] of Slavery.³⁶

In taking such a strong stand against the ACS, the 1832 Convention also found it necessary to explain their simultaneous support for emigrationists going to Canada. Indeed, in confronting this delicate negotiation between opposition to colonization and support for emigration, the early conventions began a debate and dialogue that would be a central aspect of the Black public sphere throughout the antebellum period, and again, in somewhat different

35 MINUTES AND PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE PEOPLE OF COLOUR, HELD BY ADJOURNMENTS IN THE CITY OF PHILADELPHIA, FROM THE SIXTH TO THE ELEVENTH OF JUNE, INCLUSIVE, 1831, at 15 (1831) [hereinafter 1831 National Convention], <https://omeka.coloredconventions.org/files/original/558d4609932ce29fb9c44d1409344e98.pdf>.

36 1832 National Convention, *supra* note 31, at 33. The position was reiterated forcefully in 1833 as also reflecting the position of delegates from each state, emphasizing the widespread opposition to colonization. MINUTES AND PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, FOR THE IMPROVEMENT OF THE FREE PEOPLE OF COLOUR IN THESE UNITED STATES, HELD BY ADJOURNMENTS IN THE CITY OF PHILADELPHIA, FROM THE 3D TO THE 13TH OF JUNE INCLUSIVE, 1833, at 26- 28 (1833) [hereinafter 1833 National Convention], <https://omeka.coloredconventions.org/files/original/51f074b1e438eec53b1a30fd296b63a7.pdf>.

form, after Reconstruction.³⁷ The Convention's answer was two-fold. First, it made clear that colonization was an effort by white Americans to force Black Americans to leave, against their will and to a place not of their choosing, whereas emigration was a decision made and implemented by African Americans themselves. In this respect colonization was another form of oppression and subordination; emigration was an exercise of liberty, albeit within the limited range of free choices available to Black People in the North. Second, the Convention stressed that emigration was a last resort, forced on emigrants by the "expulsory" laws of Ohio being enforced brutally in Cincinnati. As they put it, emigration to Canada was "a refuge in a storm" required by "the law of necessity" to protect the victims of white violence and legal proscription, but their support for the emigrants did not lessen their "noble sentiment which we rejoice in exclaiming—This is *our own*/Our native land."³⁸ It remained the delegates' firm belief that that their efforts at advocating for fellow Black citizens, and at seeking paths to improvement of free Black Americans, were the focus of their communal efforts.

In claiming a right of nativity, the convention delegates were redefining American citizenship to include Black Americans. This point is also seen in how the conventions addressed their public statements to "Fellow Citizens."³⁹

37 As Martha Jones explains, "[t]he line between colonization and emigration was real, distinguishing self-determination from compulsion." JONES, *supra* note 7, at 38. Jones nicely depicts how debates within the Black community of antebellum Baltimore over colonization and emigration were an important aspect of the development of African American ideas of belonging and citizenship. See also Taylor, *supra* note 31, at 287–88 (emphasizing that self-determination was the key difference between emigration and white-controlled colonization projects).

38 1832 National Convention, *supra* note 31, at 33–34.

39 See, e.g., 1831 National Convention, *supra* note 35, at 12 (beginning the conventional address with the salutation "Respected Bretheren and Fellow Citizens"); 1832 National Convention, *supra* note 31, at 32 (beginning the conventional address with the salutation "Fellow Citizens"); 1833 Convention, *supra* note 36, at 31 (beginning the conventional address with the salutation "Bretheren and Fellow Citizens"); MINUTES OF THE FIFTH ANNUAL CONVENTION FOR THE IMPROVEMENT OF THE FREE PEOPLE OF COLOUR IN THE UNITED STATES, HELD BY ADJOURNMENTS, IN THE WESLEY CHURCH, PHILADELPHIA, FROM THE FIRST TO THE FIFTH OF JUNE, INCLUSIVE, 1835, at 25 (1835) [hereinafter 1835 National Convention], <https://omeka.coloredconventions.org/files/original/9c82e209c1203b531321aa2c241d42dd.pdf> (beginning their address to the American people with the salutation "Fellow Citizens"). The 1830 meeting used only the term "Brethren." 1830 National Convention, *supra* note 31, at 9. The 1834 Convention issued a "Declaration of Sentiment" rather than an address to the public. MINUTES OF THE FOURTH ANNUAL CONVENTION, FOR THE IMPROVEMENT OF THE FREE PEOPLE OF COLOUR, IN THE UNITED STATES, HELD BY ADJOURNMENTS IN THE ASBURY CHURCH, NEW-YORK, FROM THE 2D TO THE 12TH OF JUNE, INCLUSIVE, 1834, at 27 (1834) [hereinafter 1834 National Convention], <https://omeka.coloredconventions.org/files/original/4be5b059de7e3ab811082ebd5de89309.pdf>.

As David Walker had done the year before in his groundbreaking *Appeal*,⁴⁰ the Convention delegates made a claim to their own equal and full citizenship, and that of their Black audience, from the very first words of their Addresses. This was a radical claim, and central to constitutional identity. Citizenship was a contested space for Black Americans from the very beginning of the nation. The Constitution was maddeningly vague about who was a citizen and what that status entailed. In Article IV, Section 2 it asserted a protection across state lines for citizens in clause 1, but in clause 3 made clear that those “held to service or labor” would be returned to their owners and receive no protections from the hosting state. The ambivalence this created about Black citizenship came to a head in the battle over the admission of Missouri from 1819-1821, with Missouri attempting to deny free African Americans travel to and residence in the state (an issue on which Congress basically punted).⁴¹ The Naturalization Act of 1790 barred non-white immigrants from naturalized citizenship.⁴² State-level citizenship status varied widely, but the prominent markers of full citizenship—suffrage, rights of residence, right to testify, etc.—were denied or restricted to free Black people (and of course to those who were enslaved) in many states. In this context, the assertion of full citizenship in public forums and documents was a bold exclamation of membership that white America, by law and social custom, generally denied.

The claim of citizenship also reflected the assertion of a *national* status (national citizenship was not embraced in the Constitution until 1868). The convention movement—like the Black press, Black churches, and a community of Black writers, speakers, and their audiences—was an early expression of nationalism and national identity, and reflected an increasing

40 See DAVID WALKER'S APPEAL TO THE COLOURED CITIZENS OF THE WORLD (Peter P. Hinks ed., 2000) (reprinting David Walker's 1829 original work).

41 See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 312-14 (1978) (discussing the Missouri compromise and the role it played in the discourse surrounding Black citizenship). Congress permitted Missouri to retain the racial exclusion in its constitution but simultaneously declared that the state would not pass any law violating the federal Constitution (leaving open the issue of whether the Constitution's Privileges and Immunities Clause prohibited the state's race-based migration ban). See Sean Wilentz, *Jeffersonian Democracy and the Origins of Political Antislavery in the United States: The Missouri Crisis Revisited*, 4 J. HIST. SOC'Y 375, 382 (2004) (“Clay brokered a deal that let the Missouri constitution stand—but with the perverse proviso that the state legislature would pass no law at variance with the Constitution.” (citation omitted)).

42 Act of Mar. 26, 1790, Ch. 3, 1 Stat. 103. (repealed 1795) (“[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof[.]”).

importance of an American identity based on national communities.⁴³ The conventions helped create and develop a free Black community that was united in and could identify by common interests, and that community crossed local and state lines. Indeed, with so many northern and western states enforcing and expanding legal segregation, national community building was an essential counterweight to state and local oppression.⁴⁴ And, for free Black people, many of whom had themselves recently escaped slavery, the identity of interest extended to all free and enslaved African Americans. To some extent it also extended to all people of African descent, whether in Africa or across the diaspora, and an international awareness was never far from the consciousness of speakers and writers in the American Black public sphere.⁴⁵ But in the conventions, as in David Walker's *Appeal*, the focus remained on the problem of slavery and prejudice in the United States. Thus the 1831 Convention declared that "Our attention has been called to investigate the political standing of our brethren wherever dispersed, but more particularly the situation of those in this great Republic."⁴⁶

This national identity was an important aspect of the constitutional identity that was emerging in the Black public sphere as well. The 1831 Convention asserted their membership and status as American citizens with a full embrace of the nation's founding documents. The convention's main committee recommended "that the Declaration of Independence and Constitution of the United States, be read in our Conventions; believing, that the truths contained

43 ERNEST, *A NATION WITHIN A NATION*, *supra* note 11, at 120-22 (noting that the conventions played an important role in creating a national community to deal with national evils); *see also* RAEL, *supra* note 18, at 47 (remarking on the discursive process through which African Americans created a national family). There was also a parallel establishment of the Colored American Conventional Temperance Society with branches in 18 cities, that also advocated for Black rights and moral uplift. *See* SINHA, *supra* note 16, at 300.

44 *See* ERNEST, *supra* note 11, at 107-38 (noting that the conventions were often organized specifically to address local or regional concerns). For a classic work on segregation in the antebellum north, *see* LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961). *See also* HORTON & HORTON, *supra* note 30, at 155-76 (describing anti-African American mob violence in the East and Midwest).

45 Antebellum Black Americans' relationship to Africa and the Diaspora was complex and variable, and often reflected and helped define their own identities as Americans. *See, e.g.*, LESLIE M. ALEXANDER, *AFRICAN OR AMERICAN? BLACK IDENTITY AND POLITICAL ACTIVISM IN NEW YORK CITY, 1784-1861* (2008) (discussing the ways in which Black New Yorkers infused their political activism with pride in their African heritage and wrestled with the difficulty of balancing that identity with a growing desire for freedom and equality in the United States).

46 1831 National Convention, *supra* note 35, at 12. David Walker's *Appeal*, in its full title, indicated the same concern with internationalism and focus on the United States. *DAVID WALKER'S APPEAL TO THE COLOURED CITIZENS OF THE WORLD*, *supra* note 40. The 1831 Convention also used the comparisons to other countries, like Britain and Denmark, to criticize the United States for its failure to end or curtail slavery. 1831 National Convention, *supra* note 35, at 12.

in the former are incontrovertible, and that the latter guarantees in letter and spirit to every freeman born in this country, all the rights and immunities of citizenship.”⁴⁷ This statement suggests several important aspects of the evolving constitutionalism within the Black public sphere (and one that would increasingly be shared by white abolitionists, in large part because of the influence of Black abolitionism). It sees the Declaration and the Constitution as twin foundational supports for American citizenship: the Declaration for its the incontrovertible truths of equality and of rights to life, liberty, and the pursuit of happiness as natural rights for all people, and the Constitution for the legal and political guarantee of these as rights and immunities of citizenship. This suggests several interpretive principles. First, the Constitution does in fact protect a national set of substantive rights and privileges that were linked to fundamental natural rights—a position at odds with the dominant understanding of Article IV or any other aspect of the antebellum Constitution.⁴⁸ Second, those rights and privileges are fundamentally grounded in the Declaration’s embrace of equality and rights to life, liberty, and the pursuit of happiness: the Constitution implements the Declaration through the guaranty of national citizenship rights and privileges. Third, the Constitution should be read in both “letter and spirit”, that it is properly interpreted both textually, in the way we today think of text, and ideationally, that is, from a base set of principles that animate the text. This “letter and spirit” approach was, for the convention delegates, entirely consonant with, and perhaps even necessary for, their view of the rights and privileges of citizenship and the connections between the Declaration and the Constitution.⁴⁹

47 1831 National Convention, *supra* note 35, at 4–5.

48 See LASH, *supra* note 4, at 20–66 (arguing that Article IV was most commonly understood to protect state-base privileges, which may have included rights that some considered fundamental but were still exclusively governed by state governments, and that distinctly national privileges encompassed only those rights and privileges enumerated in the Constitution, such as the right for each state to have two senators).

49 See 1834 National Convention, *supra* note 39, at 29–30 (embracing the Declaration of Independence as a source for antislavery and “the elevation of the free coloured man to the privileges of citizenship[.]” thus linking the Declaration explicitly to ideas of constitutional citizenship); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 31–32 (2018) (explaining the idea that legal interpretation encompassed both the letter of the law and the spirit of the law was common in late eighteenth and early nineteenth century legal thought). Barnett and Bernick argue that that antebellum courts resorted to the “spirit” of the law only in cases of textual ambiguity. *Id.* Regardless of whether that is correct as a history of judicial method, the reference to “letter and spirit” in the 1831 convention appears to be much broader, seeking to expand legal meaning beyond generally accepted ideas of formal citizenship to incorporate deeper principles of equality and rights. *Id.*

The convention committee then explicated these ideas:

Your Committee with regret have witnessed the many oppressive, unjust and unconstitutional laws, which have been enacted in different parts of the Union, against the free people of colour, and they would call upon this convention as possessing the rights of freemen, to recommend to the people through their delegation, the propriety of memorializing the proper authorities, whenever they may feel themselves aggrieved, or their rights invaded, by any cruel or oppressive laws.⁵⁰

Here a national constitutionalism is being asserted as a trump over racially oppressive state and local laws. As mentioned above, the Convention was especially concerned about the Ohio anti-Black laws, but this passage makes clear that all Jim Crow laws were seen to violate the basic rights of freemen. Those laws, the committee and convention argued, were not judged against state constitutions but were measured against a national constitutionalism that implemented the foundational principles of the Declaration, and which, according to the delegates, protected freemen's rights as rights and privileges of citizenship. This view of the Constitution as a trump on questions of citizenship rights did not fit the generally accepted idea of federalism of the time (although it was not until 1833 that the Supreme Court declared that the Bill of Rights did not apply to the states).⁵¹ It was, rather, a dissenting, critical interpretation, a form of counterpublic constitutionalism that would deeply affect the post-war rewriting of the Constitution and federal law.

Black abolitionists at the 1830 and 1831 Conventions were just beginning to explore the full nature and effect of these ideas. In their opposition to Ohio's segregation laws, the 1830 Convention contrasted the benefits of Canada over Ohio, declaring that "no invidious distinction of colour is recognised [in Canada], but there we shall be entitled to all the rights, privileges, and immunities of other citizens."⁵² Here we see what was likely one of the earliest published uses of the term "invidious distinction" to refer to racial discrimination, a concept that would become a staple of twentieth-century civil rights law.⁵³ By using this phrase, the convention pointedly

50 1831 National Convention, *supra* note 35, at 5; *see id.* at 12 (highlighting a similar point in the convention's Address, specifically, that "[l]aws, as cruel in themselves as they were unconstitutional and unjust, have in many places been enacted against our poor unfriended and unoffending brethren").

51 *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833).

52 1830 National Convention, *supra* note 31, at 10.

53 *See, e.g., Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." (citation omitted)); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) ("While a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination

expressed the inherently unjust nature of racial subordination. By connecting invidious racial distinctions with claims of the “rights, privileges, and immunities” of citizenship, the convention joined the concepts of citizenship and equality in a way that anticipated the work of the framers of the Fourteenth Amendment. This connection made plain that the convention members were not advocating merely for non-discriminatory treatment, but that full equality involved access to a set of basic rights and privileges inherent in citizenship.

We can also see this concern with the substantive aspects of citizenship in the 1831 Convention’s support for African American educational institutions. The Convention advanced efforts to fund and support Arthur Tappan and William Garrison in the establishment of a college for Black men in the mechanical arts. This reflected both a commitment to education as a core privilege of citizenship and also a recognition that the systematic exclusion of Black citizens from education was a fundamental denial of equality. For the convention members, the attainment of the communal standards of education, or, as they put it, access to “those sources of knowledge which abound in civilized and enlightened communities” was essential for equal citizenship, and racial prejudice had denied many free Black people such privileges.⁵⁴ This advocacy for education extended as well to schools for girls, which the 1833 Convention in particular supported.⁵⁵ The denial of education was especially galling because uplift ideology viewed education as one of the primary means with which African Americans could fight race prejudice.⁵⁶

In addition to support for education, the 1830s Conventions also supported some version of a right to property ownership. In their advocacy for emigration to Canada, the conventions stressed the acquisition of land by

against a particular class.” (citations omitted)); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that a State violates the Equal Protection Clause when it fixes voter qualifications which “invidiously discriminate”); Kenneth L. Karst, *Invidious Discrimination: Justice Douglas and the Return of the “Natural-Law-Due-Process Formula,”* 16 UCLA L. REV. 716 (1969) (discussing the expansion of the meaning of “invidious discrimination”).

54 1831 National Convention, *supra* note 35, at 14–15; *see* 1832 National Convention, *supra* note 31, at 34 (discussing the need to reject New Haven as a location for the college because of white prejudice, referred to the need to find a place where the “inhabitants are less prejudiced to our rights and privileges”). *See generally* James Brewer Stewart, *The New Haven Negro College and the Meanings of Race in New England, 1776-1870*, 76 NEW ENG. Q. 323 (2003) (exploring the history of the failed attempt to found a college for Black students in New Haven, the racist opposition to the college, and the dynamics of race in New England at the time).

55 1833 National Convention, *supra* note 36, at 21, 27, 33 (noting in particular the white resistance that closed Prudence Crandall’s school for girls that year which the Crandall case became a cause célèbre for abolitionists); *see* SINHA, *supra* note 16, at 229–31 (emphasizing the support for expanding Black education).

56 *E.g.*, 1832 National Convention, *supra* note 31, at 34.

emigrants and combatting the legal barriers in Canada to land transfer and ownership.⁵⁷ The emigration issue thus implied that access to land and property, as well as rights of residence and travel, were core rights of freemen. Similarly, in their continued opposition to colonization the conventions stressed the importance of birthright citizenship as a basis for recognizing their “natural, civil, and political rights.”⁵⁸ Notably, this statement included political rights within the ambit of basic citizenship rights, a point that would remain contested among white Republicans even during Reconstruction.⁵⁹

The colonization arguments of the ACS and its supporters pressed the conventions to define their own identity as Americans, to assert both their nativity and the rights and privileges to which such natural citizenship entitled them. By 1834 the conventions were developing a broader plan to address segregation, highlighting exclusions from religion and churches, segregated travel on steamboats and stagecoaches, exclusions from skilled education (“mechanical arts”), and the monitoring of state legislation for new laws restricting “the rights and liberties of coloured citizens” and devising strategies to lobby against and challenge such laws.⁶⁰ The 1835 Convention similarly encouraged free Black people across the country to petition congress and state legislatures “to be admitted to the rights and privileges of American citizens, and that we be protected in the same[.]” reaffirming that their rights and privileges to full access to civil society were claims of a *national* citizenship.⁶¹ Importantly, the Convention also added protection as one of the central obligations of government, something felt keenly in 1835, as we see below.⁶²

The conventions also reflected a detailed understanding of race prejudice acting across multiple social spheres and of how that prejudice caused the denial of basic rights and privileges of free Black people.⁶³ The conventions

57 *Id.* at 18–20.

58 1833 National Convention, *supra* note 36, at 34.

59 See LASH, *supra* note 4, at 24–29 (highlighting the debates among white Republicans on whether the Privileges or Immunities Clause should encompass political rights); KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. 117–20 (2010) (noting that “many who helped pass the law over Johnson’s veto believed voting rights for black men would be disastrous”).

60 1834 National Convention, *supra* note 39, at 12.

61 1835 National Convention, *supra* note 39, at 9.

62 1835 National Convention, *supra* note 39, at 9 (highlighting that the idea of a right to protection/duty to protect was especially important for free Black northerners, who experienced the failures of what they called “nominal freedom,” and would become an important principle for Reconstruction).

63 *E.g.*, 1832 National Convention, *supra* note 31, at 17 (noting that emigrants from Ohio sought place where “the roaring billows of prejudice are less injurious to their rights and privileges”).

expressed a significant fear that, in the aftermath of the Nat Turner rebellion, race prejudice was becoming a dominant governing principle:

The recent occurrences at the South, have swelled the tide of prejudice until it has almost revolutionized public sentiment, which has given birth to severe legislative enactments in some of the States, and almost ruined our interests and prospects in others . . . our situation is more precarious than it has been at any other period since the Declaration of Independance [sic].⁶⁴

This was true in some very particular ways for delegates. Not only did each of them have their own personal histories of race prejudice and violence, but such episodes punctuated the conventions. The initial convention was itself a response to anti-Black rioting and exclusions in Cincinnati. The 1832 Convention was forced to revise the project started the prior year for college in New Haven because of the fierce white opposition in Connecticut, opposition which continued in the legal and extralegal opposition to the founding of a girls school as well.⁶⁵ Then, after the 1834 Convention met in June at the interracial Chatham Chapel in New York City, a series of white riots took place, triggered by a July 4th meeting of white and Black abolitionists in the Chatham Chapel (and perhaps also fueled by the presence a month earlier of the National Convention). The riots overwhelmed the city for three hot summer days, destroyed a Black church as well as the home of Lewis Tappan, and laid bare the fierce violent resistance of white northerners (including recent immigrants) to Black emancipation.⁶⁶ No doubt delegates to the 1835 Convention were profoundly affected by the riots (some, like Samuel Cornish, had likely been present during them), as they included a resolution honoring Black residents of New York for their “forbearance” during the “mob riots of 1834.”⁶⁷ These events also likely inspired them to include protection of rights and privileges as an essential aspect of citizenship.

This analysis of prejudice also framed the conventions’ arguments about colonization. The delegates highlighted racism as the true basis for the ACS’s

64 *Id.* at 17; see also SINHA, *supra* note 16, at 210–13 (highlighting the effects of Nat Turner’s resistance action).

65 1832 National Convention, *supra* note 31, at 23; see also Stewart, *supra* note 54, at 325–26 (emphasizing that white opposition “would not tolerate a large number of young colored men”).

66 Linda K. Kerber, *Abolitionists and Amalgamators: The New York City Race Riots of 1834*, 48 N.Y. HIST. 28, 28 (1967); see also GLAUDE, *supra* note 11, at 108–09 (highlighting that the consequences of violence “produced and reproduced political and social identities” within African Americans); ALEXANDER, *supra* note 45, 85–86; W. Caleb McDaniel, *The Fourth and the First: Abolitionist Holidays, Respectability, and Radical Interracial Reform*, 57 AM. Q. 129, 135–36 (2005) (describing riots that disrupted the Chatham Street Chapel and destroyed the home of Lewis Tappan).

67 1835 National Convention, *supra* note 39, at 19.

efforts to move African Americans to Liberia.⁶⁸ In exposing and critiquing white efforts at colonization, the Black conventions were identifying a significant racial retrenchment by white people across the country. As they pointed out, despite the termination of slavery in the North, the effects of racial slavery—both its past in the North and its ongoing implementation in the South—were being felt throughout the country in the form of a more virulent race prejudice that had become a motivation for legal, political, and social subordination. Thus we see in these early conventions the use of a metaphor that was to become a staple of the Black public sphere in describing the evils of race prejudice: the “monster” and “demon” of racism.⁶⁹ This monster metaphor aptly described how racial prejudice operated, less as a discrete foe defeated in battle and more as an omnipresent entity that required persistent and multifaceted opposition.

Other ideas were being developed at these conventions as well. William Hamilton, in his president’s Address in 1834, outlined an anti-caste approach to civil and political equality that stressed the importance of a broad-based community of interests where “the good of one is the common good of the whole”, an idea that we see repeated frequently among radical abolitionists through Reconstruction.⁷⁰ For Hamilton, racial caste and race prejudice, precisely because they divorced the interests of free Black people from the “community” interests protected by white people, compelled African Americans to form organizations like the Convention and to focus almost

68 1833 National Convention, *supra* note 36, at 34–35.

69 *Id.* at 32 (showing that, in the address of Abraham D. Shadd, he utilized language like “that monster, prejudice”); see also 1834 National Convention, *supra* note 39, at 4 (quoting “the demon of prejudice” in the address of William Hamilton).

70 1834 National Convention, *supra* note 39, at 3; see also *id.* at 3–4 (articulating the problem of caste which anticipated an important theme in the 1850s and 1860s and one that is arguably central to the Reconstruction Amendments). The Convention explained:

[T]he present form of society divides the interest of the community into several parts. Of these, there is that of the white man, that of the slave, and that of the free coloured man. How lamentable . . . it is that there should be, any where on earth, a community of castes, with separate interests! . . . But alas for the people of colour in this community! [T]heir interest is not identified with that of other men. From them, white men stand aloof. For them the eye of pity hath scarcely a tear To them the finger of scorn is pointed . . . [t]hey must cringe, and crouch, and crawl, and succumb to their peers.

Id.; see also William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment’s Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 813–14 (2016) (highlighting the idea of caste and how it influenced abolitionists and the framers of the Reconstruction Amendments); REBECCA E. ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* 34–35 (2018) (“Other antislavery constitutionalists also claimed that the Constitution was an anticlass, anticaste document.”); Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 389–97 (1999) (arguing that scholars never discussed the foundations for an anticaste equality theory across axes of caste).

single-mindedly on their own interests.⁷¹ And for Hamilton, as for all of the conventions, the race prejudice oppressing Black people in the North was inextricably connected to racial slavery and its continued growth in the South.⁷²

The Conventions of the 1830s, however, steered closely to a moderate, moral uplift ideology and largely avoided direct political action beyond organizing resistance to the ACS and temperance societies.⁷³ By 1835 the leaders of the convention movement had shifted their focus away from emigration and opposition to colonization in favor of a movement more focused on moral reform. The final convention of this period established the American Moral Reform Society, which appears to have replaced the conventions and shifted the focus to “Education, Temperance, Economy, and Universal Liberty[.]”⁷⁴ It also reflected a growing split among Black leaders about the direction and means of Black resistance and organizations that would take some time to work through.⁷⁵ While the 1835 Convention still expressed the importance of a national identity and struggle, called on the Declaration of Independence as the source of their “first principles” for a just and republican government, and critiqued American society for its “inconsistencies” and “aberration” from those principles, the delegates decided to focus on moral reform methods to implement these ideas.⁷⁶ They saw themselves as model Black citizens who set out to battle prejudice by internal improvement, or what would later be known as racial uplift.⁷⁷ As they

71 The Convention stated:

Under present circumstances it is highly necessary the free people of colour should combine, and closely attend to their own particular interest. All kinds of jealousy should be swept away from among them, and their whole eye fixed, intently fixed, on their own peculiar welfare. And can they do better than to meet thus [in this Convention]; to take into consideration what are the best means to promote their elevation, and after having decided, to pursue those means with unabating zeal until their end is obtained?”

1834 National Convention, *supra* note 39, at 4.

72 *Id.* at 6.

73 On antebellum uplift ideology as a form of Black resistance, and the problems it encountered in a culture of pervasive white prejudice, see RAEL, *supra* note 18, at 118–208.

74 1835 National Convention, *supra* note 39, at 31–32. On the connections between the moral reform aspects of the conventions and efforts to seek political change, see GLAUDE, *supra* note 11, at 114–25.

75 The organizers of the American Moral Reform Society, William Whipper and Robert Purvis, insisted it be an interracial organization, while Samuel Cornish (who had been a leader in the conventions) and others advocated for Black-only institutions as an essential aspect of resistance to white supremacy. RAEL, *supra* note 18, at 49–53. This debate would continue to be important aspect of the convention movement and Black public sphere.

76 1835 National Convention, *supra* note 39, at 28.

77 Glaude, borrowing from Evelyn Brooks Higginbotham’s analysis of the end of the nineteenth century, describes this as the 1830s version of the politics of respectability in which right/moral

put it, “[w]e are unable to conceive of any better method by which we can aid the cause of human liberty, than by improving our general character, and embracing within our grasp the liberated slave for moral and mental culture.”⁷⁸ This was a group that still saw the Garrisonian ideas of moral suasion as fresh and viable. As we will see, this moral reform strand within the Black public sphere would continue to be important, but as an exclusive strategy it would increasingly be questioned as slavery and white prejudice seemed to only harden in response to 1830s abolitionism and the increase in Black autonomy and cultural presence.

III. CONSTITUTIONALISM IN THE BLACK COUNTERPUBLIC: CONVENTIONS OF THE 1840S AND 1850S

The period from the end of the initial annual national conventions in 1835 through the late 1850s reflected an evolution of the Black public sphere generally, a process reflected in the convention movement. At first there was a period of dissent and disagreement, as ideological and regional differences predominated.⁷⁹ There was no national convention until 1843, and from 1843 through the start of the Civil War there were five national conventions.⁸⁰ But far from indicating a weakness in the convention movement, this intermittence in national conventions was in large part due to the explosion of state-level conventions in the 1840s and 1850s.⁸¹ There were over forty-five state and

behavior was both a goal in itself and a means of breaking down racial prejudice and earning full respect. GLAUDE, *supra* note 11, at 117–18.

78 1835 National Convention, *supra* note 39, at 29.

79 ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 117.

80 The five conventions were 1843 (Buffalo), 1847 (Troy), 1848 (Cleveland), 1853 (Rochester), and 1855 (Philadelphia). In addition, the North American 1851 Convention in Toronto could be considered the equivalent of a national meeting. This list does not include two single-topic conventions, the Fugitive Slave Law Convention of 1850 and the National Emigration Convention of 1854. Both could reasonably be considered national but because of their issue focus they did not comprehend a cross section of Black communities. The Fugitive Slave Law Convention held in Cazenovia, N.Y., was an important biracial abolitionist convention organized primarily by white abolitionists but actively seeking to fuse together the branches of abolitionism, including radical Black abolitionists. STANLEY HARROLD, *THE RISE OF AGGRESSIVE ABOLITIONISM: ADDRESSES TO THE SLAVES* 123–24 (2004). The National Emigration Convention of 1854 was organized by Martin Delaney and focused on his more radical positions favoring emigration and opposing suffrage and opposing Frederick Douglass’s efforts, among others. SINHA, *supra* note 16, at 576. For a chronological list of state and national conventions, see Conventions by Year, COLORED CONVENTIONS PROJECT, <https://omeka.coloredconventions.org/convention-by-year> (last visited Jan. 11, 2021).

81 See, e.g., SPIRES, *supra* note 10, at 82–86 (arguing that the focus on state conventions was a necessary reaction to suffrage laws and other state and local manifestations of white supremacy across the north).

regional conventions during this time, showing a robust local and state activism that had been one of the goals of the initial movement in the 1830s.⁸² And the increasing participation of western communities, especially Ohio, showed a geographic and ideological breadth, as well as demographic changes, that were only just emerging in the 1830s.⁸³

Indeed, the proliferation of state-level conventions appears to have enabled national conventions to focus more on national strategies. State conventions addressed topics of local concern and provided a filter of sorts for the creation of a national agenda.⁸⁴ This also allowed for national meetings to be more representative geographically and demographically, being composed of representatives who were often connected to state and local organizations.⁸⁵ Thus, by the late 1840s, the conventions were building an organizational structure and rhetorical range that helped support a broader oppositional counterpublic in the North and West. Moreover, state conventions were considering some issues from a national perspective—the national identity forged in the 1830s continued to influence how Black leaders and Black communities discussed their interests.⁸⁶ Thus one sees some themes throughout the conventions that are significant in the development of constitutional ideas and constitutional identity for antebellum Black Americans and would have important influences on Reconstruction.

A. 1843 National Convention at Buffalo

If the conventions of the 1830s veered more towards moral reform and social respectability as the primary means of resistance and less toward an overtly political and confrontational style, the 1843 National Convention in

82 For an actively updated list of state and regional conventions, see State Conventions, COLORED CONVENTIONS PROJECT, <https://omeka.coloredconventions.org/state-conventions> (last visited Jan. 11, 2021).

83 The first Ohio convention was in 1837, with ten more prior to the Civil War. African Americans in Indiana held their first convention in 1842, in Illinois and Iowa in 1853, and California in 1855. *Id.*

84 *See, e.g.*, Bell, *supra* note 11, at 79–99 (discussing, among other things, the relationship and cross-influences between the national and state conventions); SPIRES, *supra* note 10, at 85–86 (discussing how state-level convention organizing was seen as a means of focusing on issues of more immediate concern to Black residents in the state).

85 ERNEST, A NATION WITHIN A NATION, *supra* note 11, at 111–20; *see also* SPIRES, *supra* note 10, at 85 (“[B]lack activists were continually balancing the benefits of national conventions (particularly for antislavery initiatives, economic uplift, and institution building) and local associations calibrated to deal with the specificity of local politics and variations in racist practices.”).

86 This point is evident in the manner in which the state conventions explored the state and local implementation of the concept of full citizenship, itself a concept forged in the national movement of the 1830s. *See, e.g.*, SPIRES, *supra* note 10, at 79–120 (exploring the state convention movement as a means of enacting, creating, and “circulating” citizenship ideas in the Black public sphere).

Buffalo did just the opposite. There are many reasons for this, not the least of which was the full disenfranchisement of Black Pennsylvanians by state constitutional amendment in 1838, done despite the well organized and forceful opposition of Black communities across the state, particularly the Black community in Philadelphia that had played such a large part in the 1830s conventions.⁸⁷ This loss of political power laid bare the threats faced by Black Americans even in northern states with progressive histories on slavery. It also revealed that social and economic advances by Black northerners could be threatening to white people and were not necessarily the path to equal treatment and respect that Black leaders had hoped. This was especially true in the late 1830s when the country fell into an economic depression more severe than any it had seen to that point.⁸⁸ In addition, a younger generation of leaders and activists were coming of age in the 1840s, a generation much more open to political activism and independence and for whom abolitionist immediatism was the only plausible response to slavery.⁸⁹

One such leader was Henry Highland Garnet. Garnet was born enslaved but his family escaped to the North when he was young.⁹⁰ He attended the African Free School, a school for Black northerners that produced some of the leading Black abolitionists of the 1840s and 1850s.⁹¹ In the Black community of New York City he experienced a strong communal self-reliance ethic and an exposure to an early version of Black Nationalism.⁹² His early experiences in New York and later New Hampshire also impressed on him the importance of active resistance. Within a couple of years of arriving in New York his family was forced to flee their home when a slave kidnapper sought to capture his family, an experience that made Garnet feel very directly

87 See Eric Ledell Smith, *The End of Black Voting Rights in Pennsylvania: African Americans and the Pennsylvania Constitutional Convention of 1837-1838*, 65 PA. HIST. 279, 279 (1998) (detailing the significance of the disenfranchisement of Black Pennsylvanians and Black opposition to this).

88 On the Panic of 1837, see generally ALASDAIR ROBERTS, *AMERICA'S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND POLITICAL DISORDER AFTER THE PANIC OF 1837* (2012).

89 See, e.g., PEASE & PEASE, *supra* note 17, at 122-23 (identifying newer generation of Black leaders, writers, and speakers who rose during the conventions of the 1840s); SINHA, *supra* note 16, at 319-25 (discussing importance of voting rights and political activism to participants in the 1840s conventions).

90 Sterling Stuckey, *A Last Stern Struggle: Henry Highland Garnet and Liberation Theory*, in BLACK LEADERS OF THE NINETEENTH CENTURY 129 (Leon Litwack & August Meier, eds., 1988) [hereinafter Stuckey, *A Last Stern Struggle*]; STERLING STUCKEY, *SLAVE CULTURE: NATIONALIST THEORY AND THE FOUNDATIONS OF BLACK AMERICA* 156-58 (2013) [hereinafter STUCKEY, *SLAVE CULTURE*].

91 Stuckey, *A Last Stern Struggle*, *supra* note 90, 131-33. On the African Free School, see John L. Rury, *The New York African Free School, 1827-1836: Conflict over Community Control of Black Education*, 44 PHYLON 187, 187 (1983).

92 Stuckey, *A Last Stern Struggle*, *supra* note 90, at 130-31.

the need for self-protection.⁹³ Then, around the age of twenty, Garnet traveled from New York to New Hampshire to attend a school in Canaan, New Hampshire. He and his classmates were met by violent white locals who destroyed the school, forcing them to leave town; Garnet's own overnight vigil with a shotgun may well have kept the mob from attacking them.⁹⁴ This incident, all too similar to the reaction to Black education and advancement in Connecticut, seemed to instill in Garnet a deep belief that moral reform and improvement, by itself, was not enough, and that more than moral suasion would be needed to force white people to end racial slavery and help free Black people attain equality.⁹⁵

Garnet began exploring his views publicly around 1840.⁹⁶ It is likely that Garnet was the author of a series of letters in *The Colored American* in 1841 under the pseudonym "Sidney" in which he argued for a distinctively African American response to oppression.⁹⁷ Responding to William Whipper's letters arguing against the use of racial language like "colored," "Sidney" argued that the problem was not the acknowledgement of race, but the actual experiences of oppression that caused race to be significant: "Whenever a people are oppressed, peculiarly (not complexionally) distinctive organizations or action, is required on the part of the oppressed to destroy that oppression. The colored people of this country are oppressed; therefore the colored people are required to act in accordance with this fundamental principle."⁹⁸ For Sidney, resistance to oppression and liberation could only be achieved by organization and action by the oppressed; white abolitionists could be allies, but the driving motivation and action had to come from Black communities: "We occupy a position, and sustain relations which they cannot possibly assume. They are our allies—*Ours* is the battle."⁹⁹ Whether scholars are right that Garnet penned these ideas, the sentiments are consistent with Garnet's

93 *Id.* at 130.

94 *Id.* at 132.

95 *See, e.g.,* STUCKEY, SLAVE CULTURE, *supra* note 90, at 172-80 (tracing Garnet's development of a radical resistance philosophy from his early confrontations with violent racism to advocacy of violent slave resistance and break with Garrisonians).

96 *Id.* at 170-72.

97 Sterling Stuckey argues that Garnet authored these letters, using as a pseudonym the name of his talented classmate and friend, Thomas Sidney, who had recently died. *Id.* at 249.

98 GLAUDE, *supra* note 11, at 140 (quoting "Sidney," *The Colored American*, March 13, 1841). For Glaude's discussion, see *id.* at 140-42. For Stuckey's, see STUCKEY, SLAVE CULTURE, *supra* note 90, at 239-49. *See also* SPIRES, *supra* note 10, at 101 (discussing how "Sidney" and Samuel Ringgold Ward "connect being 'colored' to a historical experience of Anti-Blackness and to a mode of seeing this oppression as an issue of political power and representation").

99 Stuckey, *A Last Stern Struggle*, *supra* note 90, at 134.

views. Garnet and his peers sought to press the Black public sphere toward a more direct engagement with slavery and race prejudice.¹⁰⁰

No moment better reflects this engagement, and the debate within the Black public sphere, than does Garnet's Address to the Slaves delivered in Buffalo at the 1843 National Convention.¹⁰¹ Garnet's Address and its call for direct and forceful slave resistance and rebellion clearly captured the attention of the delegates ("the whole Convention . . . was literally infused with tears") and came within one vote of being adopted as a statement of the body.¹⁰² Debate over this question extended over several days. The question of whether it was too radical divided the convention, with Frederick Douglass, still firmly espousing Garrisonian non-violence, leading the thin majority in opposing its adoption. Garnet's Address, despite not winning approval in 1843, was to become a leading statement of a Black liberationism that informed much of Black resistance thought well into Reconstruction.

The Address is perhaps best known for its call for active resistance by enslaved Black people, advocating what white people most feared, a widespread rebellion in the spirit of Nat Turner. Garnet, a Presbyterian minister, saw slavery as a deep offense to God and argued that all men, free and enslaved, had an obligation to oppose it. He insisted that the mere fact of being enslaved did not absolve slaves of this obligation: "it is your solemn and imperative duty to use every means, both moral[,] intellectual and physical that

100 GLAUDE, *supra* note 11, at 142.

101 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) [hereinafter Garnet, Address to the Slaves]. For this article I used the version of the Address available at <http://digitalcommons.unl.edu/etas/8/>. It was originally printed in HENRY HIGHLAND GARNET, WALKER'S APPEAL, WITH A BRIEF SKETCH OF HIS LIFE. AND ALSO GARNET'S ADDRESS TO THE SLAVES OF THE UNITED STATES OF AMERICA 89-97 (1848). We have Garnet's Address because he published a revised version in this later text. We do not have a copy of Frederick Douglass's response address, or Garnet's rebuttal—a rebuttal that some called Garnet's greatest speech. Stuckey, *A Last Stern Struggle*, *supra* note 90, at 135.

102 For the description of the reception of the Address, see MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS: HELD AT BUFFALO, ON THE 15TH, 16TH, 17TH, 18TH, AND 19TH OF AUGUST, 1843, FOR THE PURPOSE OF CONSIDERING THEIR MORAL AND POLITICAL CONDITION AS AMERICAN CITIZENS 13 (1943) [hereinafter 1843 National Convention], <https://omeka.coloredconventions.org/files/original/73369fab9bb261275b57276ccbdbded2.pdf>. For the vote, see *id.* at 18-19. See also EZRA GREENSPAN, WILLIAM WELLS BROWN: AN AMERICAN LIFE 118-20 (2014). William Wells Brown, a leading abolitionist, speaker, and novelist, later would describe Garnet's speech as "one of the most noted addresses ever given by a colored man in this country" and said that "none but those who heard that speech have the slightest idea of the tremendous influence which he exercised over the assembly." *Id.* at 119 (quoting WILLIAM WELLS BROWN, THE BLACK MAN, HIS ANTECEDENTS, HIS GENIUS, AND HIS ACHIEVEMENTS 149-50 (1863)).

promises success.”¹⁰³ He argued that the same level and manner of resistance was justified in ending slavery as was in fighting the initial enslavement—a full physical self-defense. Garnet then paraphrased a line from Lord Byron that would become a common rally cry for Black abolitionism’s self-reliance ideology: “the time has come when you must act for yourselves. It is an old and true saying that, ‘if hereditary bondman would be free, they must themselves strike the blow.’”¹⁰⁴ Garnet then proposed a plan of action that framed violent resistance as an end point in a process, as a last resort, and as a choice made by the enslavers.

[G]o to your lordly enslavers and tell them plainly, that you *are determined to be free*. Appeal to their sense of justice, and tell them that they have no more right to oppress you, than you have to enslave them. Entreat them to remove the grievous burdens which they have imposed upon you, and to remunerate you for your labor. Promise them renewed diligence in the cultivation of the soil, if they will render to you an equivalent for your services. Point them to the increase of happiness and prosperity in the British West Indies since the Act of Emancipation. Tell them in language which they cannot misunderstand, of the exceeding sinfulness of slavery, and of a future judgment, and of the righteous retributions of an indignant God. Inform them that all you desire is *freedom*, and that nothing else will suffice. Do this, and for ever after cease to toil for the heartless tyrants, who give you no other reward but stripes and abuse. If they then commence the work of death, they, and not you, will be responsible for the consequences. You had far better all die—*die immediately*, than live slaves, and entail your wretchedness upon your posterity. If you would be free in this generation, here is your only hope. However much you and all of us may desire it, there is not much hope of redemption without the shedding of blood. If you must bleed, let it all come at once—rather *die freemen, than live to be // slaves*.¹⁰⁵

This remarkable passage makes plain the necessity of violent resistance in much the same way that the American colonists did in the Declaration. This is violence as reasoned strategy, violence as the last resort in the quest for God’s justice and God-given liberty. This was the violence of a people who were *more* civilized than those who violently enslaved them (and Garnet made a point of highlighting the violence—the lashing, the murdering, the raping—that was an essential characteristic of slavery). Earlier in the Address Garnet

103 Garnet, Address to the Slaves, *supra* note 101, at 5.

104 *Id.* at 6. The line from Childe Harold’s Pilgrimage reads “[h]ereditary bondsmen! know ye not/Who would be free themselves must strike the blow?” LORD BYRON, CHILDE HAROLD’S PILGRIMAGE 122 (2009). Frederick Douglass and James McCune Smith also used this line. See FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM: PART I.—LIFE AS A SLAVE. PART II.—LIFE AS A FREEMAN, at xxiii (1855). Manisha Sinha also locates abolitionists’ use of Byron’s line in the connections with European freedom movements of the 1830s and 1840s. SINHA, *supra* note 16, at 364.

105 Garnet, Address to the Slaves, *supra* note 101, at 7–8.

had discussed the American Revolution, highlighting its justification of violent resistance as necessary in a battle for freedom and liberty. Garnet acknowledged that “[t]he declaration was a glorious document” and that the spirit of the Revolution was noble, then immediately called out white Americans for their failure to do the very thing they claimed as the justification for the Revolution: ending slavery: “When the power of Government returned to their hands, did they emancipate the slaves? No; they rather added new links to our chains. Were they ignorant of the principles of Liberty? Certainly they were not.”¹⁰⁶ Their cry for “Liberty or death”, Garnet argued, betrayed their own self-conscious hypocrisy.

Garnet reformulated the slavery analogy used by white Americans during the Revolution into an argument for the self-liberation of actual slaves, invoking Patrick Henry’s famous line when he exhorted: “See your sons murdered, and your wives, mothers and sisters doomed to prostitution. In the name of the merciful God, and by all that life is worth, let it no longer be a debatable question, whether it is better to choose *Liberty* or *death*.”¹⁰⁷ Garnet then named the models of slave rebellion well known to enslaved Black people and their white enslavers (Toussaint L’Ouverture, Denmark Vesey, Nat Turner, Cinque, and Madison Washington) and placed them in line with revolutionary heroes honored by white Americans (George Washington, Lafayette, and the Scottish hero William Wallace), thus further bolstering his claim that Black antislavery resistance should be considered the continuation of the great revolutions of Liberty that so formed white American identity.¹⁰⁸ Garnet concluded with his famous call: “Let your motto be resistance! resistance! resistance! No oppressed people have ever secured their liberty without resistance.”¹⁰⁹

It would only be slight hyperbole to say that Garnet’s resistance manifesto transformed Black abolition into a second American Revolution. The speech established, with the boldness and clarity he would be known for, what became a central argument of the antebellum and Civil War era Black public sphere: that active slave resistance, including the use of violence, was a necessary part of what was seen as the second revolution for American liberty. Despite its one-vote defeat at Buffalo, Garnet’s speech so inspired his audience that he

106 *Id.* at 4.

107 *Id.* at 9.

108 *Id.* at 9–10.

109 *Id.* at 11. The invocation of Black resistance fighters as being in a line with white revolutionaries was a rhetorical mode also employed by Frederick Douglass. See DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 287 (2018).

was asked to deliver it again at the next Black National Convention in Troy in 1847.¹¹⁰ And although Frederick Douglass continued in 1847 to lead the opposition to Garnet's insurrectionary activism, even Douglass would come around to this position by the late 1850s when he supported violent overthrow of slavery.¹¹¹ On the cusp of the Civil War, Garnet's rebellion theory was as much a part of the Black public sphere as were the moral reform and racial uplift ideas of the 1830s (which Garnet also advocated).¹¹² Indeed, it is critical to understanding antebellum Black constitutionalism to comprehend the full significance of how Black people saw their work as a second revolution and the subsequent work to rebuild the Constitution and the country during and after the war as a second founding.

The shift in tenor crystallized in Garnet's Address can be seen in each of the three national conventions held in the 1840s. In 1843, for instance, the call for the convention described it as a convention "of the oppressed citizens of the United States."¹¹³ This language embraced the citizenship language of the 1830s conventions and tied it to the claim that all African Americans were united by white racial oppression. The opening address by Samuel Davis also captured the tenor of Garnet's activism by asserting the need for Black Americans to initiate their own actions. Petitioning white people for change had little effect, argued Davis: "Our petitions were disregarded; our supplications slighted . . . No other hope is left us but our own exertions . . ." ¹¹⁴ Neither white legislatures, nor white churches, nor white political parties had been much help, he thundered. Not even white abolitionists, despite their "noble efforts," were any substitute for Black activism. "If we are not willing to rise up and assert our rightful claims, and plead our own cause,"

110 PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED PEOPLE, AND THEIR FRIENDS, HELD IN TROY, N.Y., ON THE 6TH, 7TH, 8TH, AND 9TH OF OCTOBER, 1847, at 10 (1847) [hereinafter 1847 National Convention], <https://omeka.coloredconventions.org/items/show/279> (noting that Garnet read an eloquent and impressive address to the Slaves of the United States and inviting him to speak at this convention).

111 See BLIGHT, *supra* note 109, 280-309. Douglass expressly advocated that while the "ballot is needed, [but] if this will not be heard and heeded, then the bullet." *Id.* at 304 (quoting Frederick Douglass, "The Ballot and the Bullet," *Douglass' Monthly*, Oct. 1859).

112 See SINHA, *supra* note 16, at 550-66 (discussing radicalization of abolition in late-1850s and the general support for John Brown's raid on Harpers Ferry); *id.* at 418-19 (discussing radicalism of Garnet's 1843 address); *id.* at 450-51 (discussing how Frederick Douglass, having opposed Garnet's 1843 address, evolved to advocate slave self-defense and slave resistance in the late-1840s and 1850s); BLIGHT, *supra* note 109, at 304-05 (discussing Douglass's "The Ballot and the Bullet" essay of 1859 in which he expressed his frustration with political abolition and advocacy of "the bullet" as a necessary option for freedom).

113 1843 National Convention, *supra* note 102, at 3.

114 *Id.* at 6.

Davis continued, “we have no reason to look for success. We, ourselves, must be willing to contend for the rich boon of freedom and equal rights, or we shall never enjoy that boon.”¹¹⁵ This freedom and equality of rights, Davis contended, were guaranteed by the Constitution and yet denied throughout the country by prejudice. Davis articulated more clearly than had most speakers at prior conventions the principle of equal rights, the idea that the liberty that white Americans so firmly proclaimed necessarily required that all laws be “just and equal for all the people.”¹¹⁶ This required equal access to basic rights of travel, suffrage, and education that enabled white Americans to pursue and attain happiness.¹¹⁷ This focus on legal equality, on the tight connection between true liberty and equality in law, and on suffrage as the essential guarantor of those rights, challenged northern Jim Crow more directly than had prior conventions of Black leaders (and more than had most white abolitionists).

The new activism of the convention was also reflected in its embrace of political action and the newly formed Liberty Party. Political engagement had been a contested point for abolitionists. Garrisonians, who had been closely aligned with the 1830s conventions, generally adopted the view that all political participation in a slaveowning republic was illegitimate and sinful, and so opposed any allegiance with political parties.¹¹⁸ The Liberty Party had been formed in 1840 by white abolitionists who broke from the more Garrisonian American Antislavery Society.¹¹⁹ The Garrisonian position was defended by Frederick Douglass, William Wells Brown, and others allied with Garrison.¹²⁰ Unlike the debate over Garnet’s Address, however, on this point Douglass was in the distinct minority. Political action, it seemed, was becoming an accepted means of resistance for Black abolitionists. This made sense, of course, given the importance of suffrage for delegates at the state conventions of the period,

115 *Id.* at 7.

116 *Id.* at 5.

117 *Id.* at 4–5.

118 On William Lloyd Garrison’s views, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 228–48 (1977) (exploring Garrison’s intellectual and spiritual perfectionism as it developed from the 1830s through the 1840s and its weakness as a political and constitutional philosophy). In 1842, Garrison referred to voting in a slave-based political system as “Satanic” and “inherently wicked and murderous”. *Id.* at 239 (citation omitted); see also HORTON & HORTON, *supra* note 30, at 242–50 (discussing Garrison’s rejection of political participation and the opposition to this view from Black and white abolitionists).

119 See SINHA, *supra* note 16, at 463–65 (discussing the differences and connections between Garrisonians and the founders of the Liberty Party in the 1840s).

120 1843 National Convention, *supra* note 102, at 15 (noting that Frederick Douglass, W. W. Brown, C. L. Remond, R. Francis, and P. Harris opposed a resolution they contended was a Liberty Party resolution and underscoring their opposition to the Liberty Party).

as discussed below. Whereas white Garrisonians could find meaning in the withholding of the right to political participation that they already possessed, Black northerners in many states were struggling to gain the right of suffrage in the first place (or, in the case of Pennsylvania to regain what had just been taken away). They were therefore not very interested in refusing to engage in the very thing they sought so hard to obtain and which defined their own status as full citizens. Over time, this aspect of Garrisonianism would have less and less purchase on Black abolitionism.¹²¹

A similar debate arose over the question of claims of constitutional citizenship. A resolution criticizing recent court opinions denying citizenship to Black Americans was debated. Douglass opposed the motion on the Garrisonian ground that the “constitution of this country was a slaveholding instrument, and as such denied *all* rights to the colored man.”¹²² Other delegates rejected this claim and opposed the resolution on the opposite ground that citizenship was so self-evident that no statement to that effect was needed.¹²³ Nobody else spoke up in favor of Douglass’s anti-constitutionalism. Over time, with the increasing denial of citizenship rights and status in the north and eventually with the *Dred Scott* decision, almost all Black leaders, including Frederick Douglass, would come to see the affirmative claim of citizenship as one of their most important statements.¹²⁴

121 On the split within between Garrisonians and the political and evangelical abolitionists, see SINHA, *supra* note 16, at 256–65 (discussing differences in strategy and ideology of Garrisonians and other abolitionist groups). This schism also involved disagreements about the importance of women’s suffrage and women’s participation in the movement. *Id.* Sinha argues that Black abolitionists, more than anything, found the schism a needless distraction. *Id.* at 264. Black abolitionists in Boston tended to support Garrison through the 1840s, and those from other areas generally supported political abolitionists. *See, e.g., id.* at 319 (discussing how Black abolitionists in New York saw political involvement as central for establishing Black rights); *see also* BENJAMIN QUARLES, BLACK ABOLITIONISTS 42–67 (1969). Quarles notes that one concern for Black abolitionists was the not infrequent racial prejudice in practice in white abolitionists organizations and a general failure to support explicitly full social and economic equality. *Id.* at 47–50. These themes are also evident in the conventions.

122 1843 National Convention, *supra* note 102, at 17.

123 *Id.*

124 *See, e.g.,* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, HELD IN THE CITY OF SYRACUSE, N.Y., OCTOBER 4, 5, 6, AND 7, 1864; WITH THE BILL OF WRONGS AND RIGHTS, AND THE ADDRESS TO THE AMERICAN PEOPLE 15 (1864) [hereinafter 1864 National Convention], <https://omeka.coloredconventions.org/files/original/91057571556d503505e8e86e8474d923.pdf> (showing John Mercer Langston discussing the importance of a recent opinion by Attorney General Bates confirming Black citizenship and highlighting a resolution asserting citizenship); *see also* BLIGHT, *supra* note 109, at 478–79 (noting Douglass recognizing importance of citizenship aspects of the 1866 Civil Rights Bill); JONES, *supra* note 7, 9–12 (discussing importance and complexity of citizenship claims by African Americans in antebellum period).

Other than the disputes over political engagement, however, the convention overwhelmingly embraced a range of rights and activities that they saw as central to full citizenship. They issued a report on the importance of the mechanical arts (skilled trades and engineering) and education, on the development of the Black press as crucial in a democratic society, and on the importance of land ownership and agriculture to self-sufficiency.¹²⁵ In these reports the convention set out a civil society vision of freedom that reflected a concrete and practical definition of their goals, one that showed why their rights claims were so important.

B. 1847 National Convention, Troy

This connection between rights claims and civil society activism reveals the critical work the conventions did in knitting together the basic principles animating Black abolitionism and the practical means (and difficulties) for implementing those principles. The debate about supporting the Black press at the 1847 convention provides a revealing case in point. It had been well established that the abolitionist press was a crucial means of advancing the cause of liberty. William Lloyd Garrison's *The Liberator* had served as a critical forum for communication among white and Black abolitionists, for the exploration of ideas within the movement, and for efforts to advocate for change to legislators and citizens outside the movement.¹²⁶ The Black press, too, had done the same, including providing important forums for debate among African Americans, as was seen, for instance, in the letter exchanges in *The Colored American* between "Sidney" and William Whipper.¹²⁷ But financing was always a struggle for Black presses. At the 1847 Convention a proposal was made to establish a national printing press to support a national Black periodical.¹²⁸ James McCune Smith, a leading Black intellectual and doctor from New York who had written on a variety of topics, including abolition, and had briefly served as editor for *The Colored American*, stressed

125 1843 National Convention, *supra* note 102, at 27-36.

126 *See, e.g.*, SINHA, *supra* note 16, at 217-18, 300, 304-05 (emphasizing the importance of *The Liberator* to Black abolitionists in getting their message out).

127 On the importance of the antebellum Black press, see ERNEST, LIBERATION HISTORIOGRAPHY, *supra* note 11, at 277-329; QUARLES, *supra* note 121, at 68-89.

128 PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED PEOPLE, AND THEIR FRIENDS, HELD IN TROY, N.Y., ON THE 6TH, 7TH, 8TH, AND 9TH OCTOBER, 1847, at 6-7 (1847) [hereinafter 1847 National Convention], <https://omeka.coloredconventions.org/items/show/279>.

the need for a national press.¹²⁹ As Smith argued, the press was an important means for achieving other rights and liberties, such as suffrage.¹³⁰ The absence of a Black press circulating in Connecticut, he suggested, left “the colored people of that State . . . without the necessary means through which to make known and urge their claims,—whereas [a national press could] . . . speak[] forth our sentiments, mak[e] known the wrongs we suffer, and demand[] the rights due manhood”¹³¹ The type of advocacy needed for Black Americans to organize and to persuade white legislators required written periodicals designed to communicate the views and opinions of Black northerners. Smith here captured the interrelationship of civil society and how important the actual exercise of press and speech rights were to achieving suffrage and other basic rights.

Interestingly, Frederick Douglass opposed this proposal.¹³² Perhaps his interest in the success of his own paper, *The Northern Star*, which he was just about to start, influenced his opposition (he mentioned his paper, along with two others, as possible alternatives for direct support from the convention).¹³³ But he also argued that a dedicated press connected with the convention “would soon dwindle down to be the organ of a clique,” by which he may have meant that leaders of the convention from New York City would dominate the press.¹³⁴ William Wells Brown worried that Black subscribers might not be able to sustain multiple papers and thought it unlikely that a new paper could compete with *The Liberator* for the limited funds of Black readers (this was a reasonable concern and may be the reason that the press never materialized).¹³⁵ At any rate, the concerns for how best to establish and maintain a press that could reflect the variety of views in the growing northern Black community showed the importance the convention placed on both the press and also on social and economic groundwork necessary for that press to do the work so central to their mission.

129 *Id.* at 7. On Smith’s editorship of *The Colored American*, see Howard H. Bell, *National Negro Conventions of the Middle 1840’s: Moral Suasion vs. Political Action*, 42 J. NEGRO HIST. 247, 258 (1957).

130 1847 National Convention, *supra* note 128, at 6–7.

131 *Id.* at 7 (summarizing the argument of James McCune Smith).

132 *Id.* at 6–7.

133 *Id.*; see also BLIGHT, *supra* note 109, at 188–91 (discussing Douglass’s participation at the 1847 convention and subsequent formation of the *North Star*).

134 1847 National Convention, *supra* note 128, at 7.

135 *Id.*; see also GREENSPAN, *supra* note 102, at 120–22 (describing Brown and the 1843 and 1847 conventions’ calls for a Black press).

In the end, the convention approved a committee report (the “Report”) supporting a national press.¹³⁶ The Report nicely framed the importance of the press: “Of the means for the advancement of a people placed as we are, none are more available than a Press. We struggle against opinions. Our warfare lies in the field of thought.”¹³⁷ To recruit soldiers for this war and carry on the battles, they argued, “we need a Printing Press, because a printing press is the vehicle of thought—is a ruler of opinions.”¹³⁸ The press would aid the Black community internally: it “shall keep us steadily alive to our responsibilities . . . point out the principles which should guide our conduct and our labors,” and communicate the success and failures and the eventual triumph of “Human Equality.”¹³⁹ They argued that, while other avenues for advancement, such as education, were equally or even more important in substance, the Black press was critical for the organization and communication of those other successes. It was invaluable as a public space, “a field in which the relative importance of the various means [for advancement] may be discussed and settled in the hearing of the whole people, to the profit of all.”¹⁴⁰ Thus the press was seen as a core locus for democratic civil society, carrying to the broader Black public the ideas and debates being explored at conventions and elsewhere.

If the press was critical for internal dialogue within the Black public sphere, the Report also recognized its value in external communications: “We need a Press also as our Banner on the outer wall, that all who pass may read why we struggle, how we struggle, and what we struggle for.”¹⁴¹ An established national Black press could counter the “weight of odium and malignity” expressed by the dominant white presses.¹⁴² It could also add a Black perspective to the antislavery press. This latter point is especially important for understanding how the convention delegates understood the role of the Black public sphere. They appreciated, deeply, the work of Garrison and other white antislavery advocates and their papers and publishers. Many delegates regularly published in their journals. Yet the perspective was not the same. The problem, they wrote, was that the “favorable feeling” of white abolitionists was one of “human sympathy.”¹⁴³ “Our friends sorrow with us,” they continued,

136 1847 National Convention, *supra* note 128, at 8.

137 *Id.* at 18.

138 *Id.*

139 *Id.*

140 *Id.* at 19.

141 *Id.*

142 *Id.*

143 *Id.* at 20.

“because, they say we are unfortunate!” While better than the “antipathy” shown by the dominant white press, neither antipathy nor sympathy reflected equality and full citizenship. “[W]e must command something manlier than sympathies. We must command the respect and admiration due men, who, against fearful odds, are struggling steadfastly for their rights. This can only be done through a Press of our own.”¹⁴⁴ This was an argument for Black autonomy as a necessary ingredient in the creation of full equality and citizenship, insisting that the claiming of and battle for rights was itself an essential part of racial equality. As would be the case in other Black conventions, this richly textured understanding of the role of race-specific institutions as a means of attaining the elimination of race prejudice would be an important, if at times contested, basic principle.

In addition to advocating for a vibrant press, the conventions also advanced an economic vision for Black Americans. One aspect of this vision reflected a version of antebellum yeoman farmer ideology. For instance, in its Report on Agriculture the 1847 Convention encouraged African Americans to seek out farms and land they could work. Farming, they argued, was the best pursuit to provide “freedom from undue care and anxiety about the necessaries and comforts of life” and “to meet the real wants of life.”¹⁴⁵ Farming, being the pursuit most directly connected with food and staples, could best address the basic wants of life, and doing so they identified as a basic aspect of freedom. For these reasons farming also enabled independence. “The farmer is an *independent man*; the man of no other pursuit is so much so.”¹⁴⁶ For people long enslaved, the prospect of such independence would have had strong appeal, and it fit well with a particular image of the farmers’ democracy that many Americans of the time shared. Another part of this ideology was the image of agriculture as a distinctly egalitarian pursuit. “[A]n Agricultural life is open to all,” they wrote, “and tends to equality in life” and is a means by which society can see “all castes fade away[.]”¹⁴⁷ The convention was especially receptive to wealthy abolitionist Gerrit Smith’s recent gift to Black people of large tracts in upstate New York, which they viewed as a means of achieving this level of freedom and equality.¹⁴⁸ Despite the fact that, like many others in this period, the convention delegates

144 *Id.*

145 *Id.* at 26.

146 *Id.* at 27.

147 *Id.* at 28–29.

148 *Id.* at 29–30; *see also* JOHN STAUFFER, *THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE* 138–44 (2001) (describing the details and impact of Smith’s land grants).

were swimming against the economic tide of American industrialization in privileging yeoman farming, the basic idea that land and property were essential for the formerly enslaved to secure independence, freedom, and equality would continue to animate Black abolitionism and become a leading principle of Reconstruction in the form of land distribution and the forty-acres-and-a-mule movement.¹⁴⁹ It also reflected a concern with economic equality that is an important aspect of Black uplift ideology, which too often is construed as having been focused mainly on the educational and professional attainment of middle- and upper-class urban African Americans.

C. 1848 National Convention, Cleveland

The relationship between a broadly understood equality across civil society and the structural nature of racial prejudice and oppression was further developed the following year in the documents of the National Convention in Cleveland. In its Address to the Colored People of the United States the 1848 Convention presented an intricate analysis of how race prejudice operated, and explored the complex aspects of Black resistance, setting forth some key concepts on the nature of equality from Black abolitionism. First, the Address acknowledged the persistence and insidiousness of white supremacy and racial slavery: “The doctrine perseveringly proclaimed in high places in church and state, that it is impossible for colored men to rise from ignorance and debasement, to intelligence and respectability in this country, has made a deep impression upon the public mind generally, and is not without its effect upon us.”¹⁵⁰ “We were not only slaves,” they continued, “but our ignorance made us willing slaves.”¹⁵¹ The Convention sought to inspire Black northerners to break free of the “despondency” and fatalism created by this “gloomy doctrine” and inspire “our fellow-countrymen” to embrace the “upward tendency of the oppressed throughout the world” toward the “triumph of right over wrong, of freedom over slavery, and equality over caste.”¹⁵² The recent progress of Black northerners showed the importance

149 See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 104–10, 308–10, 374–75 (1988) (discussing the impact of land redistribution principles and economic liberty through farming on Reconstruction).

150 Report of the Proceedings of the Colored National Convention held at Cleveland, Ohio, on Wednesday, September 6, 1848, at 17 (1848) [hereinafter 1848 National Convention], <https://omeka.coloredconventions.org/items/show/280>.

151 *Id.* at 18.

152 *Id.* at 17. The reference in the Address to freedom movements across the world shows the importance of events in Europe and the Revolution of 1848 for Black leaders in the United States.

of active efforts to claim rights and standing, to focus on education and achievement, and to become active claimers of “political and social rights.”¹⁵³ The point here was that the very act of asserting themselves, of claiming rights across all spheres of society, would itself help defeat white supremacy’s grip on the minds of both Black people and white people. Freedom and equality were made, not given.

Second, the Address authors drew the connection between racial slavery in the South and its effects on the “free” North. They made clear that slavery itself was a brutal imposition of physical and sexual violence that led to “moral death,” a total denial of personhood and that eliminated “all rights” and “all privileges.”¹⁵⁴ In the South, they wrote, “we are a murdered people.”¹⁵⁵ Black northerners were “far enough removed from the actual condition of the slave” to recognize that their situation was not as horrific; indeed, that very fact placed on them a responsibility to fight for “a speedy emancipation of our enslaved fellow-countrymen.”¹⁵⁶ They argued, however, that even though they were “not slaves to individuals . . . in many respects we are the slaves of the community.”¹⁵⁷ The widespread race prejudice in the North, a Jim Crow society that barred Black residents from many skilled trades, professions, educational institutions, churches, social organizations, and from political power, placed Black northerners in a caste system. To defeat slavery, they argued, it was necessary to also defeat this caste system, to make equality a fact on the ground in the north as well as the south.

The problem was how to do this. The answer, in part, was to seek improvement as a race, to be race conscious in the pursuit of racial equality. As the 1847 Convention had observed, white abolitionism, notwithstanding its fervent advocacy for the end of slavery, included a tendency toward sympathy or even pity that was inconsistent with equality. White abolitionists were also hesitant in recognizing the problems of Black northerners and could be rather

Indeed, the abolition of colonial slavery by England, in 1833, and France, in 1848, and the Republican movements across Europe in 1848 brought home the irony that the monarchical Europeans were seeing a greater expression of freedom than were the heirs of the Spirit of 1776. For a description of the influence of the 1848 European revolutions on abolition, see SINHA, *supra* note 16, at 363–71.

153 1848 National Convention, *supra* note 150, at 17.

154 *Id.* at 18.

155 *Id.*

156 *Id.*

157 *Id.*

critical of their economic success.¹⁵⁸ The 1848 Convention asked Black northerners to embrace white abolitionist societies and join their fight to end slavery. But they also stressed the need for Black organizations:

It will be a long time before we gain all our rights; and although it may seem to conflict with our views of human brotherhood, we shall undoubtedly for many years be compelled to have institutions of a complexional character, in order to attain this very idea of human brotherhood.¹⁵⁹

This statement reflected the complex nature of Black activism for equality in a culture of white supremacy, and is an early recognition of the role of race consciousness as a means to attaining equality. Recall that the authors had opened the Address by highlighting the context of white supremacy;¹⁶⁰ race consciousness was not something created by them but was a necessary response by the oppressed race. Institutions like the Black conventions, the Black press, and Black schools were essential precisely because white people barred African Americans from those vital civic institutions.¹⁶¹ The delegates still advised their Black audience and readers “to occupy memberships and stations among white persons, and in white institutions, just so fast as our rights are secured to us” but they also acknowledged that those rights would only be secured through Black activism.¹⁶²

The Convention considered another complicating aspect of activism in a culture of subordination: the tension within Black communities of advocating for higher social and economic achievement without at the same time denigrating the current position of many Black workers. This was a point of some contention in the convention, where some members feared that the call for advancement into skilled trades and professions implied an elitist snub of servants and unskilled labor.¹⁶³ The Address of the Convention hedged on

158 PEASE & PEASE, *supra* note 17, at 14 (noting how white abolitionists Sarah Grimke, Theodore Weld, and George Thompson found a subset of socioeconomically advantaged Black abolitionists to be self-interested and ostentatious).

159 1848 National Convention, *supra* note 150, at 19.

160 *Id.* at 17 (“The doctrine perseveringly proclaimed in high places in church and state, that it is impossible for colored men to rise from ignorance and debasement, to intelligence and respectability in this country, has made a deep impression upon the public mind generally, and is not without its effect upon us.”).

161 For the classic discussion of segregation in education, labor, business, professions, and churches in the North, see LITWACK, *supra* note 44, at 113–213. See also STEPHEN KANTROWITZ, MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829–1889, at 124–33 (2012) (discussing battle over school segregation in antebellum Boston); HORTON & HORTON, *supra* note 30, at 117–21 (discussing segregation in skilled professions, including medicine).

162 1848 National Convention, *supra* note 150, at 19.

163 See *id.* at 5 (recounting a debate over the 2d Resolution among delegates at the 1848 Convention).

this point: “the Convention regarded those [unskilled] employments, though right in themselves, as being, nevertheless, degrading to us as a class, and therefore, counsel you to abandon them as speedily as possible”¹⁶⁴ This language attempted to negotiate the balance between individual and groups experience. Unskilled labor is valued in itself at an individual level, yet has, in aggregate, the effect of creating a racial stigma and reinforcing the very assumptions of inferiority that caused white people to deny African Americans entry into skilled positions. This was a difficult argument for the Convention to make, given that so many Black northerners whom they were recruiting were themselves forced to work as servants and took pride in their livelihood. Still, the way the Convention addressed the topic reflected a deep understanding of the relationship between the dominant ideology of individual labor and the social reality of group subordination.

The Address authors then extended this point to express an idea of what could be called mutual independence. Having skilled employment in mechanical trades or in agriculture, they argued, would advance liberty, equality, and social dignity for Black people.¹⁶⁵ “[I]ndependence is an essential condition of respectability. To be dependent, is to be degraded. Men may pity us, but they cannot respect us.”¹⁶⁶ Economic independence was an essential condition of full and equal citizenship. Yet by embracing independence they did not mean stark individualism. “We do not mean” they continued,

that we can become entirely independent of all men; that would be absurd and impossible, in the social state. But we mean that we must become equally independent with other members of the community. That other members of the community shall be as dependent upon us, as we upon them.¹⁶⁷

This was a model of an egalitarian independence, of independence as mutuality. As it was, however, race prejudice and white supremacy prevented this mutuality “in the social state.”¹⁶⁸ White people, they observed, built the houses, made the clothes, produced the food.¹⁶⁹ This one-way dependency prohibited “respectability”, that aspect of equal dignity so essential to full equality.¹⁷⁰ Moreover, the employments that Black workers did maintain were

164 *Id.* at 19.

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 19-20.

170 *Id.* at 20.

too vulnerable to substitution. Unlike those white workers who provided necessities, Black unskilled and servant labor could, and likely would, be replaced: “What shall a large class of our fellow-countrymen do, when white men find it economical to black their own boots, and shave themselves? What will they do when white men learn to wait on themselves?”¹⁷¹

Throughout the Address and other materials of the convention the delegates argued for a particular vision of freedom and equality. They recognized how intimately intertwined were the achievement of full freedom and broad-based equality. For them, equality was not achieved merely by legal changes—those were necessary but not sufficient—but also by social and economic achievement and diversification. As they put it in the Declaration of Sentiments, equality included “equality of attainments,” an equality across employments and social statuses.¹⁷² They also recognized that white opposition to racial equality took place across a wide range of spheres, or what they described as “civil, political, social, or religious” restrictions “in any manner derogatory to the universal equality of man.”¹⁷³ Importantly, the Convention did not limit its concern to civil and political equality, but saw equality in social and religious spheres as components of universal equality as well. And if the achievement of equality required this broad-based approach, it also required a communal identity, including in race-based organizations, to coordinate, support, and inspire the necessary rights-claiming activism and also to successfully lobby, advocate, and promote their cause to white audiences.

The 1848 Convention was also a pivotal, if limited, moment for including women and women’s rights as part of the convention process. The 1848 convention took place just a few months after the Seneca Falls and Rochester Women’s Rights.¹⁷⁴ Frederick Douglass, who had attended those conventions, and Martin Delany, co-founder with Douglass of the *North Star*, advocated for the Cleveland convention to adopt a statement supporting the rights of women, and in particular that women be made full participants in the

171 *Id.*

172 *Id.* at 12.

173 *Id.*

174 MARTHA S. JONES, *ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900*, at 79–80 (2007).

conventions.¹⁷⁵ At first this proposal was defeated in committee.¹⁷⁶ On the third day of the convention, Douglass and Delany arranged for a speech by Rebecca Sanford, a white activist who had also attended the women's rights conventions, which was the first address to a Black convention by a woman.¹⁷⁷ Enabling Sanford to address the convention itself took some parliamentary maneuvering—as the convention minutes stated, the “Rules were suspended” to allow “Mrs. Sanford” to address the body on “the Rights of Woman.”¹⁷⁸ As Martha Jones has observed, Sanford pitched her speech carefully, advocating for the “Elective Franchise” and the “right of property in the marriage covenant,” while also showing respect for women’s “duties”.¹⁷⁹ Following Sanford’s speech, the initial conflict over whether to approve the Douglass-Delany Women’s Rights Resolution and the related issue of whether women attendees were full convention members found a compromise when Charles Langston and William Howard Day deftly asserted that the convention had already recognized the right of women to participate with a resolution “making ‘all colored persons present, delegates to this Convention’” and that since “they considered women persons” women were already full participants.¹⁸⁰ The Convention then fully supported the resolution, which read: “Whereas, we fully believe in the equality of the sexes, therefore, Resolved, That we hereby invite females hereafter to take part in our deliberations.”¹⁸¹

The support for women’s rights at the convention, and the recognition of at least some role for women as public participants and speakers, was an important development in the convention movement and recognition of the role that Black and white women had been playing in the abolitionist and

175 *Id.* at 79; see also LEIGH FOUGHT, *WOMEN IN THE WORLD OF FREDERICK DOUGLASS* 156, 350 n.10 (2017) (describing Douglass’s and other Black men’s support for the freedom of women, acts that included inviting Mrs. Sanford to speak at the Cleveland convention and promoting universalizing language in the Cleveland convention resolution). On Douglass and Delany and the founding of the *North Star*, see BLIGHT, *supra* note 109, at 191–94.

176 JONES, *supra* note 174, at 59.

177 *Id.*

178 *Id.*; 1848 National Convention, *supra* note 150, at 11.

179 JONES, *supra* note 174, at 59, 80 (quoting 1848 National Convention, *supra* note 150, at 11). The rights that Sanford promoted—including right to suffrage and marital property—were prominent claims made in the Declaration of Sentiments at the Seneca Falls Convention that she and Douglass had just attended. See REPORT OF THE WOMEN’S RIGHTS CONVENTION, HELD AT SENECA FALLS, N.Y., JULY 19TH AND 20TH, 1848, at 7–8 (1848) [hereinafter Seneca Falls Declaration of Sentiments], <https://www.loc.gov/resource/rbcmil.scrp4006702/?sp=11>; see also CARLA L. PETERSON, “DOERS OF THE WORD”, *AFRICAN-AMERICAN WOMEN SPEAKERS & WRITERS IN THE NORTH (1830-1880)* 101 (1995) (explaining how Sanford’s speech echoed the rhetoric of the Seneca Falls convention).

180 JONES, *supra* note 174, at 59–60 (quoting 1848 National Convention, *supra* note 150, at 11).

181 1848 National Convention, *supra* note 150, at 17.

moral reform movement up to that point.¹⁸² Martha Jones has described this convention as a key part of the conceptual transformation of the role of Black women: “[f]emale influence was giving way to women’s rights[.]”¹⁸³ The formal activities of convention movement, like much of the nineteenth-century public sphere, was largely male.¹⁸⁴ The abolitionist movement, however, had close ties to the growing feminist movement.¹⁸⁵ Scholars who have been reading the state and national convention materials closely have been uncovering details showing the influence of women, and particularly of Black women, on the conventions.¹⁸⁶ As was the case with abolitionism generally, women were critically important to the Black abolitionist movement but at the same time were severely limited in their public roles and often had their claims to equal rights and suffrage shunted aside or limited to brief acknowledgements at these public fora.¹⁸⁷ But, as Martha Jones has pointed out, the parallel African American moral reform societies, which had grown out of the 1830s convention movement, did include active leadership roles for Black women,

182 As the editors of the Colored Convention Project put it, as businesswomen, editors, teachers, cooks, and boarding-house proprietors (among many other roles), Black women, too, contributed to campaigns for Black social, legal, educational, and labor equality. The newspaper work, entrepreneurial activism, and political commitments of Mary Ann Shadd Cary, Elizabeth Gloucester, Julia Williams Garnet and Frances E. W. Harper, for example, illustrate the ways in which Black women challenged traditional beliefs about women’s place in public society and embodied the values of Colored Conventions beyond delegate appointment. P. Gabrielle Foreman, Sarah Patterson, & Jim Casey, *Introduction to the Colored Conventions Movement: An Overview of Nineteenth-Century Black Political History and Organizing*, COLORED CONVENTION PROJECT, <https://coloredconventions.org/introduction-movement/> (last visited Jan. 12, 2021).

183 JONES, *supra* note 174, at 60. The idea here is that, prior to the late 1840s, Black women had been seen by men as adjuncts to the public meetings and organizations advancing racial equality, exercising their influence on their communities within their traditional roles. After 1848, however, it had become clear to many Black leaders that women’s rights were part of the general struggles for African Americans. Both sentiments would continue to influence the convention movement. *See generally id.* at 60–85.

184 SPIRES, *supra* note 10, at 89 (“While the state conventions, like their national counterparts, rarely recognized women as delegates and in some cases explicitly bared them, women were deeply involved in [the] larger constellation of events, from commenting on the convention process in newspapers to providing housing and meals and raising funds to printing and circulating convention documents.”)

185 On the connections between the abolitionist movement and the women’s rights movement, see SINHA, *supra* note 16, at 266–298.

186 *See, e.g.,* Samantha de Vera, ‘We the Ladies . . . Have Been Deprived of a Voice’: *Uncovering Black Women’s Lives through the Colored Conventions Archive*, 27 19: INTERDISC. STUD. LONG NINETEENTH CENTURY 1 (2018) (describing activism of Black nineteenth-century women, including how the minutes of the Colored Conventions demonstrate their leadership roles as people independent from male relatives).

187 On women’s participation in and relationship to the abolitionist movement, see SINHA, *supra* note 16, at 266–89 and JONES, *supra* note 174, at 1–117.

at least at the local level.¹⁸⁸ The public recognition at the 1848 National Convention was followed by a local meeting of the Philadelphia African American Antislavery Society the following month at which Black and white women activists served in leadership roles, and then a few months later in Columbus where women delegates to the state convention advocated for women's educational rights.¹⁸⁹ In these ways the convention movement provided some openings for women and for the expansion of rights claims to include women's rights as well.

One other aspect of the 1848 Convention is worth noting as we consider how the Black convention movement reflected ideas of rights and constitutionalism. The Declaration of Sentiments included a Resolution supporting the organization of Vigilant Committees to encourage and train African Americans "to measure arms with assailants *without* and invaders within"¹⁹⁰ Given modern debates over the role of a right to bear arms as part of Reconstruction, it is relevant to note here that, while arms bearing and training are both assumed and encouraged by the Convention, they stress the context of both military participation ("we find ourselves far behind the military tactics of the civilized world") and collective militia defense of communities.¹⁹¹ This made sense for Black northerners, who, even before the draconian Fugitive Slave Act of 1850, were at risk of assaults by slave

188 JONES, *supra* note 174, at 47.

189 *Id.* at 76-77, 80-81. At the Columbus convention, women, led by Jane Merritt and apparently supported by Charles Langston and William Day, forced the male conventioners to recognize them as delegates and not just attendees, as the male organizers apparently had originally planned. *Id.* at 80-81. Jones at one point refers to the convention's location as Cincinnati, but as her note references make clear, she is discussing the Columbus convention. *Id.* at 236 nn.89-90; see also Minutes and Address of the State Convention of the Colored Citizens of Ohio, Convened at Columbus, January 10th, 11th, 12th, & 13th, 1849, at 14-15 (1849), <https://omeka.coloredconventions.org/items/show/247> (detailing Jane Merritt's resolution and the expressed support or opposition of male members of the convention); SPIRES, *supra* note 10, at 107 (explaining how Merritt and other women pushed for the male delegates in Ohio to recognize their participation, including by threatening to boycott the Convention of 1849); PETERSON, *supra* note 179, at 101.

190 1848 National Convention, *supra* note 150, at 12, 16.

191 The U.S. Supreme Court and Justice Thomas cited a Reconstruction-era Black convention and the Black press in support of the right to bear arms in *McDonald v. City of Chicago*, 561 U.S. 742, 771 n.18 (2010); *id.* at 847-50 (Thomas, J., concurring). For my own views on how the Court, and the scholars the Court relied on, misinterpret the African American source materials, see James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 702-08 (2016). See also SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 167-210 (2006) (discussing nature of the right to bear arms as seen in Reconstruction-era laws, discussions, and debates).

“catchers” (kidnappers) and also mobbing by white northerners.¹⁹² Self-defense, including by arms, was an aspect of life for Black people in the north,¹⁹³ but we see here that it is framed collectively and communally. As we will see, this collective dynamic would continue to be an aspect of arms bearing to the extent it appears in many of the conventions.

D. Ohio State Convention, 1851

By the 1840s and 1850s, Black activists had established vibrant and regular conventions in several states. While many of the topics of these conventions focused on state and local matters, many of those concerns directly implicated questions of national and constitutional import, such as equal rights, suffrage, and the fundamental privileges of citizenship.¹⁹⁴ Many of those discussions paralleled what was debated in the national conventions—as Howard Bell described it, the convention delegates:

[r]epeatedly . . . called upon each other to be temperate and to become skilled laborers or farmers opposed to unskilled laborers; repeatedly they requested access to the public schools; repeatedly they encouraged the development of a Negro press and a literate, interested public; but above all, they hammered home the necessity of acquiring full citizenship—including the suffrage.¹⁹⁵

While several of the state conventions from this period present excellent resources for these debates, two conventions from Ohio are particularly significant in their elucidation of the constitutional ideas and aspirations of the Black public sphere at the time. In part because Ohio, despite the Black Codes that fueled the Cincinnati mobbing in 1829, had for years been a center of the underground railroad and anti-slavery activism, and in part because northern Ohio, and especially Oberlin College, had long encouraged full rights and education for African Americans, by the late 1840s Ohio had a surfeit of young Black activists, including John Mercer and Charles Langston, William Day, and H. Ford Douglas, who would become leaders in the national movement.¹⁹⁶ The repeal of many of the restrictive Ohio Black Laws

192 See PEASE & PEASE, *supra* note 17, at 206–32 (discussing fugitive slave kidnappings and Black resistance strategies before and after Fugitive Slave Act of 1850); *id.* at 233–35 (discussing antebellum white race mobbing).

193 See, e.g., Kantrowitz, *supra* note 161, at 179–80 (describing Black Bostonians’ increasingly militant self-defense response to the Fugitive Slave Act of 1850).

194 On the state conventions during this period, see Bell, *supra* note 11, at 181–205 (describing the state conventions that Black activists organized between 1848 and 1859).

195 Howard H. Bell, *Some Reform Interests of the Negro During the 1850’s as Reflected in State Conventions*, 21 PHYLON 173, 181 (1960).

196 State Convention Proceedings, vol. 1, *supra* note 11, at 214–15. Douglas’s name is often misspelled with a double “s.”

in 1849, and the passage of the federal Fugitive Slave Act in 1850, together shifted the focus of the conventions of the early 1850s to a more national focus.¹⁹⁷ The Convention of 1851, in particular, presents an example of constitutional discourse that nicely reflects the scope of ideas in the Black public sphere from this period.

The thirty-nine African American leaders from across Ohio assembled in the Second Baptist Church in Columbus in January 1851 and discussed many issues central to Black activism, from opposition to the recent federal Fugitive Slave Law of 1850, to legal and customary bars on equal access for Black residents to public accommodations, to promoting antislavery societies and churches.¹⁹⁸ On the second day, discussion turned to the meaning of the United States Constitution. H. Ford Douglas rose to support a Resolution that “it is the opinion of this Convention, that no colored man can consistently vote under the United States Constitution[.]”¹⁹⁹ This argument sparked an extended debate over the meaning of the antebellum Constitution for African Americans. Douglas argued forcefully that “the Constitution of the United States is pro-slavery, considered so by those who framed it, and construed to that end ever since its adoption.”²⁰⁰ Douglas presented the Garrisonian covenant-with-death view of the Constitution, which, he argued, was only reinforced by the recent Fugitive Slave Act of 1850.²⁰¹ According to him, the constitutional guarantee to keep open the slave trade until 1808 was a “guilty

197 *Id.* at 214–17.

198 Minutes of the State Convention of the Colored Citizens of Ohio, Convened at Columbus, Jan. 15th, 16th, 17th, and 18th, 1851 [hereinafter 1851 Ohio Convention], at 6–18, <https://omeka.coloredconventions.org/files/original/a65f7f5d8474b86eca74df928f0e3a8b.pdf> (setting forth minutes and resolutions of convention).

199 *Id.* at 8. Douglas’s last name is incorrectly spelled in the document by adding an extra “s.” Douglas, a self-educated nineteen-year-old barber and activist from Cleveland, would become known for taking bold positions: later in the 1850s he became a leading radical voice in Black abolitionism and advocate for emigration. See generally Robert L. Harris, Jr., *H. Ford Douglas: Afro-American Antislavery Emigrationist*, 62 J. NEGRO HIST. 217 (1977) (describing Douglas’s involvement in the Ohio free Black community). Douglas also would serve as one of the few Black officers in the Civil War, and died in 1865 from malaria that he contracted in Mississippi during the war.

200 1851 Ohio Convention, *supra* note 195, at 8.

201 On William Garrison’s position that the Constitution was a “covenant with death”, see JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 5 (2011) (discussing Garrison’s view that the Constitution “was born in sin and incorrigible”); Paul Finkelman, *Garrison’s Constitution: The Covenant with Death and How It Was Made*, 32 PROLOGUE MAG. 230 (2000) (discussing Garrison’s position that the Constitution “was the result of a terrible bargain between freedom and slavery”). On Garrison’s disunionism, constitutionalism, and politics in the context and its relation to other versions of abolitionism, see SINHA, *supra* note 16, at 417–78 (detailing Garrison’s anti-constitutional views and call for a fugitive slave rebellion). The fullest contemporary statement of Garrisonian anti-constitutionalism is given in WENDELL PHILLIPS, *THE CONSTITUTION: A PROSLAVERY COMPACT* (3d ed. 1856).

contract” against the very liberty Americans so valued; the fugitive slave clause had empowered Congress to make all citizens participants “in the horrible system of human bondage” and had “shroud[ed] our country in blackness,” to the point of undermining the very legal rights like habeas corpus and trial by jury that the document supposedly protected.²⁰²

Douglas’s claim was bold not only in its Garrisonian rejection of the Constitution, but also because by condemning all political participation in the unholy American system, he challenged the very foundation of the Convention, which was its advocacy for securing the right to vote for Black men in the upcoming state constitutional convention. His speech sparked a strong response from William Howard Day, who countered that Douglas made the same error as “many others who discuss this question” (meaning Garrisonians) “of making the *construction* of the Constitution of the United States, the same as the Constitution itself.”²⁰³ He did not dispute the unjustness of “the proslavery action of this government, nor . . . the aid which the Supreme Court of the United States has given to Slavery[.]”²⁰⁴ “[B]ut,” he continued, “*that* is not the Constitution—they are not [the rules] under which I vote.”²⁰⁵ Many people, he observed, “attempt[] to justify the worst of iniquities” by citing the Bible, but nobody in the deeply Protestant communities the delegates were part of would “discard the Bible” because it was wrongly interpreted.²⁰⁶ Day further countered Douglas’s textual references: if the Constitution “says it was framed to ‘establish justice,’ it, of course, is opposed to injustice; if it says plainly no person shall be [‘]deprived of life, *liberty*, or property, without due process of law,’—I suppose it means it, and I shall avail myself of the benefit of it.”²⁰⁷ For Day, the Constitution provided a path to liberty that he would not ignore or deny:

I consider every instrument precious which guaranties to me liberty. I consider the Constitution the foundation of American liberties, and wrapping myself in the flag of the nation, I would plant myself upon that Constitution,

202 1851 Ohio Convention, *supra* note 195, at 8–9.

203 *Id.* at 10. Day was a recent graduate of Oberlin and would, in 1853, help start the *Aliened American*, the first Black newspaper west of the Alleghenies and a leading voice in abolition. See PEASE & PEASE, *supra* note 17, at 118 (stating that Day published the *Aliened American* in response to calls for the establishment of a western newspaper). He also challenged segregation in public accommodations in Michigan, losing in a state supreme court of Republican justices, in *Day v. Owen*, 5 Mich. 520, 520–28 (1858). See KYLE G. VOLK, *MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY* 158–63 (2014) (describing Day’s legal battle in the Michigan Supreme Court and the decision’s impact on the abolitionist movement).

204 1851 Ohio Convention, *supra* note 195, at 10.

205 *Id.*

206 *Id.*

207 *Id.*

and using the weapons they have given me, I would appeal to the American people for the rights thus guaranteed.²⁰⁸

For Douglas the question was less idealistic and more practical: “The gentleman may wrap the stars and stripes of his country around him forty times, if possible, and with the Declaration of Independence in one hand, and the Constitution of our common country in the other,” but he still would have no protection against the slavecatcher who, under full protection of federal law and the Constitution, could capture him.²⁰⁹ Day’s Constitution of justice and liberty, existing in the ether, was not, for Douglas, the Constitution that mattered. The Constitution that mattered was the one enforced, on the ground, upon their bodies, and with little chance of repeal.

The debate was not finished, however. Charles Langston, recently of Oberlin and who, along with his brother John Mercer Langston, was fast becoming a leading Black abolitionist in Ohio, rose to argue a third position. Although his brother had just that morning proclaimed that the Fugitive Slave Law was unconstitutional using reasoning much like Day’s,²¹⁰ Charles Langston took a different tack:

I perfectly agree with the gentleman from Cuyahoga (Mr. Douglass, [*sic*]) . . . that the United States’ Constitution is pro-slavery. It was made to foster and uphold that abominable, vampirish and bloody system of American slavery. The highest judicial tribunals of the country have so decided. Members, while in the Convention and on returning to their constituents, declared that Slavery was one of the interests sought to be protected by the Constitution. It was so understood and administered all over the country. But whether the Constitution is pro-slavery, and whether colored men ‘can consistently vote under that Constitution,’ are two very distinct questions; and while I would answer the former in the affirmative, I would not . . . answer the latter in the negative. I would vote under the United States Constitution on the same principle, (circumstances being favorable), that I would call on every slave, from Maryland to Texas, to arise and assert their *liberties*, and cut their masters’ throats if they attempt again to reduce them to slavery.²¹¹

208 *Id.*

209 *Id.*

210 John Mercer Langston described the Fugitive Slave Law as “a hideous deformity in the *garb* of law . . . [T]his enactment—unworthy [of] the name of law—reverses [Blackstone’s] definition [of law] by *prohibiting* what is *right*, and *commanding* what is *wrong*.” *Id.* at 6. And not only was it against the principles of law, but it “kill[ed] alike, the true spirit of the American Declaration of Independence, the Constitution, and the palladium of our liberties.” *Id.* at 6–7. It was unconstitutional, argued Langston, because it denied habeas, granted final judicial authority to low-level commissioners, and essentially denied due process by bribing the commissioners with payment for deciding in favor of slavery and prohibiting defendants from presenting facts and witnesses. *Id.* at 7.

211 *Id.* at 11. Charles Langston’s embrace of violence as a legitimate self-defense against slavery was also reflected in his support for the Christiana resistance action against fugitive slave captures in Maryland,

Langston argued for political action as a form of resistance. He refused to adopt a Panglossian view of the Constitution itself, a position that required Day to divorce constitutional text from constitutional practice and culture and to elide some aspects of the text in favor of others. Yet Langston also rejected Douglas's model, which seemed to be political abdication (Douglas was soon to be a leading advocate for Black-led emigrationism²¹²). For Langston, one could simultaneously proclaim the moral illegitimacy of the Constitution while also engaging constitutionalism as a strategy. For him, suffrage was a tool for resistance and a means to achieving their common goal of liberty and full and equal citizenship. As he said in conclusion, "I hope . . . that colored men will vote, or do anything else under the Constitution, that will aid in effecting our liberties, and in securing our political, religious and intellectual elevation."²¹³

This debate over constitutional principle, advocacy, and practice was held at a crucial time in our constitutional history. The Fugitive Slave Act of 1850 marked the nadir in antebellum human rights and was, for Black abolitionists especially, a clear indication that law and legal institutions were fully proslavery. This was a time of constitutional crisis, when the Constitution was used by all branches of the federal government to enforce slavery nationally, and when the descendants of Africans who were not enslaved had before them the difficult choice of whether to abandon the country and support emigration (as H. Ford Douglas and others advocated) or to fight, both politically and physically, for their place in a country and constitution that were increasingly set against them. What could the Constitution possibly mean in this context? How could African Americans find a constitutional identity in such a society? What place did Christian nonviolence and moral suasion have against the forcible kidnapping and enslavement of Black northerners and perpetuation and extension of slavery? If America had never been a just, constitutional society (a point on which all three of the speakers above agreed), what would such a society actually look like and how could these delegates imagine such a place?

None of these questions had easy answers. But the very fact that the delegates at the convention were debating them shows a deep engagement with the foundational concepts of constitutionalism and constitutional

and his later defense of fugitive slaves in Oberlin. See STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* 129, 229-47 (2010) (describing Langston's involvement with the Christiana defense team and Oberlin's embrace of escaped slaves).

212 See generally Harris, *supra* note 196 (discussing Douglas's involvement in the Black-led emigrationism movement).

213 1851 Ohio Convention, *supra* note 195, at 11.

interpretation at precisely the time when constitutional justice stood at its nadir. One response, of course, was to stress the importance of a citizenship of full participation by claiming the right of suffrage, as Charles Langston had advocated. The 1851 Convention did just that. In a detailed petition to the Ohio Constitutional Convention, which was meeting to revise the state constitution, the Black convention delegates demanded that the white Convention “strick[e] out the word ‘white’” from the state constitution’s section on suffrage.²¹⁴ This petition presented a full-throated, fully developed argument in favor of the right of suffrage. It asserted suffrage as a basic natural right for all consensual governments, and linked that point to both the Preamble of the United States Constitution and the Declaration of Independence.²¹⁵ The petition also argued that natural-born citizenship was implicit in the federal Constitution’s Naturalization Clause, and that, combined with Article IV’s Privilege and Immunities Clause, the federal Constitution required the extension of voting to all citizens — that is, all free persons born in the United States (the convention also opposed slavery, but since Ohio was a free state their focus here was on suffrage as a right of free Black men in Ohio).²¹⁶ The petition further argued that the full privileges of citizenship were also owed them because the full duties of citizenship were expected and in fact performed: Black Americans paid taxes, fought in wars, and otherwise performed the duties and showed the allegiance to government that correlated with rights to suffrage and political participation—as the petition to the white convention asked, “have we not a just claim to the same rights with you?”²¹⁷ This petition, then, set forth many of the main constitutional and political arguments in favor of equal suffrage, arguments which would over time become those of, first, the Radical Republicans in 1866-67 and then the full Republican party by 1869-70. They reflected a radical re-reading of the antebellum constitution as not only an anti-slavery but also a pro-equality document, and also a deeper commitment of political philosophy that would steer the course of constitutional amendment. And while the 1851 Ohio Convention was by no means the only source for these arguments, its

214 *Id.* at 19. On matters of racial equality, Ohio in this period was marked by ambivalence, on the one hand removing older anti-Black laws and opposing the federal Fugitive Slave Act, and on the other hand enthusiastically retaining the restriction of suffrage to white men. *See generally* Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373 (2004) (surveying the complex legal history of race in antebellum Ohio); Barbara A. Terzian, *Ohio’s Constitutions: An Historical Perspective*, 51 CLEV. ST. L. REV. 357, 372-75 (2004) (discussing the debate regarding African American rights and privileges at the 1850 Ohio constitutional convention).

215 1851 Ohio Convention, *supra* note 195, at 20-21.

216 *Id.* at 20.

217 *Id.* at 22.

documents reflect as well as any both the constitutional debates and the constitutional arguments developing in the antebellum Black public sphere.²¹⁸

The 1851 Ohio Convention, like the many similar state and national conventions held by Black northerners from 1830 through early Reconstruction, provided Black leaders and activists a forum to share ideas, debate strategies, and engage as a community in forming and reforming their identities as Black American citizens. In doing so, they also explored the meaning of many of the concepts that we now consider foundational to our Constitution and constitutional culture, from the meaning of freedom to the nature and structure of equality. They debated the role of basic institutions like religion and education in helping to create freedom to sustain white supremacy. They articulated the intimate connections between racial slavery and race prejudice and showed clearly how the Jim Crow North was a manifestation of the nation's support of slavery in the South and its history of slavery in the North. They described their experience in the "free" North as a state of "nominal freedom" and "half slavery," rejecting the dangerous binary of freedom/slavery that too easily assumed that freedom was sufficiently realized with the absence of legal slavery. Instead, by closely detailing the problems and barriers confronting Black northerners, the conventions imagined a full freedom that engaged all "civil, political, religious, and social" rights and institutions. They also struggled over questions of race consciousness and "complexional" institutions as a means to achieving a society free from racial prejudice. They even, if fleetingly and insufficiently, considered the liberty and equality of women as part of the same struggle for full citizenship. All of these ideas, percolating as they were in an era of the legal entrenchment of white supremacy, would be ready to fertilize the constitutional soil after the Civil War.

218 The 1852 Convention made similar points. Following up on the failure of the white Constitutional Convention to end racially restricted suffrage, the 1852 Convention included a resolution stating: "[W]e claim our rights at the hands of this government, not only because we are native born American citizens, but because our ancestors and ourselves have contributed to the wealth, honor, liberty, prosperity[,] and independence of this country." Proceedings of the Convention, of the Colored Freemen of Ohio, Held in Cincinnati, January 14, 15, 16, 17 and 19, at 7 [hereinafter 1852 Ohio Convention], <https://omeka.coloredconventions.org/files/original/d71e2c32134ac173b2782d59587e20ba.pdf>. Following the convention, John Mercer Langston wrote a memorial on behalf of the convention to the state legislature, which it accepted in 1854, in which he set forth many of the arguments in favor of equal voting rights contained in the 1851 convention's petition. See Memorial of J. Mercer Langston to the General Assembly of the State of Ohio, June, 1854, State Convention Proceedings vol. 1, *supra* note 11, at 298-303 (arguing "that it is unjust, and anti-democratic, impolitic and ungenerous to withhold from [Black Americans] the right of suffrage").

IV. ANTICIPATING RECONSTRUCTION: NATIONAL CONVENTION (SYRACUSE) OF 1864

The Civil War changed the dynamic for Black abolitionism. It united the movement for full citizenship and radical resistance and suspended the need for Black Americans to consider emigration. By October 1864, the progress toward a Union victory, the Senate's passage of the draft of the Thirteenth Amendment, and pay equalization in the army had given Black leaders some significant hope that victory in war would produce Black freedom and equality. Yet the stalling of the amendment in the House and the Republicans' tepid embrace of it during the fall election campaign also had Black leaders attuned to the need for continued Black activism in advocating the rights of Black Americans.²¹⁹ In this mixed climate of hope and trepidation Black leaders in the North called a national convention to meet in Syracuse in October for the purpose of founding a new national civil rights organization. The National Convention of Colored Men comprised a who's who of Black leaders of the period.²²⁰ Fredrick Douglass served as president.²²¹ Henry Highland Garnet was also present, having helped call the convention, but his participation also reflected an uneasy truce after many years of tension between Garnet and Douglass and between Garnet's supporters and other leaders.²²² Many other

219 On the background of the drafting and passage of the Thirteenth Amendment, see TSEIS, *supra* note 4, at 37-48 (discussing the ratification of the Thirteenth Amendment); ZIETLOW, *THE FORGOTTEN EMANCIPATOR*, *supra* note 70, at 108-29 (describing James Ashley's role in the passage of the Thirteenth Amendment).

220 For general biographical background on many Black leaders and activists from this period, including many who attended the 1864 National Convention, see *generally* SINHA, *supra* note 164; QUARLES, *supra* note 121; ERIC FONER, *FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION* (2d ed. 1996).

221 1864 National Convention, *supra* note 124, at 8. See also BLIGHT, *supra* note 109, at 440 ("Virtually every major black religious, political, literary, or community leader attended [the convention].").

222 Douglass and Garnet fought fiercely over the question of emigration and Black-led colonization, which Garnet supported, throughout the 1850s, but they also appear to have maintained a mutual respect during this period. See BLIGHT, *supra* note 109, at 222-23, 303-04. The conflicts over Garnet's colonization efforts emerged at the end of the convention in a debate over Richard Cain's motion to recognize Garnet's organization, the African Civilization Society, for its work on Black education; George Downing in particular objected, calling the organization "the child of prejudice" for its proto-Black nationalist positions. 1864 National Convention, *supra* note 124, at 26. Downing had long been a fervent critic of Garnet's emigrationism, and Garnet apparently felt the wealthy businessman Downing had become divorced from the concerns of the common man. See HUGH DAVIS, "WE WILL BE SATISFIED WITH NOTHING LESS": THE AFRICAN AMERICAN STRUGGLE FOR EQUAL RIGHTS IN THE NORTH DURING RECONSTRUCTION 24-25 (2011) (describing the acrimonious debate between Downing and Garnet on emigration, the African Civilization Society, and the headquarters of the National Equal Rights League). Given that some of these long-felt conflicts were still so raw, it is all the more impressive that the convention was so productive.

leading abolitionists, as well as those who would become leaders of Reconstruction, joined them, including: George Downing (successful restaurant owner from Rhode Island who would become manager of the congressional dining room and de facto lobbyist for Black interests);²²³ William Nesbit and Octavius Catto (who would lead equal rights activities in Pennsylvania);²²⁴ John Mercer Langston (founder of Howard Law School, minister to Haiti, and congressman);²²⁵ John Rock (first Black member of the Supreme Court bar);²²⁶ William Wells Brown (well-known novelist and lecturer);²²⁷ George Ruffin (who would become the first Black to graduate from Harvard Law School and also the first African American judge);²²⁸ Francis

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- 223 1864 National Convention, *supra* note 124, at 4 (listing delegates). See BLIGHT, *supra* note 109, at 474 (referring to Downing's biography and discussing his work with Frederick Douglass in leading a meeting of Black leaders with Andrew Johnson in 1866); Kantrowitz, *supra* note 161, at 348-49 (discussing Downing's importance as coordinator of congressional lobbying on behalf of Black Americans). Downing remains under-studied. The main biography is the dated work, WASHINGTON, S. A. M., GEORGE THOMAS DOWNING: SKETCH OF HIS LIFE AND TIMES (1910). Thankfully the website, blackpast.org, has been posting important work on Black leaders and other aspects of African American history. See Colin McBride, *George T. Downing (1819-1903)*, BLACKPAST (Oct. 23, 2017), <https://www.blackpast.org/african-american-history/downing-george-t-1819-1903/> (providing general biography).
- 224 1864 National Convention, *supra* note 124, at 5 (listing delegates). See DAVIS, *supra* note 219, at 28-29, 58 (discussing Nesbit's equal rights work and congressional lobbying efforts); Hugh Davis, *The Pennsylvania State Equal Rights League and the Northern Black Struggle for Equality: 1864-1877*, 126 PENN. MAG. HIST. & BIOGRAPHY 611 (2002) (exploring history of Pennsylvania Equal Rights League and work of Nesbit, Catto, and others); Villanova University, Falvey Memorial Library, *The Equal Rights League and Voting Suffrage*, in exhibit *A Great Thing for our People: The Institute for Colored Youth in the Civil War*, <https://exhibits.library.villanova.edu/institute-colored-youth/community-moments/equal-rights-league-and-suffrage/> (discussing work of Nesbit and Catto in lobbying for the Fourteenth Amendment on behalf of the Pennsylvania Equal Rights League).
- 225 1864 National Convention, *supra* note 124, at 6 (listing delegates). See William Cheek & Aimee Lee Cheek, *John Mercer Langston: Principle and Politics*, in BLACK LEADERS OF THE NINETEENTH CENTURY, *supra* note 90, at 103, 112-26 (discussing Langston's career from the end of the Civil War through the 1890s); Shirley Yee, *John Mercer Langston (1829-1897)*, BLACKPAST (Oct. 1, 2017), <https://www.blackpast.org/african-american-history/langston-john-mercer-1829-1897/> (providing general biography).
- 226 1864 National Convention, *supra* note 124, at 4 (listing delegates). See Kantrowitz, *supra* note 161, at 227-29, 347 (discussing Rock's early career as an activist and doctor and his later admission to the Supreme Court bar as a lawyer in 1865); Victor Okocha, *John S. Rock (1825-1866)*, BLACKPAST (Mar. 19, 2007), <https://www.blackpast.org/african-american-history/rock-john-s-1825-1866/> (providing general biography).
- 227 1864 National Convention, *supra* note 121, at 4 (listing delegates). For an excellent general biography of Brown, see EZRA GREENSPAN, WILLIAM WELLS BROWN: AN AFRICAN AMERICAN LIFE (2014). See also *id.* at 406-08 (discussing Brown's participation at the 1864 convention).
- 228 1864 National Convention, *supra* note 124, at 4 (listing delegates). See also J. Clay Smith, Jr., *Freedom's Birthplace: The Making of George Lewis Ruffin, the First Black Law Graduate of Harvard University*, 39 HOWARD L.J. 201 (1995-1996) (providing biography of Ruffin with an emphasis on his legal and political career).

Cardozo (the first Black statewide office holder as Secretary of State in South Carolina in 1868);²²⁹ Richard H. Cain (state senator and then congressman from South Carolina);²³⁰ and Abraham Galloway (Union spy and then political leader and state senator in Reconstruction North Carolina).²³¹ And despite it being a call for colored men, at least two women attended the National Convention, including the writer and activist Francis Ellen Watkins Harper, who addressed the convention.²³²

The confluence of these and many other accomplished delegates and attendees made this Convention one of the most important civil rights meetings of the nineteenth century. It was also incredibly productive. By founding the National Equal Rights League, the Convention set in motion what would become an extensive civic and political organization in many states that pressed for equal rights laws and suffrage nationally and in state legislatures. Despite their brief life and constant financial difficulties, these organizations helped establish schools, community aid, and other activities central to supporting freedom day-to-day, and they held a series of local and state meetings and conventions from which were issued important petitions and letters to white legislators and to Black communities. The Equal Rights League in effect established the groundwork and precedent for what would become the Black civil society movement that would later battle Jim Crow.²³³

229 1864 National Convention, *supra* note 124, at 4 (listing delegates). *See also* W. Lewis Burke, *Post-Reconstruction Justice: The Prosecution and Trial of Francis Lewis Cardozo*, 53 S. C. L. REV. 361, 366-71 (2002) (providing biographical information on Cardozo); FONER, *supra* note 149, at 351-53 (discussing Black leaders in statewide offices in South during Reconstruction, including Cardozo).

230 1864 National Convention, *supra* note 124, at 4 (listing delegates). *See also* Bernard E. Powers, Jr., *Richard Harvey Cain*, in SOUTH CAROLINA ENCYCLOPEDIA (2016), at <https://www.scencyclopedia.org/sce/entries/cain-richard-harvey/>.

231 1864 National Convention, *supra* note 124, at 4 (listing delegates). *See generally* DAVID S. CECELSKI, *THE FIRE OF FREEDOM: ABRAHAM GALLOWAY & THE SLAVES' CIVIL WAR* (2012) (providing general biography of Galloway). *See also id.* at 129-57 (discussing Galloway's preparation for and participation at the 1864 convention).

232 Frances Ellen Watkins Harper addressed the convention at the end of the third day. 1864 National Convention, *supra* note 124, at 25. Edmonia Highgate also addressed the convention, on the second day. *Id.* at 15. *See also* CECELSKI, *supra* note 228, at 143 (discussing Highgate's and Harper's participation at the convention).

233 Davis, *supra* note 219, at 22; FONER, *RECONSTRUCTION*, *supra* note 149, at 27. The convention movement and Equal Rights Leagues dissipated somewhat with the Fifteenth Amendment and the shifting of efforts of Black leaders to working within party structures. Nevertheless, conventions continued to be held, and the civil society program initiated in Syracuse was at least the precursor, if not the direct ancestor, to W.E.B. DuBois's Niagara Movement and the NAACP. *See* P. Gabrielle Foreman, Sarah Patterson & Jim Casey, Introduction to the Colored Conventions Movement, COLORED CONVENTIONS PROJECT, <https://coloredconventions.org/introduction-movement/>.

In addition to establishing the Equal Rights League, the Convention also issued two documents that presented the collective feelings and thoughts of these leaders from around the country. One of the Convention's main documents was styled a Declaration of Wrongs and Rights.²³⁴ The first six paragraphs listed the harms the authors believed African Americans had suffered.²³⁵ Steeped in slave narratives and other sentimental literature before the war, Black people and their white allies perhaps did not need a detailed listing of the injustices of slavery. Instead, the authors presented a set of categories that defined for them unfreedom. The document reads like a catalogue of the techniques of despotism and domination. The authors declared, first, that Black Americans had been denied "natural rights" and "privileges and advantages freely accorded to other men" by "brute force."²³⁶ The oppressing class had taunted them as being inferior, ignorant, cowardly, and incapable of self-government, yet they denied them the means of improvement through religion, education, literacy, self-sufficiency, and a "musket on the battle-field."²³⁷ The authors then described how their rights of families, homes, and labor had been subject to the lash, to rape, to slave auctions, and to desolation.²³⁸ The listing concluded with wrongs felt more by Black northerners than by the enslaved: the wage disparities in the military, the denial of suffrage, limited access to trial by jury, and exclusion from educational institutions.²³⁹

In a short space of six paragraphs the convention summarized the wrongs of slavery and segregation. By combining the wrongs of northern segregation with the harms of slavery, the delegates made a strong statement to their northern white audience about the inextricable relationship between slavery and racial caste. This listing also served as a set of categories essential to freedom—family, labor, bodily integrity, safety, shelter, education, religion, arms bearing, voting, jury trials. Moreover, the document asserted that denial of these rights was done forcibly by fellow Americans, thus implying a guilt and responsibility on the part of white Americans not just to eliminate the

234 1864 National Convention, *supra* note 124, at 41.

235 *Id.* at 41–42.

236 *Id.* at 41.

237 *Id.*

238 *Id.*

239 *Id.* at 41–42.

wrongs, but to re-set the starting positions.²⁴⁰ This was, at bottom, the basis for a demand for equality of opportunity as an affirmative principle.

Having set the stage, the delegates quickly stated their basic rights claims. Just as with the list of wrongs, they first declared something many white sympathizers would clearly agree with: an immediate end to slavery because “all men are born free and equal.”²⁴¹ Next, reflecting the ideas developed in conventions and the Black public sphere over the prior 25 years, the delegates asserted not only a right to remain in America (a right of nativity and also an anti-colonization statement) and to claim to American citizenship (“for here we were born, for this country our fathers and our brothers have fought”) and also a right to “the full enjoyment of enfranchised manhood, and its dignities.”²⁴² Then, in the third paragraph, they come to the broadest statement of rights in the document:

[A]s citizens of the Republic, we claim the rights of other citizens. We claim that we are, by right, entitled to respect; that due attention should be given to our needs; that proper rewards should be given for our services, and that the immunities and privileges of all other citizens and defenders of the nation’s honor should be conceded to us. We claim the right to be heard in the halls of Congress; and we claim our fair share of the public domain, whether acquired by purchase, treaty, confiscation, or military conquest.²⁴³

This deceptively short statement did a lot of work for the delegates. It was significant that they set up the paragraph with the assertion, in the second paragraph, of a historically grounded right to full membership. As we saw throughout the Black convention movement, this was a foundational point in African American claims to equal respect and worth. This citizenship claim, based as it was on African Americans’ long history in the country and right of nativity, could have morphed into an ascriptive nativism not uncommon among white Americans.²⁴⁴ Yet significantly, the Syracuse delegates avoided such moves, instead simply making their own historical claim to belonging. Moreover, they did so in order to claim the “full enjoyment of enfranchised

240 As Hugh Davis observed, the Convention delegates were quite careful to “find some balance between chastising white America for its long history of racial injustice and hypocrisy and recognizing that the rights they sought could only be attained with the assistance of sympathetic whites.” Davis, *supra* note 219, at 21.

241 1864 National Convention, *supra* note 124, at 42.

242 *Id.*

243 *Id.*

244 See, e.g., Jay Rubin, *Black Nativism: The European Immigrant in Negro Thought, 1830-1860*, 39 *PHYLON* 193 (1978) (citing some instances of this nativism in speeches from Black leaders but noting the general rejection of the nativist Know Nothings by Black abolitionists and that African American attitudes were shaped more by the extent to which immigrant communities adopted American ideas of white supremacy).

manhood, and its dignities.”²⁴⁵ Interestingly they did not simply claim a right to suffrage but also described the “full enjoyment” of suffrage and “its dignities.” For these delegates suffrage stood for more than just the political power—although that was certainly important. Suffrage also meant a dignified membership, a recognition, a showing of respect. Here we begin to see how, for Black leaders, having the ballot, and the access to political organization and power that came with it, were social characteristics as much as they were political assets.

This idea of dignified membership helps us grasp the full meaning of the third paragraph, quoted above. First, notice what the paragraph does not do. The authors had just previously listed, in the paragraphs depicting the wrongs and injuries, the problems one would expect to be followed with a then-standard set of civil rights claims: right to marriage, rights to contract and property ownership, access to courts. Indeed, these would come to be the rights protected by Congress’s 1866 Civil Rights Act.²⁴⁶ Yet, important as those were, they did not make up the delegates’ list, at least not directly. Rather, the authors engaged in a type of rhetorical syncopation, changing the expectation by shifting the emphasis, though not the theme. Although they claimed the “rights of other citizens,” the first right they listed was “respect.”²⁴⁷ Having eschewed the more standard form of rights-listing, the Convention instead asserted that citizenship was first and foremost a matter of social recognition in civil society. This “right of respect” or “right of recognition” framed the other rights and reflected the experiences of the members of the Convention and the people they represented. This was an understanding of rights that

245 1864 National Convention, *supra* note 124, at 42.

246 Civil Rights Act, 14 Stat. 27 (1866). The Act mentioned rights of contract, property, and access to courts explicitly. *Id.* at sec. 1. The right to marry was at the time seen as both an aspect of the right to contract and as a basic right of freedom right protected through the language of the Act that ensured the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” See, e.g., Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 276–90 (1999) (discussing marriage as a recognized right of freedom implemented by the Civil Rights Act and through the Freedmen’s Bureau); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 24–59 (1998) (noting how marriage was seen as an aspect of contract rights and exploring complex relationship between marriage, contract, and labor from the abolitionist movement through Reconstruction); Laura F. Edwards, “*The Marriage Covenant Is at the Foundation of All Our Rights*”: *The Politics of Slave Marriages in North Carolina after Emancipation*, 14 L. & Hist. Rev. 81, 100–24 (1996) (studying the legal and political recognition of marriages of formerly enslaved couples in North Carolina during Reconstruction).

247 1864 National Convention, *supra* note 124, at 42.

fused the basic civil rights traditionally associated with liberty with the social recognition that was the essence of equality.

Next, the Convention emphasized that “due attention” be given to “our needs.”²⁴⁸ Again deviating from a more traditional understanding of rights, the authors here characterize needs as rights. But what did they mean by “needs?” Although not specified in that paragraph, the preceding list of wrongs conveyed the content: religion, education, self-government, family, home, the “products of our labor.”²⁴⁹ All of these would be aspects of the basic elements of respected citizenship. This was a baseline approach to citizenship that equated needs-based claims with rights claims. And, although one could characterize remuneration as one of the needs, the authors said something slightly different: “proper REWARDS should be given for our services.”²⁵⁰ This phrase suggests fair payment for labor, but also something more. The dispute of unequal pay for military service was very much in their minds (it was listed in the Wrongs), as was the fact that such service had turned the tide of the war. Service here seems to have meant not just service to individuals through labor but also service to the nation, and it ties the rewards of service to their other claims to suffrage and citizenship rights. This point was repeated with the next clause: “the immunities and privileges of all other citizens and defenders of the nation’s honor should be conceded to us.”²⁵¹ This reference to privileges and immunities, along with a general statement of rights, seems to call on an encompassing, cultural understanding of the phrase “rights, privileges, and immunities” a phrase used in previous Black conventions²⁵²—rather than a more precise legal definition. And, by way of emphasizing their point, they staked a claim to a “fair share” of the public lands—highlighting the ongoing debates over how much land the formerly enslaved could obtain, work, and own, an idea to which the Lincoln administration had lent some support.²⁵³

The Convention also authored an Address of the Colored National Convention to the People of the United States.²⁵⁴ That document begins with

248 1864 National Convention, *supra* note 124, at 42.

249 *Id.* at 41.

250 *Id.* at 42.

251 *Id.*

252 *See, e.g., supra*, text accompanying notes 52–53.

253 *Id.* The administration, and especially Treasury Secretary Chase and Secretary of War Stanton, had supported the use of the Confiscation Acts to enable the freedmen to obtain land and personal property. *See* DOUGLAS EGERTON, *THE WARS OF RECONSTRUCTION* 98–100 (2014).

254 1864 National Convention, *supra* note 124, at 43. There is some confusion over who authored the Address. The Address is listed in the convention minutes as having been prepared by the Business Committee, which was chaired by John Mercer Langston. *Id.* at 16–17, 40. Hugh Davis indicates

what was a common statement of Black Reconstruction's foundational principles: "complete emancipation, enfranchisement, and elevation of our race[.]"²⁵⁵ The delegates apparently feared some slippage in the Republican Party's commitment to abolition (especially after a recent speech by Secretary of State Seward), so the Address devoted substantial attention to the hypocrisy of the Union fighting a war to end slavery and then attempting to end the war by agreeing not to end slavery.²⁵⁶ The delegates argued that such a failure to end slavery would instead create perpetual war, a point that showed the underlying radicalism embraced by all Black leaders once the war had begun.

The balance of the Address took up the issue of what next: what would freedom mean and what beyond abolition was required to see it through? As was almost always the case for African American speakers of the time, the Address argued that suffrage was the most important right of freedom. In a passage that directly confronted the more conservative white argument in favor of carving apart liberty and citizenship into discrete levels or stages, the Convention responded with a defense of the primacy of suffrage:

We are asked, even by some Abolitionists, why we cannot be satisfied, for the present at least, with personal freedom; the right to testify in courts of law; the right to own, buy, and sell real estate; the right to sue and be sued. We answer, Because in a republican country, where general suffrage is the rule, personal liberty, the right to testify in courts of law, the right to hold, buy, and sell property, and all other rights, become mere privileges, held at the option of others, where we are excepted from the general political liberty.²⁵⁷

The Declaration of Wrongs and Rights had intentionally not embraced the listing of liberal rights such as testimony, contract, and property, as its main goal; the Address explains why. In a republic founded on popular suffrage, voting is the main guaranty of all other rights. "Personal liberty" cannot be preserved, if it can even be realized, without "political liberty." For Black people who had lived in the Jim Crow North, this point was especially

that Peter Clark of Cincinnati, who was on the committee, wrote the Address. Davis, *supra* note 179, at 20. Philip Foner stated that Frederick Douglass wrote the address. 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS: THE CIVIL WAR, 1861-1865 49 (Philip S. Foner, ed. 1952). David Blight describes it as "Douglass's speech." BLIGHT, *supra* note 109, at 441. This confusion highlights one of the points of this article, which is that there is value in seeing convention materials, and especially the collectively approved documents, as themselves collective statements.

255 1864 National Convention, *supra* note 124, at 43. See also Henry Highland Garnet, "Let the Monster Perish" sermon delivered in the Hall of the House of Representatives, February 12, 1865, published as *A Memorial Discourse* by Rev. Henry Highland Garnet [hereinafter Garnet, Memorial Discourse], at 89 ("Emancipate, Enfranchise, Educate"), <https://archive.org/details/memorialdiscourse00garn/page/88>.

256 1864 National Convention, *supra* note 124, at 47-55.

257 *Id.* at 59.

important. They knew personally that access to this first level of liberal rights provided them little guaranty of security, especially as they looked west to states that excluded free African Americans.²⁵⁸ These delegates also suffered severe disabilities under Jim Crow laws and customs that restricted their education, their economic mobility, and their social status and dignity. These were the claims and complaints that Black delegates had expressed at numerous conventions throughout the previous thirty years, and when they wrote in 1864 that rights become “mere privileges, held at the option of others” they stated not an abstract idea of rights but a lived experience of rights that were restricted, impeded, and burdened. The right to contract meant far less for a class of people barred from the legal profession than it did for the dominant class.

The Address also confronted other aspects of suffrage. There was an ongoing debate, both within the Black public sphere and more generally, about whether suffrage was a natural or “conventional” right. While most Black leaders characterized it as a natural right and therefore essential to citizenship, some others accepted that it depended on the conventions, habits, and structures of societies. The Address argued that the debate itself was moot.²⁵⁹ With Black Americans having fought for liberty and the Union in the Civil War, they had “fully earned the elective franchise” and white Americans had “contracted an obligation to grant it.”²⁶⁰ While this difference would become much more problematic for women’s suffrage in the coming years—the reliance of Black men on a martial connection to suffrage and full citizenship would deepen the gender divide between Black male civil rights claims and women’s suffrage and rights advocates after the War²⁶¹—for Black men still fighting and dying in battle, the connection was too plain to not make a part of their argument.

The ways in which military service influenced the Convention’s understanding of citizenship also appears in the listing of disabilities which the delegates suffered as an extension of the slave power’s influence on the nation. In an extended paragraph the authors listed numerous changes and harms that they had experienced or foresaw if slavery were not expunged, including harm

258 See generally Litwack, *supra* note 51.

259 The Address authors clearly favor the natural rights view, calling it implicit in the Declaration of Independence, and stating that seeing suffrage as conventional places it on an “uncertain foundation.” 1864 National Convention, *supra* note 124, at 57.

260 *Id.*

261 On the tensions raised between Black male suffrage claims and women’s suffrage claims, see MARTHA S. JONES, *ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900* 140-47 (2007).

to specific constitutional rights. They feared that this could cause white Americans to “take the musket from the shoulders of our brave Black soldiers, deny them the constitutional right to keep and bear arms, exclude them from the ballot-box,” and deny them free speech “in and out of Congress” and the “right of peaceably assembling.”²⁶² Given the recent attention by our modern Supreme Court and legal scholars to Reconstruction-Era views of the right to bear arms,²⁶³ it is interesting here to see not only the direct reference to the Second Amendment right, but its connection to the arming of soldiers in the nation’s defense. For these authors writing in wartime, the right to bear arms was quite precisely connected to the military service of their brethren and to claims to full citizenship. It is not clear from this context how broadly the right to bear arms was understood, however. The tight connection made between the right and the right to serve in the nation’s military may indicate that the delegates saw the right as more collective than individual, and that they were not considering it as part of a general right of self-defense. On the other hand, the fact that it was also closely tied to the right to vote makes it seem more individualist. But even that interpretation should be tempered by the fact that each of the rights they discuss—assembly, arms bearing, and voting—were rights expressed collectively and for the purpose of protecting the safety and rights of the Black community. Thus, as was the case in the antebellum conventions, it may be that modern conceptions that see individualist and collectivist rights as distinct may not very well explain the understanding of nineteenth century African American leaders.

Another debate taken up in the Address was the question of what restrictions could fairly be placed on suffrage. For educated, middle-class African Americans in the north, this question forced them to confront some of the biases linked to their racial uplift ideology. For instance, as Kate Masur has noted, African American advocates for Black suffrage in the District of Columbia in 1866-67 tended to connect the right to vote to the duties of

262 1864 National Convention, *supra* note 124, at 47.

263 *See e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 847 (Thomas, J., concurring) (discussing the public understanding of the Fourteenth Amendment at the time of its ratification in relation to the right to bear arms). *See generally* STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* (1998) (tracing the “adoption of, and . . . interrelationship between[] the Fourteenth Amendment and the civil rights legislation passed during Reconstruction, particularly focusing on the right to keep and bear arms”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131 (1991) (discussing changes in the application of the Bill of Rights as a result of the Fourteenth Amendment).

taxpaying and even to property ownership.²⁶⁴ The underlying question, of course, was whether the achievements of the Black community—property ownership, taxpaying, military service, education—were being used as proof that all Black men should have the right to vote on par with white men, including new immigrants, or whether such indicia of “worth” would themselves become limits on the right, limits which, even if formally applied to all voters would still be used to exclude Black men particularly.²⁶⁵ The Address handled this point with a pragmatic appeal to white Republicans. The authors argued presciently that the white South would be “characterized by a sullen hatred towards the National Government. It will be transmitted from father to son, and will be held by them ‘as sacred animosity.’”²⁶⁶ Treason defeated in battle will remain under the surface. “[F]or a long time that country is to be governed with difficulty. We may conquer the Southern armies by the sword; but it is another thing to conquer Southern hate.”²⁶⁷ The surest way to retain control of the South, the Address argued, was to “give the elective franchise to every colored man of the South who is of sane mind, and has arrived at the age of twenty-one years” and they would have millions of citizens loyal to the federal government.²⁶⁸ Not only did the delegates at this Convention anticipate almost precisely the situation in the Reconstruction South and the eventual policy of Republicans, they also saw the need to embrace a broad-based suffrage among the destitute freedmen. The question of what, other than race, would constitute acceptable limits on suffrage without violating its fundamental nature would continue to trouble Black and white Republicans during Reconstruction, but the embrace of suffrage by the Syracuse Convention staked a strong claim to a broadly egalitarian suffrage principle as Reconstruction began.

264 MASUR, *supra* note 59, at 131–34. After the war white Republicans actively debated Black suffrage, and a “qualified” suffrage limited to education or property was seen as a compromise position. *Id.* at 139. President Lincoln supported qualified suffrage in his final speech on Reconstruction in April 1865. See LOUIS P. MASUR, LINCOLN’S LAST SPEECH: WARTIME RECONSTRUCTION & THE CRISIS OF REUNION 9–10 (2015). Masur reprints the speech at pages 189–93. The delegates to the Syracuse convention would have well understood the dangers of these qualification, having experienced them in some northern states already, including in New York.

265 On literacy tests as a “reform” movement in the mid- and late-19th century, see ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 141–44 (2000). Some advocates for women’s suffrage also advanced the “worth” or qualifications argument, to the point of producing full-throated racism by leaders such as Elizabeth Cady Stanton. See, e.g., MASUR, *supra* note 59, at 178–88 (discussing Stanton and others debating women’s suffrage and Black male suffrage in D.C.).

266 1864 National Convention, *supra* note 124, at 61.

267 *Id.*

268 *Id.*

Finally, the Convention raised some complex social and cultural ideas about the nature of race prejudice and what that might mean for efforts to address civil rights. As we saw, the Convention's Address sought to bridge the discussions about ending slavery and the growing debates about what freedom would mean and whether it would include enfranchisement. The way the Address connected these two points was particularly insightful, and reveals the sophistication of the delegates in recognizing and trying to manage American racial dynamics. The Convention wrote:

We have spoken of the existence of powerful reactionary forces arrayed against us, and of the objects to which they tend. What are these mighty forces? . . . The first and most powerful is slavery; and the second, which may be said to be the shadow of slavery, is prejudice against men on account of their color. The one controls the South, and the other controls the North. Both are original sources of power, and generate peculiar sentiments, ideas, and laws concerning us. The agents of these two evil influences are various: but the chief are, first the Democratic party; and, second, the Republican party. The Democratic party belongs to slavery; and the Republican party is largely under the power of prejudice against color. While gratefully recognizing a vast difference in our favor in the character and composition of the Republican party, and regarding the accession to power of the Democratic party as the heaviest calamity that could befall us in the present juncture of affairs, it cannot, be disguised, that, while that party is our bitterest enemy, and is positively and actively reactionary, the Republican party is negatively and passively so in its tendency. What we, have to fear from these two parties,—looking to the future, and especially to the settlement of our present national troubles,—is, alas! only too obvious.²⁶⁹

For the conventions' delegates in 1864, it was plain that racial prejudice was part and parcel of slavery: it was, they said, slavery's shadow. Importantly, the convention was not speaking only about the remnants of slavery in law, such as facially oppressive laws like the Black Codes of the South or the Jim Crow laws of the North, even though these were important concerns for the delegates. Their point extended to the "sentiments" and "ideas" regarding race, not just race-based laws. Just what did this mean?

To better understand what they were saying, it helps to also consider a passage from later in the Address concerning the need for equal laws:

We believe that the highest welfare of this great country will be found in erasing from its statute-books all enactments discriminating in favor or against any class of its people, and by establishing one law for the white and colored people alike. Whatever prejudice and taste may be innocently allowed to do or to dictate in social and domestic relations, it is plain, that in the matter of

269 *Id.* at 48–49.

government, the object of which is the protection and security of human rights, prejudice should be allowed no voice whatever.²⁷⁰

How can these passages be reconciled? The first emphasizes that prejudice is the shadow of slavery, and that its tentacles extend beyond laws into the ideas and sentiments of the people. Slavery—what Black abolitionists had long described as a “Monster”²⁷¹—will continue in America so long as this shadow covers the sentiments of the people. Yet the second passage seems to say that prejudice in private lives—“social and domestic relations”—is relatively innocuous so long as it has no place in law or government. The very idea of prejudice seems to shift between these passages, full of destructive power in the first while potentially innocent in the second. Resolving this problem is important, not only for accurately reading the meaning of the Convention, but also because the distinction between “political” and “social” rights was contested ground on which Reconstruction and post-Reconstruction ideas of civil and citizenship rights were forged.²⁷²

There are a couple of ways to harmonize these passages. The second passage is focused on the importance of removing race prejudice from law and government, so perhaps the authors were more casual about regulating or condemning private prejudice. This would explain their reference to prejudice and taste being “innocently allowed” to affect social and domestic relations. On this reading, “innocently” could have several possible meanings. It could mean that the prejudice expressed socially did not imply racial inferiority but was instead an erroneous but harmless or neutral set of presumptions about race. Or it could mean that prejudice, even if implying racial hierarchy, could nonetheless be rendered innocent in effect so long as it did not affect any position, standing, privilege, or benefit outside of the immediate relations of the parties (what the authors described as being allowed

270 *Id.* at 56.

271 *See supra*, text accompanying note 69.

272 The standard view of rights categories in the mid-nineteenth century is that Congress distinguished among civil, political, and social rights (and similarly distinguished among civil, political, and social equality). Civil rights included common law rights like the rights to contract and own property (rights covered by the 1866 Civil Rights Act); political rights included suffrage, office holding, and jury service; social rights covered interpersonal and private interactions. *See FONER, Reconstruction, supra* note 149, at 231 (noting the distinctions among natural, civil, political, and social rights); JACK BALKIN, *LIVING ORIGINALISM* 222–26 (2011) (outlining the tripartite theory of citizenship). Social equality was considered to be a personal matter wholly outside legal protection. There is a danger, however, seeing these categories as fixed or unified. As the discussion in the text here shows, this was contested ground: Black advocates generally sought to reduce the scope of the social equality “exemption” and to expand the idea of civil equality and political equality to cover many quasi-private areas. *See, e.g., MASUR, supra* note 59, at 161–62, 192–93 (discussing the views of Black leaders on measures to reduce inequality).

“no voice whatever”). This second view would mean that the delegates were willing, from a pragmatic perspective, to concede a certain latitude for white supremacist feelings in personal contexts, but hoped the elimination of an operationalized white supremacy would be sufficient to achieve full equality. This second reading is probably more consistent with the fact that many African Americans found they needed to speak of race prejudice and equality in a way that did not trigger white fears of interracial sexual relations, a point supported by their linking of the “social” with the “domestic”.²⁷³

But this still leaves the question of what the authors meant in the first passage when they asserted the dangers of prejudice in sentiments and ideas. While it is possible the two passages are simply not compatible and that the authors expressed two different views about social prejudice, there is value, I think, in considering a consistency. Notice that they chose the word “sentiments” here rather than “tastes.” Although sentiment was often used then, as now, to mean feelings, it also had a particular meaning in the nineteenth century.²⁷⁴ Sentiment, when used in a collective or public context, often meant more than feeling, something more akin to a moral sensibility. It was collective “right” feeling, not just a personal view and not even an aggregated public opinion (though it sometimes seems to have been that as well). This was how the term was used, for instance, in reformist collective documents called Declarations of Sentiments.²⁷⁵ If this is what the Address authors intended, then they were speaking to a middle space between the domestic and the political. This was a space where people formed moral senses about their fellow humans, and where those senses could be improved or subverted. The spaces where public sentiments governed, then, would be the lecture halls, social clubs and meetings, schools, churches, and other public gatherings that were not expressly political (although they could be) but

273 The opposition to “social equality” was often a thinly veiled metaphor for the white fear of interracial marriage and sexual relations, and Black speakers were loath to hit this nerve in their white audiences. On the problematic concept of “social equality” and the unstable categories of equality before and during Reconstruction, see Kate Masur, *Civil, Political, and Social Equality After Lincoln: A Paradigm and a Problematic*, 93 MARQ. L. REV. 1399 (2010).

274 On 19th century conceptions of sentiments, see GLENN HENDLER, PUBLIC SENTIMENTS (2001).

275 The Seneca Falls Declaration of Sentiments of 1848 is the best known of such documents. See Seneca Falls Declaration of Sentiments, *supra* note 176. We also saw such a title used for some documents in the Black conventions of the 1840s. See, e.g., 1848 National Convention, *supra* note 150, at 12. And this styling for a collective statement was used by the American Anti-Slavery Society in its important convention in 1833. See The Constitution of the American Anti-Slavery Society: with the Declaration of the National Anti-Slavery Convention at Philadelphia, December, 1833 and The address to the public, issued by the Executive Committee of the society, in September, 1835 at 6, available at Library of Congress, Digital Collections, Slaves and the Courts, 1740 to 1860, <https://www.loc.gov/item/2001615799/>.

out of which moral sentiment and ideas formed to influence and guide politics, government, and law. Such spaces were neither public, in our sense of governmental, nor private, in our sense of personal, familial, or social. These were the spaces and institutions of civil society, standing between the governmental and the personal.

Considering that the Convention delegates were themselves meeting in such a space and that their primary mission was to create a network of organizations in which such community-building institutions would engage, educate, and form the newly constituted citizens of their local communities, it makes sense that they would use this term “sentiment” to convey this public moral space. Understood this way, the type of prejudice to which the first passage above refers is not the prejudice of personal relations that affected sexual relationships, marriage, and friendships, but the public prejudices that governed access to civil society: barriers to education, the professions, churches, reformist organizations, labor unions, etc.²⁷⁶ The Convention thus articulated three spheres, not two: political (governmental and legal), societal (civil society), and personal (social and domestic). This difference in typology, and the contest over how to divide and define it, was a pivotal point in the legal-cultural understanding of civil rights, public/private action, and a range of other modern concepts.

Through both its organizational/structural achievements in founding a national Equal Rights League and in its rich public documents, the National Convention at Syracuse stands as one of the most important events for the nineteenth century civil rights movement. It was a pivotal transition convention between the era of abolition and the re-founding of the country during Reconstruction. The Convention collected some of the key components of the antebellum Black Convention Movement—its critique of white supremacy and racial prejudice, its articulation of a substantive, civil society-based idea of freedom and equality—and refocused it toward a positive project with the potential to enact some of those ideas and principles through political, legal, and societal change. And where earlier national conventions had often failed to extend their influence and projects, the Syracuse Convention set the stage for an explosion of Black activism across the country.

276 If my reading here is right, churches would have been viewed as more “public” than they are today. The fact that Charles Sumner’s original Civil Rights Bill included churches as public institutions should be a clue about this difference in meaning between the public and the private. See CONG. GLOBE, 42th Cong., 2d Sess. 244 (1871) (setting out text of Senator Sumner’s bill).

V. IMPLICATIONS FOR CONSTITUTIONALISM: METHOD AND SUBSTANCE

Up to this point this Article has taken an outside-in approach to constitutional discourse. I have analyzed the speeches and writings of the members of the Black Conventions, people who stood outside the legal and political institutions that created formal constitutional law, to consider their readings and imaginings of constitutional text and principles. In this section I want to step back and see what generalizations about constitutional meaning and method we can identify from this survey of the Black Convention Movement. In doing so, however, it is helpful to bear in mind that the source material themselves are not political or legal treatises. These were rhetorical documents, designed to persuade audiences, sometimes Black communities, sometimes white communities and legislatures, and most often both. They were not, therefore, focused on presenting structured legal analysis as one would see in a judicial opinion or systematic exegesis of law as one would find in a legal treatise. But this is also why these documents are important: the discourses evident in public settings, in conventions and meetings and speeches, reflect a more direct public meaning. They also reveal the ways in which constitutional discourse covered more than formal law, more even than formal politics. The ways in which people who were formally excluded from law-creation engage and conceive of the Constitution tells us things about constitutionalism that we cannot glean from official texts. Given the subsequent constitutional, political, and moral embrace of inclusion, it is even more important that we should take these ideas very seriously. And given that the very concepts being explored and developed in the Black convention movement were precisely the ones broadly adopted after the war—despite the fact that white lawmakers actively refused to adopt them before the war—makes this particular source of constitutional ideas essential to our constitutional history, culture, and collective understanding of the text itself. Thus, although I recognize that my effort here to find some coherence runs the risk of imposing an order on materials that is not there, in fact, I believe such an effort is necessary to any historical approach to constitutional meaning that takes seriously both inclusive equality and constitutional history.

The approaches to the Constitution taken at the Black conventions from the 1830s to 1865 encompassed ideas ranging from a major reconceptualization of constitutional history, to arguments about constitutional methods, to specific claims about the essential elements of a re-founded constitution that would establish freedom and full citizenship. Together these ideas reflect an aspirational approach to the Constitution that was

simultaneously critical and hopeful, an approach that saw the small “c” constitution of society as a necessary component of capital “C” Constitutionalism, and one that homed in on the critical aspects of civil society that were needed to realize freedom and citizenship on the ground. It also reflected a sophisticated understanding of racial prejudice as a widespread and dangerous obstacle to freedom and citizenship that required those oppressed by that prejudice to take active and collective steps to defeat the “monster.”

A. The Conflicted Constitution and a Constitution of Aspiration

For antebellum Black Americans, the Constitution represented a fundamental contradiction. Simultaneously a protection for racial slavery and the foundation of a political society dedicated to liberty, the Constitution, like the country itself, embodied an irresolvable conflict. This point was well articulated in the Ohio State Convention of 1851, where H. Ford Douglas, William Day, and Charles Langston debated the legitimacy of the Constitution and the moral and strategic choices that confronted Black people as they sought to end slavery and secure equal rights.²⁷⁷ Viewed together, their positions reveal a complex and layered approach to the Constitution.

As we saw, Douglas set forth the Garrisonian view that took the Constitution’s protection of slavery at face value, and which saw the Constitution as comprised of both the text and the interpretations and applications of text by the ratifiers and by subsequent legislators and judges.²⁷⁸ That Constitution, declared Douglas, enslaved and oppressed African Americans, was patently immoral, and should not be supported by Black people through participation in elections or other mechanisms founded on such an anti-liberty document.²⁷⁹ Day countered that rather than focusing on the applications or constructions of the text, it was better to look to the text and its specific language—language that did not mention slavery and that did, in the Preamble, declare a commitment to justice and general welfare and in the Fifth Amendment assert its protection of life and liberty.²⁸⁰ Day thus rejected textual evidence that condoned slavery, as well as later pro-slavery constructions of the text and the ratifiers’ intentions to protect slavery, resting

277 See *supra*, Section III. D.

278 *Id.* See also 1851 Ohio Convention, *supra* note 195, at 8 (“I hold, sir, that the Constitution of the United States is pro-slavery, considered so by those who framed it, and construed to that end ever since its adoption.”).

279 See 1851 Ohio Convention, *supra* note 195, at 9 (“Now, I hold, in view of this fact, no colored man can consistently vote under the United States Constitution.”).

280 *Id.* at 10.

his commitment to the Constitution on more general textual evidence and a more general principle of liberty.²⁸¹ For his part, Langston set forth a hybrid position, fully accepting the dismal view of the Constitution and constitutional law described by Douglas but at the same time viewing the Constitution as a *potential* source of protection.²⁸² Langston fully accepted the violence and oppression enabled by the Constitution and did not shrink from blaming the document for the support of slavery and racial prejudice. Yet he also embraced the hopeful Constitution, the idea that with the substantial effort of Black activists and their white allies there remained a possibility of a new Constitution—whether through new text or merely new interpretations was not yet clear—that fully supported liberty and equal rights and rejected racial slavery.²⁸³

In an important sense they were all right. Or, rather, what can be identified as an African American constitutionalism encompasses all three perspectives. Indeed it is precisely such multivocality that makes the study of the Black Conventions so helpful. While it may be tempting to view a single perspective as the dominant view, or alternatively to reject any attempt to divine a perspective in the face of disagreement, I suggest that we see the debate here as a coherent whole. The delegates were not, like a political convention, representing different and competing interests. They were instead expressing the views of people with a similar interest—the elimination of slavery and securing of rights for all Black people. Or, as Langston put it, they sought to “effect [] our liberties, and secur[e] our political, religious, and intellectual elevation.”²⁸⁴

This position, I suggest, reflects a Constitution of Aspiration.²⁸⁵ On the one hand, an aspirational view of the Constitution fully accepts the radical critiques of the Constitution and its dominant interpretations. Like Douglas and Langston, it attributes fault to the text itself as well as to the applications of the text in law and politics. Yet it also sees in the text a counterweight to these

281 *See id.* (“If [the Constitution] says it was framed to ‘establish justice,’ it, of course, is opposed to injustice; if it says plainly no person shall be [‘deprived of life, liberty, or property, without due process of law,’—I suppose it means that, and I shall avail myself of the benefit of it.”) (emphasis in original).

282 *Id.* at 11.

283 *Id.*

284 *Id.*

285 On the idea of the aspirational constitution, *see generally* Robin West, *The Aspirational Constitution*, 88 N.W. U. L. REV. 241 (1993); Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009); BALKIN, *supra* note 198.

flaws in the basic principles expressed in the text, principles that Day highlighted, such as justice, liberty, and due process.

On this reading the text is, like the Founding itself, ambiguous: it supports a pro-liberty, human rights view but also a pro-slavery, oppression, and caste system interpretation. For antebellum Black activists, the struggle was whether to reject the document, and perhaps the country, or to engage it. Both Langston and Day, and most members of the conventions, chose engagement. For them the resolution to the constitutional conflict lay in their own activism, in their forward-looking efforts to gain political power and change law and social structures. It was their own activism that would produce a more just constitution and constitutional practice. The aspirational Constitution was one that would be made and remade by their own efforts.

The Declaration of Independence played an important role in this Constitution of Aspiration. As the earliest Black Convention wrote in 1831, “the truths in the [Declaration] are incontrovertible, and [the Constitution] guarantees in letter and spirit . . . the rights and immunities of citizenship.”²⁸⁶ They read the documents together, with the rights and privileges of national citizenship that they believed were part of the Constitution being in “letter and spirit” an implementation of the truths of equality and rights to life, liberty, and the pursuit of happiness.²⁸⁷ This was a principle-based idea of constitutionalism, one in which the ideals expanded the interpretations of text rather than the text limiting the scope of the ideals. It was a principles-and-text approach to constitutional interpretation.²⁸⁸

But just as the Declaration inspired a principles-based interpretivism, it also sounded a more radical idea: the Revolution that it represented was still being fought. This is why Henry Highland Garnet used the Declaration as a tool of critique, a measuring stick to judge white America’s legal and political failure. “[T]he declaration was a glorious document,” he thundered, but white Americans’ cry for “LIBERTY OR DEATH” was hypocrisy, for “[w]hen the power of Government returned to their hands . . . they [] added new links to our chains.”²⁸⁹ The Constitution thus measured poorly when judged against

286 1831 National Convention, *supra* note 13, at 4–5.

287 *See supra*, text accompanying notes 48–49.

288 By “principles-and-text” I mean to compare this approach to, and distinguish it from, Jack Balkin’s text-and-principle method. *See* JACK BALKIN, *supra* note 269, at 3–20 (2011) (introducing the “text and principle” theory, which “requires fidelity to the original meaning of the Constitution, and, in particular, to the rules, standards, and principles stated by the Constitution’s text”).

289 1843 National Convention, *supra* note 102, at 4. A more extensive critique of antebellum society based on the Declaration appears in Frederick Douglass’s great oration, *The Meaning of July Fourth*

the glory of the Declaration's proclamation of equality and liberty. Liberty or death remained, for Garnet, the appropriate response for Black Americans. The liberty Revolution was still alive; the Founding was unfinished. For Garnet, and for an increasing number of leaders in the Black public sphere through the Civil War, the Declaration, as well as the liberty-affirming portions of the Constitution, were a source of immanent critique.²⁹⁰ Their constitutionalism, while certainly a constitutionalism of hope and aspiration, was itself founded on a method of internal and continuous critique of constitutionalism itself.²⁹¹

B. Meaning and Method

What this combination of critique and aspiration produced was a reformulation of constitutional ideals, including those ideals expressed in textual forms. This is most apparent in the concept of national citizenship that was uniformly embraced by the Convention Movement. Even though the original Constitution contained only a thin statement of citizenship in Article IV, and even though that had been minimized in legal application, the Convention Movement embraced citizenship as both national and as rights-bearing. As we saw in the 1831 Convention where the delegates identified the rights and privileges of citizenship as the constitutional vessel containing the Declaration's ideals of equality and liberty, citizenship was taken to have a substantive content and a national scope.²⁹² It also was a source for the Constitution to act directly upon citizens, protecting them from invasions of rights and privileges by both state government and even potentially private (or more accurately quasi-private) actors. This was a fundamentally radical and transformative view of the antebellum constitution, one at odds with the dominant constitutionalism and only loosely tethered to the text, but also one

for the Negro, July 5, 1852. This speech is widely available, including online here: https://masshumanities.org/files/programs/douglass/speech_complete.pdf and <https://www.the-root.com/what-to-the-slave-is-the-fourth-of-july-1836083536>.

290 Immanent critique is a concept developed in modern critical theory. Robert Antonio nicely described it this way: "Immanent critique attacks social reality from its own standpoint, but at the same time criticizes the standpoint from the perspective of its historical context." Robert J. Antonio, *Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx, and Contemporary Thought*, 32 *BRIT. J. SOC.* 330, 338 (1981).

291 This idea—that African American constitutionalism was both immanent critique and aspirational and creative—is similar to Derrick Spires's point about antebellum ideas of citizenship in Black print culture: "[B]lack theories of citizenship were both critical—defamiliarizing the ostensible naturalness of what citizenship was becoming—and reparative in their articulation of what might have been and what could still be." SPIRES, *supra* note 10, at 12.

292 See *supra*, text accompanying notes 47–48.

that would feed into the creation of a textually guaranteed national citizenship during Reconstruction.

The meaning of this newer American citizenship did not, however, rest upon traditional legal understandings of rights and privileges. Rather, in the Black conventions we see a more ground-up approach to considering what the essential aspects of citizenship should be. This is a crucial characteristic of the type of constitutionalism developed in the Black public sphere during this period, one that emphasized what could be called the Constitution of Lived Experience. To understand the scope and possibilities of the particular type of aspirational constitutionalism of the Black public sphere we need to look at what the speakers and writers saw as the essential aspects of what they conceived as full citizenship. This, it turns out, involved multiple activities and protections across a range of spheres—civil, political, and social.

A thorough exploration of this civil society conception of citizenship is beyond the scope of this Article, but one can glean the basic contours from the discussion above of the debates and activities in the Black Conventions. As we saw, the conventions frequently emphasized education, press, labor/employment, and suffrage as critical spheres for social participation as full citizens. Each of these areas was necessary on its own and was also intertwined with the other areas in ways that could produce a virtuous circle if all were met and a vicious circle if one or more were abridged. Thus, the delegates discussed how education, including both basic literacy and skills education as well as more advanced education, were critical for the elevation of Black Americans in status, wealth, respectability, and political power. Similarly, advances in labor and employment, whether in skilled trades in towns and cities or through landowning agriculture, were fundamental to the ability of Black Americans to achieve what the 1848 Convention described as the mutual dependency of independent citizens.²⁹³ The development of a press that could reflect the concerns and interests of African Americans and that could reach and mobilize Black readers was also seen as essential for the organization of African Americans in both civil society and as a political force.

Finally, and most significantly, the ability to vote was seen as the single most important right of citizenship. It was so important that it often was listed with emancipation as the one of the most essential demands made by conventions. As the organizers of the pivotal Syracuse Convention of 1864 phrased it in their general Address, the three demands were “emancipation,

293 1848 National Convention, *supra* note 150, at 19.

enfranchisement, elevation of the race.”²⁹⁴ The Syracuse Convention discussed “political equality” as the most important right after freedom and argued the demand was particularly urgent given the massive contributions of over two hundred thousand African Americans as soldiers.²⁹⁵ And even though the Convention suggested suffrage was a natural right on par with those listed in the Declaration, it pragmatically also argued that even as a “conventional right” the service of Black soldiers made it an obligation of the government: “we claim to have fully earned the elective franchise; and that you, the American people, have virtually contracted an obligation to grant it.”²⁹⁶ Then, in a series of rhetorical questions, the Convention drew out the fundamental nature of suffrage as a basic right:

Are we good enough to use bullets, and not good enough to use ballots? May we defend rights in time of war, and yet be denied the exercise of those rights in time of peace? Are we citizens when the nation is in peril, and aliens when the nation is in safety? . . . May we give our lives, but not our votes, for the good of the republic? Shall we toil with you to win the prize of free government, while you alone shall monopolize all its valued privileges?²⁹⁷

After asserting justice claims for suffrage as a citizenship right, the Convention then explained why, contrary to the view of many white Republicans, suffrage was even more important than the then-standard set of civil rights:

We are asked, even by some Abolitionists, why we cannot be satisfied, for the present at least, with personal freedom; the right to testify in courts of law; the right to own, buy, and sell real estate; the right to sue and be sued. We answer, Because in a republican country, where general suffrage is the rule, personal liberty, the right to testify in courts of law, the right to hold, buy and sell property, and all other rights, become mere privileges, held at the option of others, where we are excepted from the general political liberty.²⁹⁸

294 1864 National Convention, *supra* note 124, at 43. See also Henry Highland Garnet’s riveting sermon in the hall of Congress to celebrate the passage of the Thirteenth Amendment, “Let the Monster Perish,” in Garnet, Memorial Discourse, *supra* note 252, at 89 (“*Emancipate, Enfranchise, Educate.*”). Garnet was the first African American to deliver a speech in the Capitol building, a Sunday sermon to a large and interracial audience. See DAVID QUIGLEY, *SECOND FOUNDING: NEW YORK CITY, RECONSTRUCTION, AND THE MAKING OF AMERICAN DEMOCRACY 15-17* (2004); Henry Highland Garnet, *Let The Monster Perish*, BLACKPAST, <https://www.blackpast.org/african-american-history/1865-henry-highland-garnet-let-monster-perish/>. Quigley states that Lincoln invited Garnet to speak, but the original source indicates that the invitation came from the House chaplain and some Republican members of congress. See Statement of the Elders and Trustees of the Fifteenth Street Presbyterian Church, March 31, 1865, in Garnet, Memorial Discourse, *supra* note 253, at 16.

295 1864 National Convention, *supra* note 107, at 55-56.

296 *Id.* at 57.

297 *Id.* at 58.

298 *Id.* at 59.

Suffrage, like education, labor, and the press was fundamentally intertwined with all citizenship rights. Indeed, they argued, it was even more fundamental since it secured all other rights.²⁹⁹ To lose political power was to be at risk of losing all one's basic rights, a fact that Black northerners knew all too well from their antebellum experiences.

Yet it is also important to see that the Syracuse Convention did not speak of voting as merely an instrumental right. Rather, they saw suffrage as a key aspect of the broader social goal of full respect and dignity, or, in the deeply gendered language of the time, as an expression of "manhood."³⁰⁰ This idea of respect and dignity as itself a right, as itself an expression of both equality and liberty, tied together the different claims made at the conventions. And while "respectability" has often been described as a relatively conservative goal of the middle-class Black leaders of that period, we would be wrong to miss its more radical potential as a claim to a broad-based change to civil society. Indeed, we see in the Syracuse Convention an argument for freedom and rights as emphatically not limited to the rights to vote, testify, own property, and contract, but as a claim for access to a range of activities in civil society. The Black Convention Movement had been addressing, for many decades, the problems of exclusion from full citizenship. They had developed an understanding of the need for access to education, the professions, religious institutions, and other institutions of civil society, opposing restrictions that were "civil, political, social, or religious" and "in any manner derogatory to the universal equality of man."³⁰¹ Dignity and respectability were words that described this more granular understanding of equality as a function of civil society and not just legal institutions.

Moreover, they argued that the failure to implement this broader equality and the tendency of white governments to limit equality to the rights of

299 This position was eventually adopted by the Supreme Court, even if it has not been fully or consistently honored. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating that suffrage is a "fundamental political right because [it is] preservative of all other rights"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (observing that suffrage "is preservative of other basic civil and political rights"). The Court has more recently hedged on the "fundamentals" of the right by permitting state actions that potentially burden the right, see *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 181 (2008) (law mandating photo identification for voter registration is constitutional), and by limiting congressional power to enforce the right through preclearance, see *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (striking down the preclearance and coverage provisions of the Voting Rights Act of 1965).

300 1864 National Convention, *supra* note 124, at 42.

301 1848 National Convention, *supra* note 150, at 12.

contract, property, and court access amounted to “nominal freedom.”³⁰² This was freedom in name only, a formal freedom that masked the actual condition of continued oppression. As one convention put it, Black northerners in a Jim Crow society were merely “slaves of the community”; their nominal freedom to contract and own property and go to court did not prevent them from being victims of collective oppression.³⁰³ This was a deeper understanding of the problem of equality than was generally discussed in the dominant sphere, even among white Abolitionists (as the Syracuse Address pointed out).³⁰⁴ In many ways this analysis anticipated what would happen after Reconstruction, as formal legal equality became a mask for the full implementation of Jim Crow across the South and, to a lesser degree, in other regions as well. The problem of “nominal freedom” was an integral part of the Black public sphere’s understanding of the meaning of freedom, equality, and full citizenship.

Black northerners understood the nature of equality and freedom precisely because they had experienced its denial daily, and had been fighting so persistently against racial oppression. This is why one of the central points they also made through this period, a point that became a pivotal aspect of the Syracuse Convention, was how race prejudice was intimately connected with racial slavery. It was slavery’s “shadow,” extending the civil death of slavery to a kind of civil half-life in segregation. All of the disabilities of civil society that prevented the realization of full citizenship were the result, they argued, of a foundational racial animus among white northerners—sometimes including their allies in the abolitionist movement. The reason that they were denied access to institutions of civil society, despite their status as legal rights-holders, was due to the extensive reach of the monster that was race prejudice.

302 *See, e.g.*, 1843 National Convention, *supra* note 102, at 22 (describing the situation of Black northerners as follows: “the disabilities of the nominally free people of this country flow from slavery, and that while that heaven-daring system continues, our entire enfranchisement will be retarded.”). *See also* MINUTES OF THE STATE CONVENTION OF COLORED CITIZENS, HELD AT ALBANY, ON THE 18TH, 19TH, AND 20TH OF AUGUST, 1840, FOR THE PURPOSE OF CONSIDERING THEIR POLITICAL CONDITION at 12 (1840) (“[W]e hold the elective franchise as a mighty lever for elevating in the scale of society any people, and feel sensible that without it, WE are but nominally free, the vital means of our improvement being paralyzed.”); OFFICIAL PROCEEDINGS OF THE OHIO STATE CONVENTION OF COLORED FREEMEN: HELD IN COLUMBUS, JANUARY 19TH-21ST, 1853 at 4 (1853) (“[I]n the free states, the colored man is only nominally free.”).

303 1848 National Convention, *supra* note 151, at 18.

304 *See, e.g.*, 1864 National Convention, *supra* note 124, at 47–49.

C. Constitutional Directions

This analysis, which we see in the documents from the Black Convention Movement and which is reflected across a wider range of the speeches, articles, and other forums of the Black public sphere, carries important implications for how we should think about the meaning of the Reconstruction Amendments. Even though the Conventions discussed above were not directly addressing constitutional text and proposals, their general understanding of race, slavery, citizenship, and civil society suggests significant lines of inquiry about the Amendments that were adopted. Far more needs to be done to explore these points, but I will close with some suggestions about where this African American constitutionalism might lead on some particular constitutional issues.

1. Thirteenth Amendment as a Civil Rights Amendment

A persistent theme among the antebellum Black Conventions was the idea that racial prejudice, as experienced outside the slaveholding South, was merely an extension, or shadow, of slavery itself. African Americans understood, better than almost all white people (including white abolitionists), that American slavery was racial, and that white America's hypocritical efforts to harmonize slavery and liberty fueled the many-tentacled monster of race prejudice. Black northerners well knew that escaping formal slavery, slavery-in-law, did not mean the abolition of informal slavery, or what they called slavery to the community. Thus the Jim Crowism of the North, seen in both legal segregation and informal customs and practices of segregation and subordination, were just as much a part of slavery as were the chains that bound their family and friends to the south.

Ending slavery, therefore, also required ending prejudice. Freedom in a formal sense of legal abolition was merely nominal freedom, a freedom hardly worthy of the name. Under this view the abolition of slavery necessarily implied a commitment to the abolition of prejudice. It required, in the words of the Syracuse Convention, a change in public sentiments.³⁰⁵ For these leaders, a constitutional amendment ending slavery was plainly a civil rights amendment. American slavery was racial slavery, and its end must include the end of racial prejudice and oppressions. Whereas white congressmen debated

305 1864 National Convention, *supra* note 124, at 49.

whether the Amendment authorized congressional legislation on civil rights,³⁰⁶ for the delegates who attended the Syracuse Convention such questions merely reflected the weak-kneed nature of abolitionist understandings of American slavery. The abolition of slavery not only permitted the securing of civil rights, it required it. And what it required was not only the first-order rights to contract, property, and court access, but a complete elimination of prejudicial exclusion across civil society. Freedom necessarily included, they argued, suffrage rights, rights to integrated education, integrated professions, integrated religious institutions, desegregated public transportation, desegregated public theaters and inns, and myriad other points of access to the public sphere and civil society that comprised full freedom.

Thus, at bottom, only a broad reading of the Thirteenth Amendment can capture this vision of freedom developed in the Black public sphere. Modern scholars have suggested various versions of this view, including an anti-caste vision, a labor vision, and an abolitionist vision, among others.³⁰⁷ And while the precise contours of the meaning of the Amendment would require a

306 Compare CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (“[The Civil Rights Bill] is intended to give effect to [the Thirteenth Amendment]”) with CONG. GLOBE, 39th Cong., 1st Sess. 1291–92 (1866) (“[T]he enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic . . . is of the reserved powers of the States.”) and CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866) (“Can Congress confer citizenship upon persons who are excluded by the Constitution? The courts have uniformly decided that negroes are not citizens under the Constitution.”). See also LASH, *supra* note 4, at 113–44 (discussing the relationship between debates over the Civil Rights Bill and the Fourteenth Amendment).

307 There have been several excellent recent explorations of the possibilities for developing the much under-utilized jurisprudence of the Thirteenth Amendment. See, e.g., THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 8–12 (Alexander Tsesis ed., 2010) (exploring abolitionism’s influence on the passage of the Thirteenth Amendment); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 3 (2001) (“To understand the making of the [Thirteenth] amendment is to understand the fluid interaction between politics, law, and society in the Civil War era.”); Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1698 (2012) (describing Ashley’s theory of the thirteenth amendment “that addressed the intersectionality of racial and class-based oppression”); Jack M. Balkin & Sanford Levinson, *Panel I: Thirteenth Amendment in Context: The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1460 (2012) (noting that the Thirteenth Amendment was not limited to the abolishment of slavery but “cover[s] those forms of compulsory labor *akin to African slavery*”) (quoting *United States v. Kozminski*, 487 U.S. 931, 942 (1988)); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 437 (1989) (arguing that congressional debates on the thirteenth amendment “contain a . . . rich[] vision of constitutional reform” that encompasses “fair and just labor relations”). For a caution on these possibilities for doctrinal development, see Jamal Greene, *Panel III: The Limits of Authority: Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012). Dorothy Roberts has recently challenged us to connect antislavery abolitionist constitutionalism to modern prison abolitionism in ways that confront the perceived deficiencies of the Thirteenth Amendment. Roberts, *supra* note 1, at 108.

detailed and extended period of working out—something that the members of the Black conventions like Charles Langston understood quite well—there would have been no doubt among Black leaders of the time that legislative and judicial efforts to implement these ideas of freedom were authorized by a constitutional commitment to freedom in the first place. There is every reason to think that this understanding of the Thirteenth Amendment—its text and its principle—included the power and the duty for state and federal governments to eliminate all vestiges of race prejudice that affected the liberty and rights of Black people to be equal, respected citizens in American society.

2. *The Fourteenth Amendment, Citizenship, and Access to Civil Society*

If the Thirteenth Amendment included a commitment to full citizenship, then the Fourteenth Amendment, with its explicit guarantee of citizenship and its privilege and immunities, was, from the perspective of the Black public sphere, primarily a re-expression and further reification of this principle. It was not that the Thirteenth Amendment did not go far enough, but that there was a danger that white legislators and judges would not follow the Amendment's promise. White northerners had, after all, been inclined to see nominal freedom as enough. They needed a more definite articulation of the principles to force their hands. This was especially true given the fact that they faced a future of entrenched resistance to even the most basic ideal of freedom and racial equality in the postwar South.

Viewed this way, section one of the Fourteenth Amendment becomes a more detailed exposition of the Thirteenth Amendment's establishment of freedom. It is, in a sense, an interpretation of the Thirteenth Amendment, an explanation of what freedom should mean and how it should be achieved. For Black Americans reading the language of section one, it would have been natural to read the words citizenship and privileges as incorporating the very things Black northerners had been fighting for and discussing in conventions: education, access to professions, a free press, labor rights, land ownership, rights to bear arms and military service, among others. For people who lived the exclusions of segregation, citizenship and its privileges were not only formal legal statuses but were the stuff of daily experience. In this sense the Fourteenth Amendment would have implied an obligation for government to create the framework for full freedom and the elimination of race prejudice, to constitute, in law and practice, the Constitution's principles.

Moreover, seeing the Fourteenth Amendment as an exposition of the thirteenth would mean that the Fourteenth should be understood—

interpreted—with the ideals of full freedom in mind. Thus, for example, limitations on the Fourteenth Amendment that restrict it to state action and thus prevent legislatures or courts from addressing prejudice and segregation in non-governmental civil society would be plainly erroneous.³⁰⁸ As we saw with the Black Convention Movement, much of the means of implementing segregation and the denial of freedom occurred in the non-governmental public sphere. Achieving full citizenship and its respectability required addressing the sentiments of prejudice across civil society. This is simply impossible under a strict state action limitation. Indeed, the judicial imposition of a state action doctrine was a key component in the rejuvenation of Jim Crow at the end of Reconstruction, something that was all too familiar to people who had lived through both. The binary of the public-private distinction makes little sense if one sees freedom the way African Americans described it in the nineteenth century. This is not to say that there would be no distinctions at all—as we saw, the Syracuse Convention recognized distinctions between the public sentiments affecting civil society and the personal prejudices that presented no barriers to the social spheres of power and dignity. Such a civil society view of citizenship might well accept a range of regulations and relationships. It would not, however, see state action as an acceptable line.

3. *Suffrage as a Fundamental Right*

If a form of constitutionalism based in the Black public sphere would see the Fourteenth Amendment as an explication of the thirteenth, then it certainly would see the Fifteenth Amendment as the embodiment of the principle that suffrage was the most critical right of freedom and full citizenship. From this perspective, suffrage was already a right guaranteed by the Thirteenth Amendment (as a component of freedom) and the Fourteenth (as a basic privilege of citizenship). The Fifteenth Amendment was, like the Fourteenth, a further articulation of the commitment to freedom and equality. Unlike the dominant view among white Republicans, who temporized on Black suffrage during the drafting of the Fourteenth Amendment, Black leaders had seen suffrage as an essential right of citizenship since at least the 1830s.

308 See, e.g., *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“[Fourteenth Amendment] nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States.”). On the problems of the state action doctrine, see the still classic article by Erwin Chemerinsky, *Rethinking State Action*, 80 NW.L. REV. 503 (1985).

The Black public sphere's emphasis on voting as the pivotal right arguably would require rethinking current constitutional law. While the Supreme Court has at times regarded the right to vote as fundamental, it has also taken a light hand when faced with voting restrictions, such as voter ID requirements, felon disenfranchisement, limited polling locations, and other mechanisms that are justified as protecting against chimeric claims of voter fraud.³⁰⁹ A constitutionalism more deeply informed by the nineteenth-century Black public sphere would re-orient the prioritization of voting rights, requiring both a presumption against restrictive voting laws and a stronger burden to justify restrictions. This would be especially true for restrictions that had disproportionate effects on racial minorities, since the purpose of securing suffrage with the Fifteenth Amendment was to counter antebellum-style barriers to suffrage based on race. Otherwise suffrage rights become another form of nominal freedom, which Black leaders consistently exposed and opposed. Finally, this view of voting as fundamental could also impose a duty on government to make voting widely accessible in the same way that there would be a governmental duty to ensure that all citizens have access to education.

4. *Race Consciousness and Equality*

The problem of race-specific organizations and policies presented difficult questions for Black leaders at the antebellum conventions. Ultimately, however, the Black conventions recognized the importance of Black organizations—the conventions themselves, the Black press, Black schools, Black churches. Henry Garnet and others emphasized that the reason race-conscious organizations were necessary was precisely because the dominant white public had imposed racial oppression on African Americans: it was oppression, not race, that required such organizations. This was also true for the Black press. The conventions recognized that without a press run by and focused on African Americans, any effort they made to achieve equality could be thwarted by the dominant white press.

Legal scholars and courts have struggled with the question of whether race consciousness—in the form of affirmative action—is consistent with Fourteenth

309 See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 181 (2008) (requiring Indiana voters to provide photographic identification is constitutional). See also Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143, 143 (2008) (arguing that *Crawford* exemplifies the Supreme Court's "inconsistent" jurisprudence on the right to vote).

Amendment originalism.³¹⁰ The fact that members of the Black public sphere also struggled with the question of race consciousness shows how important and intrinsically complex the issue was and is, pitting the ideal of full racial equality against the reality of racial oppression. Yet the experience and discussion of Black leaders is instructive. As discussed above, the particular approach to constitutionalism developed in the Black public sphere of that period embraced a fundamental contradiction between ideals of liberty and the reality of slavery and race prejudice. As an aspirational constitutionalism it was at heart a constitutionalism that refused to ignore either the ideal or the reality, instead seeking a dynamic relationship between the two through which activists could progress toward a further implementation on the ground of the ideal principles.

That is precisely how they saw race consciousness. For these leaders and activists, Black organizations were absolutely essential to the process of achieving equality, racial improvement, and uplift. Given the fact of white supremacy and its complex influence on white society across all regions of the country, it simply was not possible to approach the end of slavery and elimination of racial prejudice without acknowledging and supporting race conscious Black organizations. Because race prejudice extended throughout the social sphere, a nominal color-blindness would not solve the problems of racial slavery any more than the mere legal end of slavery would actually end the effects of racial slavery. This is not to say that color-blindness was not a goal. To the contrary, one of the key demands of Black leaders in this period was the elimination of the word “white” from all statutes. But they also recognized the need for African American organization to develop, express, and advocate on behalf of the interests of Black communities. Thus, even though they admired and supported the interracial work of William Garrison in *The Liberator*, they also worked to support presses and papers run by Black editors. The need for such organization ultimately came down to a question of how far the reality of racial equality and progress was from the ideal of equal liberty, and no doubt such questions were and would remain complex and

310 See, e.g., Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 72 (2014) (arguing that affirmative action is not supported by an originalist understanding of the Fourteenth Amendment); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (contending that legislative history is “dispositive” of the affirmative action debate); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427 (1997) (suggesting that race-consciousness was a basis for Congressional statutes passed in the 1860s); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 477 (1998) (“The vogue for originalism in constitutional theory and the Constitution’s condemnation of race-conscious laws lie in uneasy tension.”).

fraught with differing views. But it was also true that the measure for whether race consciousness was still necessary was ultimately not the abstract form of colorblindness in law but the actual condition of African Americans on the ground in their access to spheres of power, whether political, economic, social, or religious. And that is a lesson we continue to work to understand.

CONCLUSION

Answering Eric Foner's call "to find ways to get the voice of African Americans into discussions of the Amendment's original meaning, scope, and limitations" will take a great deal of time and effort.³¹¹ It calls for the sort of interdisciplinary work that historians and law scholars can do very well but which often confronts problems of disciplinary fit and division. The history of nineteenth-century African American freedom struggles does not provide neatly tailored answers to questions of constitutional meaning of the sort that judges, lawyers, and some legal scholars seem determined to find or create. Yet that history, and the role of African Americans in forging the very text that reconfigured our Constitution and constitutional commitments, should not be prevented from providing meaning to modern constitutional law simply because it is not as readily accessible as is an antebellum court opinion or an extended speech in the Congressional Globe. As the debates and documents of the Black Convention Movement show, perspectives on the antebellum Constitution within communities of free African Americans were varied, and ideas of how one could change the constitution—both in text and in on-the-ground enactments—were significant in the development of African American political and legal ideals. As the nation moved toward ratification of the Reconstruction Amendments—a ratification, in the case of the Fourteenth and Fifteenth Amendments, only possible through the participation of Black male voters in the South—these ideas forged in the antebellum freedom struggle became important sources for how to understand and implement the broad concepts of liberty, equality, and citizenship embraced by the newly-minted text. Those ideas still speak to us across time, if we can learn how to hear them.

311 Eric Foner, *Remarks at the Conference on the Second Founding*, 11 U. PA. J. CONST. L. 1289, 1290 (2008).