

# FORGOTTEN FRAMERS: BLACK CONVENTIONS AND THE SECOND FOUNDING

79 STAN. L. REV. \_\_ (forthcoming 2027)

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## Abstract

*This Article tells the forgotten story of the Black Conventions of the Reconstruction era, examining convenings of Black Americans across the nation during the time when the Thirteenth, Fourteenth, and Fifteenth Amendments were under consideration. Invoking the promises of liberty and equality contained in the Declaration of Independence, these conventions insisted on Black Americans' right to respect and dignity, fought for control of their bodies and their right to be full members of the body politic, including at the polls, and demanded an end to racial prejudice and violence that kept them in a subjugated status. Through their relentless activism, Black Americans repeatedly pressed white Americans to make the United States into a multiracial democracy that guaranteed fundamental rights, protection, and equal citizenship as an American birthright. In large measure, the Amendments that produced our Second Founding bore the imprint of this constitutional activism.*

*While critical to understanding the meaning of the Reconstruction Amendments, this history has never gotten its due. Dominant judicial and scholarly accounts of the text and history of the Reconstruction Amendments privilege elite white understandings, presenting history as if white voices were the only ones that mattered. As this Article demonstrates, this impoverishes our understanding of the Reconstruction Amendments and ignores how the Black Convention movement of the Reconstruction era shaped the transformational guarantees in those Amendments. Grappling with the work of the Black Conventions can help generate an inclusive constitutionalism, deepen our understanding of the text and history of the Reconstruction Amendments, provide resources to resolve current constitutional disputes, and help recover fundamental constitutional principles the Supreme Court has long betrayed.*

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## INTRODUCTION

Historians have long recognized that Black Americans played a central role in their liberation struggle.<sup>1</sup> But courts and legal scholars have long ignored this fundamental insight, privileging white voices and ignoring the many ways in which Black Americans shaped the Reconstruction Amendments. For example, when the Roberts Court turns to history, it repeatedly privileges white male voices and views and places great weight on the work of institutions that systematically excluded communities of color and women.<sup>2</sup> Rarely does the Court discuss how Black Americans viewed the constitutional amendments that promised them freedom and equal citizenship.<sup>3</sup> And legal scholars, too, overwhelmingly give pride of place to the white Republicans who pushed the Thirteenth, Fourteenth, and Fifteenth Amendments through Congress.<sup>4</sup> In attending to the public meaning of these Amendments, much constitutional scholarship equates public meaning with elite white understandings.<sup>5</sup> Courts and scholars routinely erase Black voices

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<sup>1</sup> See, e.g. W.E.B. DUBOIS, BLACK RECONSTRUCTION: TOWARD A HISTORY OF THE ROLE WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA (1935); VINCENT HARDING, THERE IS A RIVER: THE BLACK FREEDOM STRUGGLE IN AMERICA chs. 12-16 (1981); ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION (2003); MANISHA SINHA, THE RISE AND FALL OF THE SECOND AMERICAN REPUBLIC: RECONSTRUCTION, 1860-1920 (2024).

<sup>2</sup> See, e.g. Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 773 (2024); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 311, 339-40 (2023); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism--and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1196 (2023).

<sup>3</sup> For exceptions, see *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 446-47 (1968) (Douglas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 676, 684 (2002) (Thomas, J., concurring); *Gutter v. Bollinger*, 539 U.S. 306, 349-50, 378 (2003) (Thomas, J., concurring in part and dissenting in part); *McDonald v. City of Chicago*, 561 U.S. 742, 771 n.18, 849-50 (2010) (Thomas, J., concurring); *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 693 (2021) (Kagan, J., dissenting); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 320 (2023) (Sotomayor, J., dissenting); *id.* at 386, 393 (Jackson, J., dissenting); *Medina v. Planned Parenthood So. Atlantic*, 606 U.S. 357, 417 n. 11 (2025) (Jackson, J., dissenting).

<sup>4</sup> See, e.g. KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021); MARK GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (2023); William Baude, et al., *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024); Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039 (2024).

<sup>5</sup> See James W. Fox, *Publics, Meaning & the Privileges of Citizenship*, 30 CONST.

from the constitutional stories told about our Second Founding,<sup>6</sup> turning a blind eye to the fact that Black voices were influential in shaping the Reconstruction Amendments. As a result, numerous judicial doctrines reflect an impoverished understanding of those Amendments and perpetuate the exclusions and democratic deficits these Amendments sought to redress.

This Article aims to correct this omission. Examining primary historical documents and other contemporaneous accounts, it takes a detailed look at Black Conventions held in 1864-1869,<sup>7</sup> the period during which the Thirteenth, Fourteenth, and Fifteenth Amendments were drafted, debated, and ratified. Engaging with the work of the Black Conventions, I argue, is critical to developing a proper understanding of the meaning of the Reconstruction Amendments.

The period between 1864-1869 was an incredibly generative period for Black constitutionalism. As a multiracial Union Army was putting the final nail in the Confederacy's coffin, Black activism was on the rise. Black Americans had been holding conventions for three decades before the Civil War, but the post-war period saw an explosion in Black organizing and

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COMMENT. 567, 606 (2015) (reviewing LASH, *supra* note 4) (“Without a deliberate effort to recapture lost voices, however, the ‘public’ in public meaning originalism remains both exclusionary and historically erroneous.”); Gregory Ablavsky & W. Tanner Allread, *We The (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 1, 64 (2023) (observing that, in the practice of originalism, the public “are usually implicitly coded as white men,” an approach that “risks smuggling in exclusion without any defensible justification”).

<sup>6</sup> See James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 688 (2016) [hereinafter *Counterpublic Originalism*]; Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives from Slavery*, 97 NOTRE DAME L. REV. 1375, 1377 (2022); see also Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J. L. & PUB. POL’Y 19, 25-27 (2022) (making a similar point about exclusion of women’s voices). For exceptions, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); Dorothy E. Roberts, *The Supreme Court, 2018 Term, Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 54-71 (2019); James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 U. PA. J. CON. L. 267, 272-335 (2021) [hereinafter *Constitution of Black Abolitionism*]; Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 139-42 (2022).

<sup>7</sup> Many of these conventions were entitled Conventions of Colored Men or Colored People, while others were denominated Freedmen’s Conventions. In this Article, I use the term, Black Conventions, to cover all these assemblies. See SINHA, *supra* note 1, at 158 (discussing the work of “black conventions”); DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790-1870*, at 469 (2021) (noting that there were “fully twenty different Black conventions in 1865 alone”); DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA 185-186* (2014) (observing that “the fall of 1864 witnessed the rebirth of the movement in what would be the first of dozens of black conventions”).

activism, particularly in Southern states.<sup>8</sup> During these years, Black Americans throughout the nation assembled in convention—travelling great distances and overcoming white supremacist violence—to work for changes in the law, to establish new organizations to fight for their rights, to issue declarations of rights and wrongs, and to urge white Americans to change the Constitution to guarantee them full rights, protection, and citizenship. To this end, they sent countless petitions to the President, Congress, and state legislatures, using a key part of the democratic process open to disenfranchised persons.<sup>9</sup> The post-war Black Conventions represented a high point of Black constitutional thought and activism, building on thirty years of Black organizing and advocacy that preceded it, at precisely the moment when transformative constitutional change was on the table.<sup>10</sup>

The extraordinary outpouring of constitutional activism did not go unnoticed. Mainstream media regularly highlighted the work of post-war Black Conventions, reporting on their meetings and excerpting their addresses and demands,<sup>11</sup> while congressional allies introduced their petitions into the congressional record and referred them to the Joint Committee on Reconstruction, the body charged with writing the Fourteenth Amendment.<sup>12</sup>

Through these conventions, Black Americans proclaimed their status as American citizens and made forceful claims about what freedom and equal citizenship entailed. These documents, which have long been ignored by courts and scholars, provide rich material that can deepen our understanding of the Thirteenth, Fourteenth, and Fifteenth Amendments and illuminate what a truly inclusive constitutional jurisprudence would look like. The Black Conventions of 1864-1869 provide an important complement to the records of congressional debates over these Amendments and contemporaneous federal legislation that is the predominant focus of the scholarly literature on the text and history of the Reconstruction Amendments. Yet they remain perennially ignored.<sup>13</sup>

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<sup>8</sup> See SINHA, *supra* note 1, at 158. On the antebellum Black Convention movement, see Fox, *Constitution of Black Abolitionism*, *supra* note 6; P. Gabrielle Foreman, *Black Organizing, Print Advocacy and Collective Authorship: The Long History of the Colored Conventions Movement* in *THE COLORED CONVENTIONS MOVEMENT: BLACK ORGANIZING IN THE NINETEENTH CENTURY* 21-30, 44-53 (P. Gabrielle Foreman, et al. eds. 2021).

<sup>9</sup> See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538, 1547 (2018). On how petitioning by the disenfranchised contributed to the growth of American democracy, see CARPENTER, *supra* note 7.

<sup>10</sup> See Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 276 (discussing the “post-war conventions” as “the culmination of decades of development of ideas and practices of constitutionalism and democratic citizenship”).

<sup>11</sup> See *infra* Part III.A.

<sup>12</sup> See *infra* Part III.B.

<sup>13</sup> See Foreman, *supra* note 8, at 30 (observing that “[t]he antebellum period has largely

In demanding white Americans respect their rights as citizens, Black Conventions, both pre and post-war, turned to the Declaration of Independence, which they celebrated as “one of the greatest documents the world has ever seen.”<sup>14</sup> Black Americans offered a radical reinterpretation of the Declaration as the foundation of a multiracial democracy that promised equal citizenship as the birthright of all Americans. The Declaration opens with the affirmation that “all men are created equal” and “are endowed by their Creator with certain inalienable rights” and “that among these are life, liberty and the pursuit of happiness.”<sup>15</sup> It then declares that “to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”<sup>16</sup> To Black Americans, their demands for full and equal citizenship were inscribed in these two sentences. In post-war convenings, Black Americans repeatedly invoked these fundamental principles, as well as the founding promise of no taxation without representation, in urging white Americans to redress widespread denials of liberty and equal justice and to make our nation a multiracial democracy that lived up to the Declaration’s promises. During these conventions, Black Americans offered forceful reminders that the Declaration is a document fundamentally about democracy, written to justify the act of breaking free of a tyrannical regime that denied its inhabitants an equal voice in their affairs.

The Black Conventions of 1864-1869 not only offered a novel way to think about the Declaration of Independence but also provided a distinctive perspective on the meaning of equal citizenship and what rights Black Americans possessed as American citizens. The documents produced by these Conventions are rich and multi-faceted, demanding equal citizenship, the enjoyment of fundamental rights, and protection by the government, ideas at the core of the Reconstruction Amendments. Four major themes run through the Convention documents.

First, the Black Conventions that met in these crucial years provide a critical perspective on the tripartite theory of citizenship repeatedly invoked in Reconstruction-era debates, which sharply distinguished civil, political,

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been the focus of the handful of scholars who substantively include Black conventions in their work”); Paul E. Herron, “*This Crisis of Our History*”: *The Colored Conventions Movement and the Temporal Construction of Southern Politics*, 36 *STUD. IN AM. POL. DEV.* 21, 26 (2022) (noting that the postwar “Southern conventions . . . have been most neglected by scholars”).

<sup>14</sup> See CELEBRATION BY THE COLORED PEOPLE’S EDUCATIONAL MONUMENT ASSOCIATION IN MEMORY OF ABRAHAM LINCOLN ON THE FOURTH OF JULY 1865, at 13 (1865); see also Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 338-39 (discussing the prominent role the Declaration played in pre-war Black constitutional thought).

<sup>15</sup> Decl. of Independence (1776).

<sup>16</sup> *Id.*

and social rights.<sup>17</sup> Under this schema, equal citizenship requires equality in civil rights, but not political or social rights.<sup>18</sup> To Black Americans, this way of thinking about rights was unduly cramped.

In the conventions of the Reconstruction era, Black Americans demanded a wide array of rights. The full matrix of freedoms was essential to the respect and dignity Black Americans demanded as equal citizens. For example, they rejected the idea that the right to vote was a privilege that could be given to some and denied to others. During Reconstruction, Black Conventions maintained that “the right to vote is an essential and inseparable part of self-government, and therefore natural and inalienable,” a view that anticipated the numerous voting rights amendments later added to the Constitution beginning with the Fifteenth Amendment.<sup>19</sup> Indeed, one of the most fundamental aspects of Black constitutionalism, common to both pre-war and post-war conventions, was the insistence that the right to vote was fundamental because it was preservative of all other rights.<sup>20</sup> Likewise, Black Conventions demanded rights that were often castigated by white people as mere social rights, such as equal access to public institutions and accommodations, insisting that “it is our undeniable right to hold office, sit on juries, ride in all public conveyances, sit at public tables and places of amusement.”<sup>21</sup> Black Americans insisted that equal public rights were fundamental to the promise of equal citizenship.<sup>22</sup> Without full participation in all aspects of civil society, they insisted, equal citizenship would be illusory. In all walks of life, Black Americans insisted, “we are by right entitled to respect.”<sup>23</sup> Thus, according to Black constitutionalism of the Reconstruction era, the tripartite theory of rights was fundamentally flawed: Black Americans were due all the rights possessed by white citizens.

Second, Reconstruction-era Black Conventions expanded the canon of fundamental rights beyond the rights enumerated in the Bill of Rights, defining the meaning of freedom by looking to the horrors they experienced during enslavement. In their convenings, Black Americans bore witness to the fact that “[a]s a people, we have been denied ownership of our bodies, or

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<sup>17</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* 221-226 (2011); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-29 (1997).

<sup>18</sup> BALKIN, *supra* note 17, at 222-23.

<sup>19</sup> ADDRESS AND RESOLUTIONS OF THE NAT’L EQUAL RIGHTS LEAGUE CONVENTION OF COLORED MEN, HELD AT WASHINGTON, D.C., JANUARY 10<sup>TH</sup>, 11<sup>TH</sup>, AND 12<sup>TH</sup>, 1867 (1867).

<sup>20</sup> See Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 347.

<sup>21</sup> *From Alabama*, PHILA. INQUIRER, May 4, 1867, at 4.

<sup>22</sup> ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 13, 94 (2019).

<sup>23</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, HELD IN THE CITY OF SYRACUSE, N.Y., OCTOBER 4, 5, 6 AND 7, 1864, at 42 (1864).

a right to our wives, our homes, our children, and the products of our own labor.”<sup>24</sup> Rights to bodily integrity, family integrity, and to enjoy the fruits of their labor, Black Conventions insisted, were part of the freedom that belonged to all. Likewise, Black Americans who convened to fight for their rights viewed education as fundamental to freedom and equal citizenship. Reconstruction-era conventions denounced how white enslavers made it a crime to teach Black people to read and write, keeping them illiterate and unlearned. Building off antebellum conventions that linked education to full citizenship, post-war Black Conventions demanded a right to education, insisting that “[k]nowledge is power” and that “an educated and intelligent people can neither be held in, nor reduced to slavery.”<sup>25</sup>

Third, Reconstruction-era Black Conventions emphasized that the government had an obligation not only to respect their rights, but also to meet their needs. The most basic need of all was protection by the government, a constitutional ideal traceable to the idea that in return for allegiance, the government owes its citizenry protection.<sup>26</sup> Time and again, post-war Black Conventions stressed positive rights, demanding the protection of the laws, including protection from violence and other legal wrongs, and access to goods and services. To make equal citizenship a reality, the government had to act to protect people’s life, liberty, and property, stamp out prejudice, provide access to education and land, and ensure bodily and economic security.

Fourth, Black Conventions, both pre- and post-war, focused on all the ways racial prejudice and hatred fueled the subjugation of Black people. Virtually every convening of Black Americans from 1864-1869 paid special attention to racial prejudice and how it compromised the possibility of meaningful freedom and equality. During Reconstruction, Black Conventions not only insisted that the government protect Black people from the violence, discrimination, and dehumanization fed by racial prejudice, but made the further demand that white Americans give up their deep-seated prejudice. A constitutional order premised on the fundamental equality of all was impossible if white Americans continued to treat Black Americans as their inferiors. Black constitutionalism was not only concerned about limits

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<sup>24</sup> *Id.* at 41.

<sup>25</sup> PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA 9 (1865). On demands for education made in pre-war Black Conventions, see Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 286.

<sup>26</sup> See Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 513 (1991); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 135 (1991); Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 21 (2021); David H. Gans, *Equality and Protection: The Forgotten Meaning of the Fourteenth Amendment*, 102 DENVER L. REV. 897, 904-05 (2025).

on state power; it was equally concerned with ensuring that the populace treated one another with respect and dignity throughout civil society.

Attending to the constitutional ideals and demands made in the Black Conventions of the Reconstruction era can help produce a more inclusive constitutionalism and enrich our understandings of the text and history of the Reconstruction Amendments.<sup>27</sup> Eric Foner, one of the most eminent historians of the era, has called Reconstruction “a stunning experiment in the nineteenth-century world, the only attempt by an outside power in league with the emancipated slaves to fashion an interracial democracy from the ashes of slavery.”<sup>28</sup> A key driver of this constitutional transformation was the Black activism, reflected in Black Conventions, continually pushing white Republicans to write into the Constitution their demands for equal respect, dignity and the right to participate in all aspects of American life as equals. During Reconstruction, Black demands that were initially rebuffed by white politicians as too radical—such as voting rights, equal jury service and an end to prejudicial exclusions in civil society—became bedrock guarantees embedded in the Reconstruction Amendments and landmark enforcement legislation. In fact, Black demands for full and equal citizenship helped shape both the substance of the Reconstruction Amendments and the ratification process. Black voting rights were instrumental to the ratification of both the Fourteenth and Fifteenth Amendments. By virtue of the First Reconstruction Act of 1867,<sup>29</sup> reconstructed Southern state legislatures, chosen in elections in which Black men enjoyed the right to vote, cast crucial votes to ratify. The ratification of the Fourteenth and Fifteenth Amendments was due in no small part to the political participation of Black Americans.<sup>30</sup> In this respect, Black Americans were constitution-makers who played a critical role in what has been called America’s Second Founding.

Last but not least, engaging with the Reconstruction-era Black Conventions can help recover fundamental constitutional principles that the Supreme Court has betrayed and provide new resources for pushing back on the many ways the Supreme Court has hollowed out the Reconstruction Amendments. Many of the rights demanded by Black Conventions are in the crosshairs today. In *Dobbs v. Jackson Women’s Health Organization*, the Court’s conservative justices refused to protect the fundamental right of bodily integrity.<sup>31</sup> In many cases, the Roberts Court has gutted the right to vote and second-guessed congressional efforts to eradicate racial

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<sup>27</sup> See Ablavsky & Allread, *supra* note 5, at 9 (“The value of more inclusive constitutional history is not to relitigate the past, but to help build more inclusive law now.”).

<sup>28</sup> ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 40 (1983).

<sup>29</sup> Act of Mar. 2, 1867, ch. 153, 14 Stat. 428-29.

<sup>30</sup> See *infra* Part III.C.

<sup>31</sup> 597 U.S. 215 (2022).

discrimination at the polls, treating the right to vote as a second-class right.<sup>32</sup> In yet another line of rulings, the Supreme Court has refused to read the Fourteenth Amendment to safeguard positive rights, turning a blind eye to the constitutional duty of protection embedded in the Fourteenth Amendment's Equal Protection Clause.<sup>33</sup> In each of these particulars, the Court has invented a jurisprudence that turns its back on fundamental principles of freedom and equality. Taking seriously the work of the Black Conventions can provide powerful, long-forgotten, resources that could be employed to rehabilitate constitutional promises of freedom, equal citizenship, and democracy that the current Supreme Court refuses to respect and begin planting the seeds of a new constitutional jurisprudence.

This Article proceeds as follows. Part I introduces the Black Conventions of the Reconstruction era, examining a representative set of national and southern state conventions from 1864-1869. It details the arguments made in these Black Conventions, examining their constitutional demands for freedom, equal citizenship, and multiracial democracy. Part II discusses the distinctive elements of Black constitutionalism reflected in the Black Conventions of the Reconstruction era, highlighting similarities to, and differences from, the views of congressional Republicans who drafted and passed the Reconstruction Amendments. Turning from the descriptive to the normative, Part III argues that the work of the Black Conventions of the Reconstruction era is critical to a proper understanding of the Reconstruction Amendments. As Part III explains, whether one looks at newspaper coverage, congressional debates, or the ratification campaign, Black Americans were a key part of the public that helped usher in the transformational guarantees contained in the Reconstruction Amendments. Part IV then discusses how the work of the Black Conventions might be brought to bear on the Supreme Court's interpretation of the Reconstruction Amendments. A short conclusion follows.

## I. THE BLACK CONVENTIONS OF THE RECONSTRUCTION ERA

Reconstruction witnessed an explosion of Black organizing and activism for constitutional change. As the nation debated the Thirteenth, Fourteenth, and Fifteenth Amendments, Black Americans across the country met in conventions to defend their rights, detail the wrongs they continued to experience, and demand equal citizenship. They produced addresses, adopted resolutions, and issued declarations of rights and wrongs. All told,

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<sup>32</sup> See, e.g. *Shelby County v. Holder*, 570 U.S. 529 (2013); *Brnovich v. DNC*, 594 U.S. 671 (2021).

<sup>33</sup> *DeShaney v. Winnebago County Dep't Soc. Servs.*, 489 U.S. 189, 195-96 (1989); Bernick, *supra* note 26, at 12 (critiquing the "positive-rights exclusion").

between 1864-1869, Black Americans gathered in more than fifty conventions,<sup>34</sup> an unprecedented surge of activism. For formerly enslaved Black southerners, who previously had no right to express themselves, these conventions represented a huge moment of political transformation—the first time they had gathered as a body to express their demands and aspirations.<sup>35</sup>

These meetings took place at a key turning point in the Black freedom struggle. Slavery was crumbling as the Civil War unfolded, but the question of what would come next loomed large. What might freedom mean? Would white enslavers continue their reign of violence, terror, and domination over Black life? Would America emerge as a multiracial democracy in which those once enslaved could elect their political leaders? These conventions, largely held in urban areas such as Charleston, Alexandria, and Raleigh, provided an opportunity for a wide cross-section of Black Americans to exchange ideas, register their bitter disapproval of President Andrew Johnson’s effort to return power to white southerners, and demand that their rights be recognized and their needs fulfilled. As newspapers accounts of these meetings stressed, these conventions had “the rich and the poor, the literate and educated man, and the country laborer, hardly released from bondage,” all “united in a common thought: the actual liberation from social and political bondage.”<sup>36</sup>

This Part examines a number of prominent national and state Black conventions held from 1864-1869. Rather than attempt the impossible task of doing justice to all the conventions held during this period, this Part focuses on national conventions held in 1864 and 1869 and a number of state conventions held in the former Confederacy, highlighting the claims of Black southerners, many of whom were experiencing freedom for the very first time. In choosing among the many conventions held in this period, my aim was to include conventions held in the upper and deep South over the course of these critical years. The nine conventions I examine here were neither the first nor the last convenings of Black Americans, but they provide an illuminating window into Black constitutionalism at the time of the framing and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments.

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<sup>34</sup> See Colored Conventions Project, Digital Records, Conventions By Year, <https://omeka.coloredconventions.org/convention-by-year>.

<sup>35</sup> See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 507 (1979).

<sup>36</sup> NEW ORLEANS TRIBUNE, Jan. 15, 1865, *reprinted in* PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865-1900, at 252 (Phillip S. Foner & George E. Walker eds. 1986).

*A. 1864 National Convention of Colored Men*

In October 1864, Black leaders across the country, representing seventeen states and the nation’s capital, met in Syracuse, New York for “the most truly black convention” ever held.<sup>37</sup> The Convention featured pre-eminent Black abolitionists such as Frederick Douglass, John Langston, Henry Highland Garnet, Frances Ellen Watkins Harper, as well as future leaders of Reconstruction. Some were newcomers; others had participated in Black Conventions for decades.<sup>38</sup> The Convention issued a Declaration of Wrongs and Rights as well as an Address to the People of the United States, urging the American people to “concede us our just claims, accord us our rights, and grant us our full measure of citizenship, under the broad shield of the Constitution.”<sup>39</sup>

The Convention’s Declaration of Wrongs and Rights centered the denial of bodily integrity and dignity inherent in human bondage, insisting that “[w]e have been made to suffer well-nigh every cruelty and indignity possible to be heaped upon human beings,” while being “taunted with our inferiority by people whose statute-books contained laws inflicting the severest penalties on whomsoever dared teach us the art of reading God’s word.”<sup>40</sup> The Declaration ticked off the many ways that, “[a]s a people, we have been denied the ownership of our bodies, our wives, homes and children and the products of our labor”: “we have been forced to silence and inaction in full presence of the infernal spectacle of our sons groaning under the lash, our daughters ravished, our wives violated, and our firesides desolated, while we ourselves have been led to the shambles and sold like beasts of the field.”<sup>41</sup> Linking their grievances to the colonists who had revolted from British rule, the Declaration asserted that “we are taxed, but denied the right of representation. We are practically debarred the right of trial by jury; and institutions of learning which we help to support are closed against us.”<sup>42</sup> As this list of abuses made clear, the right to control one’s body, the right to have a family, and the right to education were all viewed as fundamental to freedom and equal citizenship.

In demanding freedom, the 1864 Convention stressed that Black people were quintessentially Americans. “[H]ere were we born, for this country our

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<sup>37</sup> See WILLIAM CHEEK AND AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM 425 (1989).

<sup>38</sup> See Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 295 (discussing debate between Douglass and Garnet at the 1843 National Convention).

<sup>39</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 34.

<sup>40</sup> *Id.* at 41.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 42.

fathers and brothers have fought, and here we hope to remain in full enjoyment of enfranchised manhood, and its dignities.”<sup>43</sup> Fulfilling their constitutional aspirations for belonging entailed more than simply equal rights. The delegates insisted that “as 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.”<sup>44</sup> They also demanded “the right to be heard in the halls of Congress” and a right to “our fair share of the public domain, whether acquired by purchase, treaty, confiscation or military conquest.”<sup>45</sup>

This was an incredibly robust understanding of equal citizenship. First, it explicitly linked citizenship with respect and dignity, demanding that Black Americans be treated as equals in American society. Equal respect, the Convention insisted, was at the very core of what it meant to be an equal citizen. Second, equal citizenship entailed constitutional responsibilities to meet the needs of all citizens. Although the Convention did not mention the constitutional duty of protection, an affirmative right that would eventually be embedded in the Fourteenth Amendment, the idea here is similar: the government has affirmative responsibilities to meet the basic needs of citizens.<sup>46</sup> At a minimum, this would likely include guaranteeing the right to education, which was prominent in the lists of wrongs Black Americans had experienced. Third, economic justice was a matter of equal citizenship.<sup>47</sup> The Syracuse Convention demanded fair pay for the work performed by Black people—whether as laborers or as soldiers fighting to defend the nation—as well as a fair share of government-owned lands.<sup>48</sup> The Convention did not go so far as to demand redistribution of their enslavers’ land, but they insisted on equal access to public lands in the government’s possession. Land was fundamental to economic independence and real freedom.

The Convention’s Address to the American People focused on slavery and prejudice, calling them the two “powerful reactionary forces arrayed against us.”<sup>49</sup> It explained that “[t]he first and most powerful is slavery; and

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Fox, *Counterpublic Originalism*, *supra* note 6, at 727.

<sup>47</sup> On economic justice, see David H. Gans, “*I Am Free But Without a Cent*”: *Economic Justice as Equal Citizenship*, 93 GEO. WASH. L. REV. 221 (2025).

<sup>48</sup> See Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 326 (suggesting that the “dispute of unequal pay for military service was very much in their minds”).

<sup>49</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 48.

the second, which may be said to be the shadow of slavery, is prejudice against men on account of 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.”<sup>50</sup> The Address called for the immediate abolition of enslavement, exclaiming that “we cannot be free while our brothers are slaves. The enslavement of a vast majority of our people extends its baleful influence over every member of our race; and makes freedom, even to the free, a mockery and a delusion.”<sup>51</sup>

At the same time, the Address made clear that it was not enough to end enslavement. Private prejudice sustained white supremacy and racial subjugation.<sup>52</sup> It fed mob violence against Black Americans, sustained private acts of discrimination, and generated racially discriminatory laws. As the Address reflected, Black constitutionalism was deeply concerned with public and private manifestations of prejudice and the central role they played in denying Black Americans the equal respect they were owed as equal citizens.

The Convention’s Address called for an end to racially discriminatory laws, insisting that “the highest welfare of this 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 the colored people alike.”<sup>53</sup> It argued that “[w]hatever prejudice and taste may be innocently allowed to do or to dictate in social and domestic relations, . . . in the matter of the government, the object of which is the protection and security of human rights, prejudice should be allowed no voice whatever.”<sup>54</sup> In other words, some matters were purely private—for instance, whom one chooses to love, form a family with, or befriend—but prejudice should play no role in the law or in participation in public-facing aspects of civil society.

The Address demanded the right to vote, insisting that it was necessary for the protection and security of Black people. “The possession of that right is the keystone to the arch of human liberty . . . If you still ask why we want to vote, we answer Because we don’t want to be mobbed from our work, or insulted with impunity at every corner.”<sup>55</sup> The Convention forcefully pushed back against whites who insisted that Black Americans should be content with civil rights:

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<sup>50</sup> *Id.* at 48-49.

<sup>51</sup> *Id.* at 53.

<sup>52</sup> Indeed, this was a consistent theme of pre-war Black Conventions. See Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 287-89.

<sup>53</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 56.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 59.

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, when we are excepted from the general political liberty.<sup>56</sup>

In short, political rights were essential to make civil rights real. There could be no real freedom without the right to vote. Black Americans viewed “universal suffrage” as the “best foundation of Government” and insisted it would be a betrayal to deny them the right to vote, particularly when so many Black soldiers were helping the Union win the Civil War.<sup>57</sup> The Convention’s Address pointedly asked white Americans, “[m]ay 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?”<sup>58</sup> As we see here, the 1864 Convention combined universalist arguments for voting rights for all Black people, with gendered arguments that Black men had “fully earned the elective franchise” by serving in the Union Army and that the American people “had contracted an obligation to grant it.”<sup>59</sup> By and large, universalist arguments dominated, but for the all-male delegation that gathered in Syracuse, the linkage between Black military service and equal citizenship was undeniably powerful.

The Black leaders who gathered at the 1864 National Convention understood that rights would not be won without a struggle and established a new Black-led institution, the National Equal Rights League, to organize and fight to secure “a recognition of the rights of the colored people of the nation as American citizens.”<sup>60</sup> Aiming to foster institution-building on the local level, the League’s Constitution encouraged people to form State Leagues, open to all without “distinction on account of color or sex,” to help uplift the Black community and fight for equal rights.<sup>61</sup> The League would play an important role in fighting for freedom and racial equality on both the state and federal level, and many states established state branches of the League.<sup>62</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 57.

<sup>58</sup> *Id.* at 58.

<sup>59</sup> *Id.* at 57.

<sup>60</sup> *Id.* at 36.

<sup>61</sup> *Id.* at 38.

<sup>62</sup> See HAHN, *supra* note 1, at 121; HARDING, *supra* note 1, at 266, 293; KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT FROM THE REVOLUTION TO RECONSTRUCTION 311 (2021).

Black Americans who participated in the 1864 National Convention offered a robust vision of the meaning of freedom. The question of what the end of enslavement meant for Black Americans became increasingly important as the end of the war brought the destruction of slavery throughout the Confederacy. In the wake of the Union’s triumph, Black Americans across the country held state conventions to make their demands for freedom and equal citizenship. The next subsections examine these state conventions.

*B. The Virginia Colored Conventions of 1865*

1. The Norfolk Convention of 1865

In June 1865, Black Americans in Norfolk, Virginia convened a mass meeting that produced a powerful call for equal citizenship. As had many pre-war conventions, Black Norfolks addressed their demands to their white “fellow citizens,” urging them to “concede to us the full enjoyment of those privileges of full citizenship, which not only, are our undoubted right, but are indispensable to that elevation and prosperity of our people, which must be the desire of every patriot.”<sup>63</sup>

The address, like those written by other Black Conventions of the period, stressed how public and private power and prejudice worked together to keep Black Americans in a state of virtual enslavement. Slave codes, still in effect, the address lamented, remained “a convenient engine for our oppression” that left Black Virginians “doomed to ignorance,” and without a host of basic rights, including rights to contract and possess property, to marry, to freedom of movement, to choose a common occupation, and to access to courts.<sup>64</sup> “[I]n short, so far as legal safeguards of our rights are concerned, we are defenceless before our enemies.”<sup>65</sup>

But the problems Black Americans faced were not limited to discriminatory laws on the books. The Norfolk address discussed how virulent forms of prejudice left Black people unfree. As the address explained, ex-Confederate rebels “have returned to their homes with all their old pride and contempt for the negro transformed into a bitter hate for the new-made freeman, who aspires to the exercise of his new-found rights, and who has been fighting for the suppression of their rebellion.”<sup>66</sup> The address described a litany of abuses including mass arrests of Black people “simply

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<sup>63</sup> See ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, VA., TO THE PEOPLE OF THE UNITED STATES 1 (1865); see also Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 281 (discussing pre-war Black conventions that addressed their “fellow citizens”).

<sup>64</sup> ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, *supra* note 63, at 2, 3.

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.*

for walking the streets without a pass” and how concerted action by white planters “keep[] us in a state of serfdom,” “prevent[] our free selection of our employers,” and, in the best case, provide the most meager wages, far below the cost of the necessities of life.<sup>67</sup> Moreover, “individual planters are to be found who still refuse to recognize their negroes as free, forcibly retaining the wives and children of their late escaped slaves,” and even “shooting to death” those who “attempt to leave the plantation.”<sup>68</sup> In other cases, “a faithful performance, by colored men, of the duties or labor contracted for, has been met by a contemptuous and violent refusal of the stipulated compensation.”<sup>69</sup>

To remedy these abuses, the address demanded “give us the suffrage, and you may rely upon us to secure justice for ourselves, and all Union men, and to keep the State forever in the Union.”<sup>70</sup> Uniquely among the Conventions, the Norfolk address did not insist on a broader list of rights, but asked only for the right to vote, viewing suffrage as the ultimate form of protection. The address urged white northerners to secure the ballot to Black Americans rather than to commit to “a prolonged military occupation of the southern States,” which would be inevitable “without the existence of a larger loyal constituency than, at present, exists in these States.”<sup>71</sup> Ensuring true freedom for “the white Union men of the South, as well as ourselves,” would be impossible without the promise of a truly multiracial democracy.<sup>72</sup> Thus, there was no cleavage between civil and political rights. Both were essential to a thriving constitutional republic. Indeed, America’s claim to be an “example to the world of true Republican institutions,” the Norfolk address stressed, was in serious doubt “when America alone, among Christian nations, sustains an unjust distinction against four millions of her most loyal people, on the senseless ground of a difference in color” and effectively places them “outside the pale of the Constitution.”<sup>73</sup>

Published together with the Norfolk address was a brief history of Black activism in Norfolk for voting rights, including resolutions adopted by a mass meeting in May 1865. That meeting resolved that, with the destruction of slavery, “it behooves us . . . to speak and act as freemen, and as such to claim and insist upon equality before the law, and equal rights of suffrage at the ‘ballot box.’”<sup>74</sup> Black people would “prove ourselves worthy of the elective franchise, by insisting upon it as a right” and “by not tamely submitting to its

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3, 3-4.

<sup>69</sup> *Id.* at 4.

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

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 5.

<sup>74</sup> *Id.* at 10.

deprivation.”<sup>75</sup> This tapped into a deep vein of Black constitutionalism identified by the historian Martha Jones. Black Americans would strive to win rights “by acting like rights-bearing people” and “comporting themselves like citizens.”<sup>76</sup> Indeed, later that month, Black people in Norfolk sought to exercise the right to vote, taking advantage of the fact that election officials in one ward permitted Black citizens to cast a ballot and place their names on a list of voters whose qualifications were in dispute.<sup>77</sup> Through such actions, Black Americans insisted they were equal citizens entitled to the right to vote.

As Black Norfolks pressed for the right to vote, they also recognized the need for safeguards to protect our democracy from traitors. The May mass meeting insisted that “all loyal men, black or white, should have equal political and civil rights” while also demanding that “traitors shall not dictate or prescribe to us the terms or conditions of our citizenship, so help us God.”<sup>78</sup> In this demand, the Norfolk mass meeting anticipated the necessity of constitutional reforms—ultimately added to Section Three of the Fourteenth Amendment—that would ensure that rebels and former secessionists would not be able to return to political power and attack the promise of equal citizenship that was essential to the new republic. Section 3 was added to the Constitution out of a recognition that “[i]f former Confederates held the levers of federal and state government power, effective ‘reconstruction’ of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end.”<sup>79</sup> Well before white Republicans inserted this constitutional safeguard into our national charter, Black Americans insisted traitors should have no say over their equal citizenship, reflecting their understanding that structural safeguards were necessary to prevent racialized domination.

## 2. The Alexandria Colored State Convention of 1865

In August 1865, two months after the Norfolk meeting, Black Virginians met in Alexandria for a statewide convention. Like other Black Conventions, the proceedings focused on the bitter racial prejudice they faced, their need for protection from the government, and their demands for equal rights and the right to vote.

The Convention demanded protection from white people “who hate us as

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<sup>75</sup> *Id.*

<sup>76</sup> MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 10 (2018).

<sup>77</sup> ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, *supra* note 63, at 13-14.

<sup>78</sup> *Id.* at 11.

<sup>79</sup> See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 609 (2024).

a class” and “despise us simply because we are black.”<sup>80</sup> Like many pre-war conventions, the Alexandria Convention insisted that Black Virginians were entitled to be protected in their life, liberty, and property, including their rights to bodily and familial integrity, drawing on the principle that the government owes citizens protection in return for their allegiance.<sup>81</sup> The Convention decried that “we have no where to look for that protection which is essential for the safety of our persons or our property, our wives, or our children.”<sup>82</sup> Without federal protection, they insisted, “we are left to the assaults of the vile and vicious to do with us as they please, and we are left without redress.”<sup>83</sup>

The Alexandria Convention made a far-reaching demand for equal protection, equal rights, and the right to vote, rooted in a bold reading of the Declaration of Independence. First, it insisted that “as citizens of this State, the laws of the Commonwealth shall give to all men equal protection” so that “each and every man may appeal to the law for his equal rights without regard to the color of his skin.”<sup>84</sup> Second, it claimed the right to vote was inherent in equal protection, insisting that the only true way to vindicate the promise of equality is “by extending to us the elective franchise, which we believe to be our inalienable right as freemen, and which the Declaration of Independence guarantees to all free citizens of this Government, and which is the privilege of the nation.”<sup>85</sup> Black Virginians read the Declaration as a charter for multiracial democracy built on the promise of equality.

The Convention demanded the right to vote because “we can see no other safe-guard for our protection” and because “we are citizens of the country and natives of this State.”<sup>86</sup> It insisted that “we are as well qualified to vote who shall be our rulers as many who do vote for that purpose who have no interest in us, and know not our wants.”<sup>87</sup> Going forward, full equality, including at the polling place, was essential. To Black Virginians, “nothing short of equality in law will ever secure to us the wants which every freeman needs and must enjoy if he will be at peace at home and in the community in which he lives.”<sup>88</sup> Here again is the idea, which surfaced in the 1864 National

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<sup>80</sup> PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VIRGINIA HELD IN THE CITY OF ALEXANDRIA, AUG. 2, 3, 4, 5, 1865, at 9 (1865).

<sup>81</sup> Gans, *supra* note 26, at 906-07 (discussing demands for protection by pre-war Black Conventions).

<sup>82</sup> PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VIRGINIA, *supra* note 80, at 9.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 10.

Convention, that the government has the responsibility to meet the needs and wants of the Black community, an impossibility without the right to vote.<sup>89</sup> From this perspective, voting was not a mere privilege, it was a right fundamental to freedom and equality that should belong to all citizens.

The Convention also produced a lengthy address that discussed the growing power ex-rebels held in the South and urged Congress to act to secure the freedom promised by abolition. President Johnson's mass pardons of Confederate rebels, the Convention argued, has "left us entirely at the mercy of those subjugated but unconverted rebels, in *everything* save the privilege of bringing us, our wives, and little ones to the auction block."<sup>90</sup> Far from enjoying the freedom they had won, the result was enslavement in all but name. The address continued, "[h]e has . . . remitted us for all our civil rights to men, a majority of whom regard *our devotion to your cause and flag* as that which decided the contest against them."<sup>91</sup> The Alexandria Convention demanded protection, urging northern white Republicans "*not* to desert us in this, *the hour of our peril*."<sup>92</sup> Black Virginians urged that "our only safety" lies in military occupation, insisting "[w]e are 'sheep in the midst of wolves,' and nothing but the military arm of the Government prevents us and all the *truly* loyal white men from being driven from the land of our birth."<sup>93</sup> The address ended by demanding the ballot as the ultimate source of protection. "Give us this, and we will protect ourselves. No class of men relatively as numerous as we were ever oppressed, when armed with the ballot."<sup>94</sup> Here again was the idea, fundamental to pre- and post-war Black constitutionalism, that the right to vote was preservative of all other rights.

### C. Colored People's Convention of South Carolina of 1865

One of the last major Black conventions of 1865 was held in South Carolina, a state that was closely watched because it was majority-Black and home to some of the most rabid secessionists.<sup>95</sup> On November 20-25, 1865, thousands of Black South Carolinians gathered in a packed church in Charleston to demand their rights as citizens.<sup>96</sup> Coming just weeks before

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<sup>89</sup> Further illustrating the influence of the 1864 Syracuse Convention, the Alexandria Convention contained a Declaration Rights and Wrongs that was copied verbatim from the Syracuse documents. *Id.* at 12.

<sup>90</sup> *Id.* at 21.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 21, 22.

<sup>94</sup> *Id.* at 21.

<sup>95</sup> See HARDING, *supra* note 1, at 324-25.

<sup>96</sup> See *id.* at 325.

the convening of the 39<sup>th</sup> Congress, Black leaders in South Carolina, many of whom would play significant roles during Reconstruction, sought to make their case to the nation.<sup>97</sup>

Like many other pre- and post-war Black Conventions, the Convention's documents emphasized the Declaration of Independence's promise of liberty and equality for all. In their Address to the People of South Carolina, the delegates stressed "the language of the immortal Declaration of Independence, 'that all men are created equal,' and that 'life, liberty, and the pursuit of happiness' are the right of all; that taxation and representation go together; that governments are to protect, not to destroy the rights of mankind."<sup>98</sup> In their Declaration of Rights and Wrongs, they insisted that these guarantees protected them. "That the phrase 'all men' includes the negro no one will attempt to deny. Therefore, we, the colored citizens of South Carolina and these United States of America, justly claim such rights as are set forth in the above Declaration."<sup>99</sup>

The Convention's delegates demanded a broad set of fundamental rights, including the right to vote, the right to education, economic rights, and equal access to the courts, including the right to testify and serve as jurors. But perhaps the most notable aspect of their constitutional vision was the emphasis on the right to bodily integrity. The Declaration of Rights and Wrongs affirmed the individual's "right to his body and mind" and stressed not only personal liberty, but also "the right of personal security and protection against injuries to our bodies or good name."<sup>100</sup> In describing the wrongs they experienced, the 1865 South Carolina Convention assailed that "[w]e have been subjected to cruel proscription, . . . our bodies have been outraged with impunity," and we "have bled and sweat for the elevation of those who degraded us, and still continue to oppress us."<sup>101</sup> Indeed, their insistence on the right to testify in court was linked to their bodily integrity. Without the right to testify, the convention asserted, "our persons and property are subject to every species of violence, insult and fraud without redress."<sup>102</sup> The Convention's demand for the fundamental right of bodily integrity reflected the fact that enslavement represented the ultimate violation of bodily freedom and control.

Like other Black Conventions, the South Carolina Convention demanded

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<sup>97</sup> See CARPENTER, *supra* note 7, at 470 (observing that "the conventioners were taking their case directly and simultaneously to Washington and Charleston, as well as wider Black and white publics").

<sup>98</sup> PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 23.

<sup>99</sup> *Id.* at 27.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 25.

“the inestimable right of voting for those who rule over us in the land of our birth.”<sup>103</sup> As one speaker argued, “[a] government based upon an oligarchy of the skin is not republican in form.”<sup>104</sup> The Convention’s Memorial to Congress urged that “equal suffrage be conferred on us, in common with the white men of this State,” because, in the words of the Declaration of Independence, “all free governments derive their just powers from the consent of the governed.”<sup>105</sup> Full voting rights were “inherent and essential to every republican form of government” and were a critical “protection for the hostility evoked by our known faithfulness to our country’s flag under all circumstances.”<sup>106</sup> The Convention demanded an end to being subjected to “the burden of an odious taxation, without a just representation.”<sup>107</sup> “This is the very burden,” one speaker argued, “that the heroes of ’76 fought through a seven years’ war to rid themselves, and this is what we are now contending for.”<sup>108</sup>

Undergirding these fundamental rights was a broad vision of equal citizenship. The South Carolina Convention’s demand for equal citizenship was informed by the violence and degradation Black Americans had experienced as enslaved persons. They reflected how, during their enslavement, “we have had no avenues opened to us and our children” and that “the laws which have made white men great, have degraded us, because we were colored, and because we were reduced to chattel slavery.”<sup>109</sup> The Convention bore witness to the fact that “[t]he avenues of wealth and education have been closed to us.”<sup>110</sup> Having been stripped of their rights and dignity in virtually every aspect of life, the Convention insisted that, as “Americans by birth,”<sup>111</sup> they were entitled to be recognized as equals in all aspects of civil society. While they were willing to recognize white South Carolinians “as friends and fellow countrymen,” and “extend the right hand of fellowship to *all*,” notwithstanding all the horrors they had experienced, they insisted on their fundamental right to belong and to shape the new America that would be born out of slavery’s ashes.<sup>112</sup> The Convention’s Address to the People of the State of South Carolina put it this way:

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<sup>103</sup> *Id.* at 25.

<sup>104</sup> *Id.* at 19.

<sup>105</sup> *Id.* at 30.

<sup>106</sup> *Id.* at 28, 31.

<sup>107</sup> *Id.* at 30-31; *see also id.* at 27 (“We have been, and still are, deprived of the free choice of those who govern us, and subjected unjustly to taxation without representation.”).

<sup>108</sup> *Id.* at 19.

<sup>109</sup> *Id.* at 23.

<sup>110</sup> *Id.* at 27.

<sup>111</sup> *Id.* at 24.

<sup>112</sup> *Id.* at 24, 13.

We simply desire that we shall be recognized as men; that we have no obstructions placed in our way; that the same laws which govern white men shall direct colored men; that we have the right to trial by a jury of our peers, that schools be opened or established for our children; that we be permitted to acquire homesteads for ourselves and our children; that we be dealt with as others, in equity and justice.<sup>113</sup>

Importantly, their vision of freedom was not limited to negative rights that constrained the power of government. Black South Carolinians insisted that equal citizenship entailed a number of positive rights to make the promise of freedom real, including the right to education and land. In calling for a system of public education open to Black children, the South Carolina Convention stressed that “[k]nowledge is power” and that “an educated and intelligent people can neither be held in nor reduced to slavery.”<sup>114</sup> Schooling, one of “the three great agents of civilized society,” the Convention’s memorial to Congress argued, should “be as secure in South Carolina as in Massachusetts or Vermont.”<sup>115</sup> This echoed the 1864 National Convention’s insistence that the government had to respect their rights and meet their needs.

The South Carolina Convention also stressed the role of prejudice in keeping Black Americans unfree. As the Convention’s Declaration of Rights and Wrongs asserted, “[t]he strong wall of prejudice, on the part of the dominant race, has obstructed our pursuit of happiness.”<sup>116</sup> Living up to the promises of the Declaration of Independence required eradicating racial prejudice that enabled the subjugation of Black people. Ensuring freedom required ending not only racially discriminatory laws, but also private prejudice that entrenched the powerlessness of Black Americans. Our founding promises of fundamental rights and equality, the Convention insisted, required white Americans to overcome their prejudices about Black Americans and treat them with the dignity and respect they deserved. Without this, true equal citizenship was impossible.

#### *D. The North Carolina Freedmen’s Conventions of 1865 and 1866*

On September 29, 1865, a freedmen’s convention consisting of 115 delegates from sixty counties, many of whom had until recently been enslaved, met in the African Methodist Episcopal Church in Raleigh, North

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<sup>113</sup> *Id.* at 25.

<sup>114</sup> *Id.* at 9.

<sup>115</sup> *Id.* at 30.

<sup>116</sup> *Id.* at 27.

Carolina to press their claims for equal justice and the right to vote. The timing of the mass meeting was hardly accidental. Across town, white North Carolinians were holding a constitutional convention seeking to find new ways to entrench white supremacy.<sup>117</sup> As the call announcing the convention urged, it was time for “[f]our millions of chattels, branded mercantile commodity,” to “shake off the bands, drop the chains and rise up in the dignity of men.”<sup>118</sup> Once again, Black Americans invoked equal dignity as key to the meaning of freedom.

Opening the convention, Rev. J.W. Hood, a northern-born Black minister who was elected president of the Convention, delivered an address making three demands. First, Hood insisted, Black people were entitled “to *the right to testify in courts of justice*, in order that we may defend our property and our rights.”<sup>119</sup> The right to testify was not only essential to access to courts, but the protection of basic rights would be meaningless if Black Americans could not testify as witnesses in the courts. A letter written by a sympathetic white lawyer, introduced during the convention, buttressed Hood’s point, explaining that, without the right to testify, “[y]ou will be at the mercy of every scoundrel who has white skin and is disposed to swindle you. . . . You may be set upon, beaten into jelly and murdered on sight, and although fifty respectable colored persons might have seen it, you would still be without redress.”<sup>120</sup> The letter continued, “[w]hat is to protect your wives and daughters from the brutal lust of those who would select a time when no white witnesses were present, to effect their devilish designs?”<sup>121</sup> In short, the right to testify was inextricably linked to the genuine enjoyment of a host of other rights. Without the right to serve as a witness in court, Black demands for the bodily integrity, protection of Black families, and economic justice would remain out of reach.

Second, Hood’s address demanded the equal right to serve on juries, insisting on equal “*representation in the jury box*.”<sup>122</sup> Hood explained that “[i]t is the right of every man accused of any offence, to be tried by a jury of his peers. . . . [T]he black man is my peer, and so I am not tried by my peers unless there be one or more black men in the jury box.”<sup>123</sup> Hood’s comments reflected the centrality of the jury to the promise of equal citizenship. One of America’s great democratic institutions, the jury plays a critical role in ensuring equal justice and serving as a check on abuse of power. All-white

<sup>117</sup> See LITWACK, *supra* note 35, at 502-03.

<sup>118</sup> See WILLIAM MCKEE EVANS, *BALLOTS AND FENCE RAILS: RECONSTRUCTION ON THE LOWER CAPE FEAR* 87 (1967).

<sup>119</sup> CONVENTION OF THE FREEDMEN OF NORTH CAROLINA 5 (1865).

<sup>120</sup> *Id.* at 8.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 5.

<sup>123</sup> *Id.*

juries achieved through the exclusion of Black jurors, Hood argued, were inconsistent with equal justice under law and the jury's function of speaking for the entire community. Black Americans had a right to serve on a jury, particularly in cases in which Black persons were accused of a crime.<sup>124</sup>

Third, Hood demanded the right to vote, insisting that "*the black man should have the right to carry his ballot to the ballot box.*"<sup>125</sup> Black North Carolinians, like those in other states, viewed the right to vote as fundamental to the promise of freedom and equal citizenship. To the North Carolina convention, "[n]othing could be more preposterous" than "to refuse men the right of suffrage who have undergone all manner of hardship and danger for the sake of government; who have volunteered in the ranks of its armies and risked their lives upon the battle-field to maintain its integrity."<sup>126</sup>

Addressing the all-white Constitutional Convention meeting across town, the Convention's Address asked for protection from cruel planters, who have "driven their hands away without any pay at all, or even a share of the crops they have raised" or summarily dismissed "[w]omen with families of children . . . from the homes where, under slavery, they have spent a lifetime of hard service."<sup>127</sup> "Is it just or christian," the authors asked, "to thrust out upon the cold world helpless families to perish?"<sup>128</sup> The Convention also sought "education for our children," the eradication of "the disabilities under which we formally labored," an end to "oppressive laws which make unjust discriminations on account of race and color," and "protection for the sanctity of our family relations."<sup>129</sup> "Is this asking too much?" the Address queried white North Carolinians.<sup>130</sup> But despite the conciliatory tone, the Convention understood that rights would not be won without a struggle. On adjourning, the Convention organized a State Equal Rights League to combat racially discriminatory laws.<sup>131</sup>

A year later, the State Equal Rights League issued a call for another Freedmen's Convention. The resolutions and address of the 1866 Convention contained a far more impatient tone, reflecting the yawning gap between the promise of freedom and the reality of racial oppression and violence on the ground. The Convention's resolutions decried that,

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<sup>124</sup> For helpful discussions of race and jury service during Reconstruction, see Thomas Ward Frampton, *The First Black Jurors and the Integration of the American Jury*, 99 N.Y.U. L. REV. 515, 520 (2024); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 897 (2004).

<sup>125</sup> CONVENTION OF THE FREEDMEN OF NORTH CAROLINA, *supra* note 119, at 5.

<sup>126</sup> *Id.* at 8.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 14.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 15-17.

throughout the state, “outrages are being committed, such as killing, shooting, and robbing the unprotected people, for the most trivial offence, and in many instances, for no offence at all” and that “the criminals who permit these fiendish outrages are allowed to roam freely at large.”<sup>132</sup> Other resolutions attacked “taxation without representation” as “unjust and directly in violation of our sacred rights as American citizens” and denounced the state apprenticeship law that permits “our children, the dearest ties of which bind us to domestic life and which make the ties of home endearing” to be “ruthlessly taken from us and bound out without our consent.”<sup>133</sup> The Convention urged the creation of auxiliary leagues to publicize “reports of outrages . . . so that the government and the world may know of the cruelties inflicted upon us and the disadvantages under which we labor.”<sup>134</sup>

Like other Black Conventions, the Convention’s Address demanded the state provide “protection . . . to shield us from the murderous hand.”<sup>135</sup> The Address painted a gruesome picture of the horrific violence Black Americans faced as they sought to enjoy freedom for the first time in their lives. “Our defenceless wives and children, fathers, sons and brothers, are beaten with clubs, robbed, shot, and killed, in various localities, and the authorities regard it not.”<sup>136</sup> Insisting that personal security was fundamental to freedom, they appealed to the authorities “to shield our defenceless heads, and guard our little homes.”<sup>137</sup> The Convention claimed “by merit the right of suffrage” and connected it to the horrific violence they suffered, linking “our grievances, our sufferings, and the outrages heaped upon us” to “our long and unjust political disenfranchisement.”<sup>138</sup> As Black Americans throughout the South insisted, the right to vote was necessary to their protection.

### *E. The Georgia Freedmen’s Convention of 1866*

In January 1866, Black Georgians held a Freedmen’s Convention in Augusta, proudly declaring that “[t]he colored citizens of the State of Georgia are here for the first time in history of the Government, represented by their delegates in convention assembled,” highlighting the unprecedented nature of the mass meetings that were being held throughout the South in the wake of the war’s end.<sup>139</sup> “Who one year ago would have thought that the slaves

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<sup>132</sup> See MINUTES OF THE FREEDMEN’S CONVENTION, HELD IN THE CITY OF RALEIGH 14 (1866).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 26.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> PROCEEDINGS OF THE FREEDMEN’S CONVENTION OF GEORGIA, ASSEMBLED AT

of the Empire State, in the short space of twelve months, would have the right to assemble in convention and deliberate like their masters” and insist “they must have the[ir rights] accorded to them if peace and prosperity was the desire in the future.”<sup>140</sup>

The Freedmen’s Convention, like many others, stressed Black people’s demand for human dignity, linking their pursuit of dignity to the promises laid out in the Declaration of Independence. “[W]e claim for ourselves the dignity of manhood in common with all other men of whatever race, that we are endowed by our Creator with all, and the same inalienable rights that are other men’s, and that we cannot be deprived of these rights by any earthly power, nor can any power or individual infringe those rights . . . .”<sup>141</sup> The Convention also demanded “legal protection against every species of outrage,” noting that “our people are daily subjected to the most cruel abuses by men who, in defiance of law and authority, violate and outrage the simplest form of moral justice.”<sup>142</sup> Only bringing these offenders to justice could vindicate “the principles of liberty and right.”<sup>143</sup>

Many of the Convention’s demands concerned economic justice. They sought the “same personal safety” and “the enjoyment of the fruits of honest industry and economy that are enjoyed by other men,” even as they reminded the all-white state legislature that “thousands have been driven away from their homesteads by their former owners, merely to gratify a vindictive spleen” or as “a consequence of such inhuman cruelty.”<sup>144</sup> They also claimed a right to own land, insisting it was “the duty of the Government to dispose of any lands it may own to the freed people” in order to “secure to themselves and their children permanent homes.”<sup>145</sup> After “[s]uffering from the consequent degradation of two hundred and forty-six years enslavement,” they looked to the state legislature to enact “laws as are equitable, and progressive,” so as to meet their needs.<sup>146</sup> “We shall want asylums for our lunatics; schools and colleges for our children; churches for our respective faiths,” the Convention told the Georgia legislature.<sup>147</sup>

At the same time, they remained pessimistic that white Georgians would rise above their deeply engrained prejudices. Black people, the Convention argued, should represent the Black community. “We need the power to represent our interest in every department bearing upon our condition as a

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AUGUSTA, JANUARY, 10, 1866, at 28 (1866).

<sup>140</sup> *Id.* at 31.

<sup>141</sup> *Id.* at 28-29.

<sup>142</sup> *Id.* at 20, 29.

<sup>143</sup> *Id.* at 29.

<sup>144</sup> *Id.* at 29, 20.

<sup>145</sup> *Id.* at 30.

<sup>146</sup> *Id.* at 18.

<sup>147</sup> *Id.* at 19.

people,” they told the Georgia legislature.<sup>148</sup> “The interests of our race,” the Convention later resolved, “can be represented fully only by our own chosen delegates, and . . . it is unreasonable to suppose that those who once deprived us of our natural rights will now pursue or advocate and sustain a policy commensurate to our necessities.”<sup>149</sup> The Convention stressed that “we believe firmly, as did the founders of this Republic, that ‘all governments derive their just powers from the consent of the governed.’”<sup>150</sup> The Convention stopped short of demanding universal suffrage, but it urged that Black Americans should have “the privilege to vote in all cases where our interest is at stake, and the education and general intelligence of our people will guarantee security in the exercise of that exclusive right.”<sup>151</sup>

The Convention also demanded the right to serve on juries, particularly in criminal cases involving Black defendants. The Convention “claim[ed] the right, under the rules of the common Law, to be tried for all offences, by a jury of our peers, and that the white man is not our peer, so long as legal distinctions are made between persons on account of color or race.”<sup>152</sup> All-white juries should not have the power to decide whether a Black person should be adjudged guilty of crime and face the loss of their liberty. Even as Black Americans sought to eliminate racial discrimination against them, they understood that race still mattered when it came to dispensing justice.

#### F. *The Alabama Colored Convention of 1867*

As Congress sent the Fourteenth Amendment to the states, nullified existing all-white governments, and started the process of reconstructing the South, Black Conventions grew increasingly militant. The Address delivered in Alabama’s 1867 Colored Convention opened with a bold, striking claim for racial equality. “[W]e claim exactly *the same rights, privileges and immunities as are enjoyed by white men*—we ask nothing more and will be content with nothing less. *All legal distinctions between the races are now abolished.*”<sup>153</sup> The Address stressed that this meant that all public accommodations had to be open to all regardless of race. “*Color can no longer be pleaded for the purpose of curtailing privileges, and every public right, privilege, and immunity is enjoyable by every member of the public.*”<sup>154</sup> Thus, “[s]o long as a park or a street is a *public* park or street the entire public

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 29.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 19.

<sup>152</sup> *Id.* at 29.

<sup>153</sup> *Address of the Colored Convention to the People of Alabama*, DAILY STATE SENTINEL, May 21, 1867, at 2.

<sup>154</sup> *Id.* (emphasis in original).

has the right to use it; so long as a car or steamboat is a public conveyance, it must carry all who come to it, and serve all alike who pay alike.”<sup>155</sup> They derided the idea that “riding in cars or sitting in jury boxes or steamboat cabins are social acts and privileges.”<sup>156</sup> Access to public accommodations and the right to sit on a jury were rights common to the public, and therefore were a matter of basic legal equality. Going forward, the Convention demanded, “we are entitled to ride in public conveyances, hold office, sit on juries, and do everything else which we have in the past been prevented from doing solely on the ground of our color.”<sup>157</sup>

The Alabama Convention also addressed the arguments of those who counseled that Black people should patiently wait until the day white people voluntarily accorded them their rights.<sup>158</sup> The Convention answered that “we do not intend to wait one day longer than we are absolutely compelled to,” insisting that the time was now for white people “to surrender unreasonable and unreasoning prejudice.”<sup>159</sup> As Black Alabamians were poised to take power in upcoming state elections, they served notice to their white fellow citizens that “they are being watched closely, and that their conduct will be remembered when we have power.”<sup>160</sup>

The Convention’s Address spoke eloquently about what was at stake in the request that Black people accede to be treated like second-class citizens until the white people of Alabama were willing to treat them as equals. “[T]hey would have us pay for what we do not get; tramp through the broiling sun or pelting rain, or stand upon a platform, while empty seats mockingly invite us to rest our wearied limbs; our sick must suffer or submit to indignity” and “the virtuous aspirations of our children must be continually checked by the knowledge that no matter how upright their conduct, they will be looked on as less worthy of respect than the lowest wretch on Earth who wears a white skin.”<sup>161</sup> In short, Black Alabamians stressed, “[w]e ask you . . . to surrender your prejudices, nothing but prejudices; and you ask us to sacrifice our personal comfort, health, pecuniary interests, self-respect, and the future prospects of our children.”<sup>162</sup> Refusing to “submit voluntarily to such infamous discrimination,” the Alabama Convention demanded not merely formal legal equality, but equal respect and dignity, vindication of their rights and attention to their needs, including their health, education, and

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> On racial conceptions of time, see Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625 (2023).

<sup>159</sup> *Address of the Colored Convention to the People of Alabama*, *supra* note 153, at 2.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

welfare.<sup>163</sup>

The Address concluded with a call for “the establishment of a thorough system of common schools throughout the state,” insisting that the denial of education, “the consequence of our long servitude” should be eliminated.<sup>164</sup> Establishing a right to education, the Alabama Convention argued, “will benefit every citizen of the State” and help ensure a republican government.<sup>165</sup> “In a Republic, education is especially necessary, as the ignorant are always liable to be led astray by the arts of the demagogue.”<sup>166</sup> “With education secured to all,” the Convention insisted, “Alabama will commence a career of which she will have just cause to be proud.”<sup>167</sup>

### G. *The 1869 National Convention of Colored Men*

In 1869, Black leaders representing twenty-one states and the District of Columbia gathered in the nation’s capital for another national convention. The list of delegates included Frederick Douglass, who was elected the Convention’s President, as well as numerous Black leaders, such as Henry Highland Garnet, John and Charles Langston, and William Wells Brown, and a host of Black officeholders from the South.<sup>168</sup> It also included Harriet Johnson, the head of the female department of Avery College, who was accepted as a delegate over the objections of one Black delegate that “he understood the call for this Convention to be expressly for colored men.”<sup>169</sup> The Convention chose to “throw all prejudices aside,” recognizing that to deny a Black woman the right to participate “would be too much like the actions of the occupants of the White House, who had excluded the colored race for two hundred years.”<sup>170</sup> Despite the gendered name, this assembly understood that it had to speak for all Black Americans.<sup>171</sup>

The Convention’s opening Address, delivered by Pennsylvanian activist William Nesbit, highlighted the continuing denial of the right to vote. “The

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, HELD IN WASHINGTON, D.C., ON JANUARY 13, 14, 15, AND 16, 1869, at 6-8 (1869) (listing delegates).

<sup>169</sup> *Id.* at 11.

<sup>170</sup> *Id.* at 12.

<sup>171</sup> For helpful discussions of Black women’s participation in Black grassroots activism of the 1860s, see MARTHA S. JONES, ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN-AMERICAN POLITICAL CULTURE, 1830-1900, at 141-47 (2007); Elsa Barkeley Brown, *Negotiation and Transforming the Public Sphere: African American Political Life from Slavery to Freedom*, 7 PUBLIC CULTURE 107, 109-26 (1994).

partial or total exclusion of colored citizens from the exercise of the elected franchise and other citizen rights, in so many States of the Union, especially demands . . . the continued consideration of every colored man, and of the Congress of the nation.”<sup>172</sup> “Citizenship, as declared by th[e Fourteenth] [A]mendment carries with it the rights of citizens” and it was “the evident duty of a liberty-loving and loyal Congress” to “see that a Republican form of government is guaranteed to every State.”<sup>173</sup> Republican government, the Address urged, “is not guaranteed while any State is permitted to withhold from citizens, on account of color merely, the rights of citizens.”<sup>174</sup> “[T]his exclusion,” Nesbit argued, “is the all-absorbing question of the present, and must call forth our earnest action, by petition, by personal appeal, by protest, and by what votes we have, until justice is done.”<sup>175</sup>

Resolutions adopted during the Convention demanded the right to vote. Insisting that “our Government is a government of the people,” the Convention demanded the nation live up to “a cardinal idea of republicanism”: “the people shall have a voice as to who shall rule over them and what shall be the laws to govern them, which can only be fairly expressed through the ballot.”<sup>176</sup> “[N]o class who are not secured in this privilege,” the resolution stressed, “can feel secure in their freedom.”<sup>177</sup>

Speakers at the Convention enlarged on these ideas. In an Address to the Colored Citizens of the United States, George Vashon argued that absent the right to vote, “we are an unjustly degraded people; for we are stripped in this Union of privileges and franchises which are fully enjoyed by every class of our white fellow citizens.”<sup>178</sup> “[T]he right of suffrage and of eligibility to office,” Vashon urged, should be “as universal as citizenship itself.”<sup>179</sup> Vashon argued that the right to vote was “the strongest weapon in the possession of the subject, repelling the approaches of despotism, and guaranteeing the possession of all other franchises.”<sup>180</sup> “[T]o deny such a right to one class of citizens while it is accorded to another,” he argued, “was manifestly unjust and antirepublican.”<sup>181</sup>

Likewise, Pennsylvanian Isaiah Weir, who was invited to address the House Judiciary Committee, demanded “protection in the exercise of all

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<sup>172</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, *supra* note 168, at 1.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1-2.

<sup>176</sup> *Id.* at 30.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 38.

<sup>179</sup> *Id.* at 39.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

political rights belonging to us as American citizens.”<sup>182</sup> Our government, Weir argued, “derives its powers from the consent of the governed” and “the only way known to us and acknowledged by us, is to express that consent through the ballot box.”<sup>183</sup> Weir stressed that the right to vote was “one of the pursuits of happiness” and “the most permanent and effectual mode of securing the blessings of liberty to ourselves and those who shall come after us.”<sup>184</sup> In short, the Declaration of Independence promised an inclusive, multiracial democracy.

While much of the discussion at the 1869 Convention concerned the right to vote, that right did not stand alone. It was part of a broader matrix of rights and freedoms. A set of resolutions offered by New York delegate H.C. Moulson and immediately adopted by the Convention underscored that new forms of racial oppression “belie the Declaration of Independence by which the American people profess to be governed.”<sup>185</sup> As Moulson explained,

[T]he [Declaration’s] words are far from being made effective. A large majority of the citizens of the United States are denied those rights which were given them by their Creator. They are taxed without being represented; they are subject to trials by juries which are not their peers; they are murdered without having redress, and are taxed to support common schools while their children are denied the privilege of attending those in their respective wards; they are called upon for the military of the country without receiving proper protection of the country . . . . We have been promised our rights, but have not received them.<sup>186</sup>

The response to these systemic denials was a far-reaching demand for full equality and inclusion in all aspects of American life. “We demand all the rights and prerogatives enjoyed by our white-fellow citizens. . . . We demand these as natives of the country. We demand them from our long, unrequired toil . . . . We demand them as men, children of a common Father.”<sup>187</sup> Moulson concluded with a final “demand” for “equality of suffrage and all political franchises in the United States,” urging a petition calling for “a constitutional amendment securing the right to vote without distinction of race or color.”<sup>188</sup>

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<sup>182</sup> *Id.* at app. III.

<sup>183</sup> *Id.* at app. V.

<sup>184</sup> *Id.* at app. VII.

<sup>185</sup> *Id.* at 34.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 35.

Through these conventions, Black Americans, such as H.C. Moulson and countless others, created a rich record of their constitutional ideals, demands, and aspirations, building off foundational texts such as the Declaration of Independence. Some of these shared much in common with the ideals of white Republicans who fought to add new amendments to the Constitution, while others did not. The next Section discusses the distinctive aspects of Black constitutionalism during Reconstruction.

## II. THE DISTINCTIVE CONTRIBUTIONS OF BLACK CONSTITUTIONALISM OF THE RECONSTRUCTION ERA

The Republicans who pushed the Thirteenth, Fourteenth, and Fifteenth Amendments through Congress and the Black leaders and activists who were responsible for the speeches, resolutions, and addresses of the Black Conventions that met in 1864-1869 shared a common constitutional language. Influenced by the abolitionist movement, they maintained that human bondage had betrayed the ideals of the Declaration of Independence and that it was essential to enshrine the Declaration's principles directly in the Constitution by guaranteeing equal citizenship, safeguarding the enjoyment of fundamental rights for all, and obliging the government to protect all persons and keep them safe from harm.<sup>189</sup> While the Declaration served as a shared North Star, there were key differences as well.

As the records of the Black Conventions of 1864-1869 show, Black Americans developed a rich and distinctive understanding of the meaning of equal citizenship, what rights were due them as citizens, and what the duty of protection required of the government. In many respects, the ideas expressed in the Black Conventions of the Reconstruction era complemented elite white Republican understandings. When Black Americans spoke about their need for dignity, for protection of their bodily integrity, and why it was essential to stamp out engrained racial prejudice, they voiced crucial ideas that white Republicans addressed, if at all, in a far more cursory manner. In other respects, Black views went well beyond what white Republicans were willing to countenance. Particularly when it came to voting rights, the Black Conventions offered a more robust vision of equal citizenship, pushing white Americans to accept them as full equals in the new republic emerging out of the destruction of slavery. This Section examines four distinctive aspects of Black constitutionalism during Reconstruction: (1) respect and dignity as fundamental to equal citizenship; (2) the embrace of constitutional rights and needs; (3) prejudice as a barrier to equal citizenship; and (4) color-blindness

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<sup>189</sup> See Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 849-850 (2023). On the constitutional ideals of citizenship, rights, and protection, see Gans, *supra* note 47, at 230-34.

and race-consciousness.

*A. The Constitution of Belonging: Respect and Dignity as Fundamental to Equal Citizenship*

Black constitutionalism during Reconstruction put a premium on respect and dignity as constitutional values. Having been treated as property, disrespected and subjected to unending violence, Black Americans insisted that, now that they were free, they were equal citizens entitled to dignity and respect. Equal citizenship was not only about possessing the rights enjoyed by others; it was also about being recognized as equals in all aspects of civil life.<sup>190</sup> Numerous state and national conventions explicitly demanded respect and dignity as a part of equal citizenship.<sup>191</sup> They demanded that Black Americans “shall be recognized as men,” accorded “full enjoyment of . . . its dignities,” and vowed to “agitate, agitate, agitate until our manhood is respected.”<sup>192</sup> Conventions opposed “invidious, political, or legal distinctions on account of color” as “inconsistent with our own self-respect and the respect of others.”<sup>193</sup> White speakers, too, sometimes invoked human dignity, but their use of the term pales in comparison.<sup>194</sup>

In many respects, Black activists who demanded equal respect and human dignity were ahead of their time, turning to a concept that would not achieve prominence until the twentieth century.<sup>195</sup> They seized on these two closely related concepts to insist on their equal worth, their right to self-determination, and their right to participate as full members of the body politic as equals. They demanded the full range of civil, political and economic rights to allow them to forge opportunities for themselves that their enslaved forbears could not enjoy. As the 1865 South Carolina Convention put it, Black Americans now liberated from enslavement had to enjoy “the right to develop our whole being by all the appliances that belong to civilized

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<sup>190</sup> Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 325-26 (arguing that Black “understanding of rights . . . fused the basic civil rights traditionally associated with liberty with the social recognition that was the essence of equality”).

<sup>191</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 42; PROCEEDINGS OF THE FREEDMEN’S CONVENTION OF GEORGIA, *supra* note 139, at 28.

<sup>192</sup> PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 25; PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 42; PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VIRGINIA, *supra* note 80, at 12, 23.

<sup>193</sup> ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, *supra* note 63, at 12.

<sup>194</sup> See CONG. GLOBE, 39<sup>th</sup> Cong. 111 (1865) (urging that Black Americans should enjoy “the conscious dignity of a free man”).

<sup>195</sup> See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1924 (2003); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CON. L. 669, 681 (2005).

society.”<sup>196</sup> Without full equality, “we are an unjustly degraded people,” charged George Vashon’s address to the 1869 National Convention.<sup>197</sup> Black Americans had to control their bodies, enjoy economic rights to amass wealth and rise in the world, enjoy the right to education to cultivate their children’s minds, the right to equal enjoyment of public accommodations, the right to participate in all aspects of political life, and to testify in court and serve on juries, to name just a few of rights Black Americans prized as fundamental to equal citizenship. Anything less would be inconsistent with the respect and dignity they were due as equal citizens.

The demand for equal respect and dignity had a second, equally important, implication: White Americans had to treat Black Americans as their fellow-citizens. In invoking their right to respect, Black Americans insisted that white people give up their racial prejudices and treat Black people with respect and dignity. The 1867 Alabama convention made this point explicitly. “We ask you . . . to surrender your prejudices, nothing but prejudices; and you ask us to sacrifice our personal comfort, health, pecuniary interests, self-respect, and the future prospects of our children.”<sup>198</sup> As Black Alabamians made clear, racial prejudice was a formidable obstacle to freedom and true equal citizenship.<sup>199</sup> If Black people were to have the respect and dignity they demanded, white Americans would have to treat them as equals.

### *B. Fundamental Rights and Needs*

The 1864 National Convention was notable not only for declaring a right to respect, but for affirming that Black Americans were entitled to a government that safeguarded their rights and met their needs. The protection of fundamental rights was necessary, but not sufficient. The 1864 Convention insisted that “due attention should be given to our needs.”<sup>200</sup> This was an explicit recognition that the government had an affirmative duty to meet the needs of its citizens, a critical affirmation that some rights are positive in nature. As James Fox has suggested, “the very use of the term *needs* emphasizes that access to freedom implied some obligation to address basic needs of citizens.”<sup>201</sup> The 1864 Convention was not an outlier in this

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<sup>196</sup> PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 31.

<sup>197</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, *supra* note 168, at 39.

<sup>198</sup> *Address of the Colored Convention to the People of Alabama*, *supra* note 153, at 2.

<sup>199</sup> See *infra* Part II.C (discussing the role of prejudice in Black constitutionalism).

<sup>200</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 42.

<sup>201</sup> Fox, *Counterpublic Originalism*, *supra* note 6, at 727.

regard. Black conventions during Reconstruction repeatedly demanded respect for their rights and fulfillment of their needs. This was an enduring aspect of Black constitutionalism.

In discussing fundamental rights, congressional Republicans tended to stress rights of free labor, including rights to contract, own and possess property, to enjoy the fruits of one's labor, and access to courts.<sup>202</sup> Reconstruction-era Black Conventions, of course, recognized these rights as fundamental. But they centered other rights as well.

Among fundamental rights, Black Americans repeatedly stressed their right to control their bodies and establish families. Black people prized the individual's "right to his body and mind" and "the right of personal security and protection against injuries to our bodies."<sup>203</sup> Congressional Republicans, too, recognized the fundamental nature of the right of personal security, drawing on the writings of William Blackstone,<sup>204</sup> but the Black Conventions of the Reconstruction era offered a distinctive theory of why the right to bodily control was fundamental to freedom, drawing on how, for centuries, "our bodies have been outraged with impunity" by white enslavers.<sup>205</sup> Black men and women could not be free if they did not have the right to bodily integrity.

Bodily integrity was not only fundamental in its own right; it was also inextricably intertwined with other rights, such as the right to testify in court. Numerous conventions across the South made this observation, stressing the importance of equal justice in the courts. If Black Americans could not testify in court, white supremacist violence would likely continue unabated without possibility of redress. In this way, the right to testify was "essential to personal dignity and safety."<sup>206</sup>

Black Conventions during Reconstruction fought tirelessly for the right to vote. Virtually every Convention demanded the right to vote, insisting that the right to choose one's representatives was "inherent and essential to every republican form of government."<sup>207</sup> Hence, political rights were just as fundamental as civil rights. Black constitutionalism, thus, rejected one of the core pillars of the tripartite understanding of citizenship commonly invoked

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<sup>202</sup> See FONER, *supra* note 22, at 40-43.

<sup>203</sup> PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 27.

<sup>204</sup> See David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 S.M.U. L. REV. F. 191, 198 (2022); Murray, *supra* note 189, at 850 n.248.

<sup>205</sup> PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 27.

<sup>206</sup> ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, *supra* note 63, at 23.

<sup>207</sup> PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 27.

by white elites at the time.<sup>208</sup> This marked the biggest schism with congressional Republicans.

Indeed, Black Conventions during Reconstruction insisted that, without the right to vote, civil rights “become mere privileges, held at the option of others.”<sup>209</sup> They demanded the right to vote as protection from “being mobbed from our work and insulted with impunity at every corner.”<sup>210</sup> Without the right to vote, Black Americans feared that the government would not safeguard their rights and protect them from violence. There was simply “no other safe-guard for our protection.”<sup>211</sup> Far from being a mere privilege fundamentally distinct from civil rights, the right to vote, they argued, was essential to the enjoyment of civil rights. In demanding equal voting rights, they drew on the promises of the Declaration of Independence, the founding principle of no taxation without representation, and the Constitution’s insistence that governments be republican in character. To be republican, government had to rest on the consent of the governed, not “an oligarchy of the skin.”<sup>212</sup> To Black Americans, the promise of a multiracial democracy was embedded in our founding principles, which had long been flouted while America was a slave society. Now that chattel slavery was abolished, they demanded the right to vote.

These arguments did not initially succeed. In drafting the Fourteenth Amendment, congressional Republicans refused to safeguard the right to vote as a fundamental right. They insisted that “the first section of the proposed amendment does not give . . . the right of voting” and that therefore the Fourteenth Amendment “leaves the right to regulate the elective franchise with the States, and does not meddle with that right.”<sup>213</sup> Section 2 of the Amendment did impose a penalty of reduced congressional representation on states that denied the vote to its male citizenry, but this allowed states to disenfranchise Black citizens so long as they were willing to pay the price of reduced representation.<sup>214</sup> The Fifteenth Amendment was necessary to annul racial discrimination in voting and vindicate the arguments of Black Americans that the right to vote was essential to their protection. Persistent

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<sup>208</sup> On the tripartite understanding of citizenship, see *supra* text accompanying note 17-18.

<sup>209</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 59.

<sup>210</sup> *Id.* at 60.

<sup>211</sup> PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VIRGINIA, *supra* note 80, at 9.

<sup>212</sup> PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 19.

<sup>213</sup> CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 2766 (1866).

<sup>214</sup> U.S. Const., amend XIV, § 2; CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 2543, 2766-67 (1866).

Black activism over the course of Reconstruction helped push white Republicans to recognize that the promise of freedom and equality was incomplete without the right to vote. By 1869, congressional Republicans demanded an end to racial discrimination in voting, adopting wholesale arguments that the Black Conventions had long been making.<sup>215</sup> In relentlessly pushing for the right to vote, Black Americans helped make multiracial democracy a critical part of our constitutional order. As this history shows and the next section discusses in more detail, Black demands for voting rights powerfully shaped the constitutional transformations wrought by the Reconstruction Amendments.<sup>216</sup>

Rights, like the right to bodily integrity and the right to vote, were fundamental to equal citizenship. But, as numerous Reconstruction-era Black Conventions recognized, citizens also had fundamental needs that the government was obliged to meet. If rights were by and large negative in character, needs imposed positive obligations on the government. The concept of fundamental needs was powerfully influenced by the work of the Freedmen’s Bureau, which Congress created in 1865 and expanded in 1866, to provide goods and services to Black Americans and white refugees whose lives were uprooted during the Civil War, including access to basic necessities, such as food, clothing, health care, and education.<sup>217</sup> Black Conventions repeatedly “hail[ed]” the work of the Bureau in “governing the interests of the colored men in the South” and “the vast service” it provided to “raise up an oppressed and deeply injured people.”<sup>218</sup> But while the Freedmen’s Bureau may have provided a source of inspiration, it was Black Americans who explicitly called attention to what was implicit in the work of the Freedmen’s Bureau: rights and needs were both essential to ensuring a flourishing constitutional democracy.

Black Conventions during Reconstruction focused on a number of basic needs. First, Black Conventions demanded protection by the government, insisting that it was the responsibility of the government to protect their rights to life, liberty and property and keep them safe from harm. In invoking the right of protection, Black constitutionalism during Reconstruction built on a deeply rooted constitutional ideal that, in return for allegiance, the

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<sup>215</sup> CONG. GLOBE, 40<sup>th</sup> Cong. 3d Sess. 912 (1869) (“Suffrage is the only sure guarantee which the negro can have . . . in the enjoyment of his civil rights. Without it his freedom will be imperfect, if not in peril of total overthrow.”); *id.* at 1008 (arguing the right to vote would help Black Americans “protect themselves in the southern reconstructed states” from attacks on their rights).

<sup>216</sup> See *infra* text accompanying notes 271-274.

<sup>217</sup> See Gans, *supra* note 47, at 253-77; Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1362-66 (2016).

<sup>218</sup> CONVENTION OF THE FREEDMEN OF NORTH CAROLINA, *supra* note 119, at 6; PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 30.

government owes protection to all citizens.<sup>219</sup> Protection had a long lineage in abolitionist and Black demands for freedom, and special resonance in the post-Civil War South.<sup>220</sup> Against the backdrop of indiscriminate white supremacist violence aimed at Black Americans and rampant disregard for their new status as a free people, Reconstruction-era Black Conventions demanded the right to protection. Protection was in some sense the most fundamental need of all, reflecting the reality that without physical safety and security, Black Americans could not really be free.

Education was a second fundamental need. Across the South, Black Americans decried how, even after freedom, “institutions of learning which we help to support are closed against us.”<sup>221</sup> Numerous Reconstruction-era Black Conventions consistently affirmed that access to education was fundamental to freedom and equal citizenship and called on their fellow citizens to provide for a system of public education open to all on the basis of equality.<sup>222</sup> Affording educational opportunities to all would prepare the young to participate as equal citizens in all aspects of society, including at the ballot box.

In other respects, too, Black Americans demanded a government that would meet their needs by helping uplift the neediest people in the community. These included taking care of the elderly, the poor and helpless, and those afflicted with mental illnesses.<sup>223</sup> Indeed, one of the reasons the right to vote was so fundamental to Black constitutionalism was it ensured that Black Americans could help choose representatives who would enact laws that met the needs of the whole community. The right to vote was not merely a matter of self-defense against predation, but reflected that “it is unreasonable to suppose that those who deprived us of our natural rights will now pursue or advocate and sustain a policy commensurate to our necessities.”<sup>224</sup> Indeed, during Reconstruction, armed with the vote, Black Americans worked to put these ideas into practice, helping to elect state legislative bodies committed to an activist state that would help uplift the poor and powerless by providing access to goods and services, such as

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<sup>219</sup> See Fox, *Counterpublic Originalism*, *supra* note 6, at 733 (“By asserting a claim to full citizenship, African Americans were invoking an obligation of the government, an obligation to provide protection to them precisely because they were citizens.”).

<sup>220</sup> See Gans, *supra* note 26, at 904-08.

<sup>221</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 42.

<sup>222</sup> See PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 9, 30; *Address of the Colored Convention to the People of Alabama*, *supra* note 153, at 2.

<sup>223</sup> See PROCEEDINGS OF THE FREEDMEN’S CONVENTION OF GEORGIA, *supra* note 139, at 19; *Address of the Colored Convention to the People of Alabama*, *supra* note 153, at 2.

<sup>224</sup> PROCEEDINGS OF THE FREEDMEN’S CONVENTION OF GEORGIA, *supra* note 139, at 29.

education, medical care, and orphanages.<sup>225</sup>

### *C. Combatting Racial Prejudice*

As we have seen, a major part of Black constitutionalism during Reconstruction aimed to ensure that the government respected the rights and needs of the Black community. But equally fundamental to Black constitutionalism was eradicating racial prejudice held by their white fellow-citizens. In other words, rights running against the government were necessary, but they were hardly sufficient on their own. A constitutional order built on freedom and equality for all was impossible if white Americans continued to treat Black Americans as less than fully human and designed only to occupy a subordinate position in American life. In short, racial prejudice had to be eliminated root and branch in all aspects of civil society to make the promise of freedom real.<sup>226</sup>

This idea had important implications for Black conceptions of rights and the government’s obligation to protect rights from infringement. In modern constitutional law, rights are principally rights against government infringement, and the Thirteenth Amendment, which, in the words of Akhil Amar, “provided for rights against the world,” is an anomaly.<sup>227</sup> Black constitutionalism adopted a very different perspective. Black Americans regarded rights as constraints on both government and private actors. The use of private power to entrench white supremacy was just as much of a problem as state infringement of rights or state-sponsored discrimination. To be effective in eradicating slavery and its badges and incidents, rights had to equally curb white-dominated state governments and private power wielded by white enslavers and other private actors. Moreover, to protect Black Americans in their enjoyment of their rights required attacking the role of racial prejudice across public life. The Thirteenth Amendment, rather than being an anomaly, provided a model for how to think about rights.

The idea that the Constitution should constrain both public and private wrongs, far from anomalous, was at the heart of not only the Thirteenth Amendment, but the Fourteenth Amendment as well. Indeed, that Amendment was written against the backdrop of what the Joint Committee on Reconstruction called “a deep seated prejudice against color” that “leads

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<sup>225</sup> See FONER, *supra* note 1, at 368.

<sup>226</sup> See Fox, *Counterpublic Originalism*, *supra* note 6, at 345 (“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.”).

<sup>227</sup> Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 *HARV. J. L. & PUB. POL’Y* 37, 39 (1990).

to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.”<sup>228</sup> In this respect, the Fourteenth Amendment was simply “a more detailed exposition of the Thirteenth Amendment’s establishment of freedom,”<sup>229</sup> fully concerned with all the ways public and private power worked together to keep Black Americans “landless and homeless” and effectively “slaves of society.”<sup>230</sup> Congressional debates over the Amendment and the nation’s first federal civil rights laws reflected the influence of Black advocacy concerning the insidious role played by racial prejudice, as members of Congress spoke of their duty to “protect these freedmen against the public sentiment and the oppression that will undoubtedly be thrown upon them by the people of the southern States.”<sup>231</sup> Congressional Republicans argued that “Congress is bound to see that freedom is in fact secured to every person throughout the land” and that “any legislation or public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution.”<sup>232</sup> To Republicans in Congress, it was plain that “there is a strong prejudice against the colored race in this country, and that that prejudice takes active form and results in outrages on the rights and privileges and immunities of that race.”<sup>233</sup> As these statements indicate, the sentiment of racial prejudice was itself a constitutional problem.

Black constitutionalism during Reconstruction demanded an end to all forms of prejudicial exclusion from civic life. It did not entirely reject the distinction between civil and social equality but insisted that civil rights encompassed equal access to all public places and institutions, whether run by the government or privately owned, that make up civil society. As the Alabama Colored Convention of 1867 insisted, equal rights in public institutions and places were essential to equal citizenship. “So long as a park or street is a *public* park or street the entire public has the right to use it; so long as a car or steamboat is a public conveyance, it must carry all who come to it, and serve all alike who pay alike.”<sup>234</sup> The Alabama Convention and others like it recognized the category of social rights, but insisted that it was very narrow and applied only to purely private affairs. The social rights category reflected the idea that “[e]very man controls his house according to

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<sup>228</sup> REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. 39-30, at xvii (1866); see also Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1847 (2010); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1354 (1964).

<sup>229</sup> Fox, *Constitution of Black Abolitionism*, *supra* note 6, at 346.

<sup>230</sup> CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 39, 168 (1865).

<sup>231</sup> *Id.* at 744.

<sup>232</sup> *Id.* at 77.

<sup>233</sup> CONG. GLOBE, 40<sup>th</sup> Cong. 2d Sess. 1125 (1868).

<sup>234</sup> *Address of the Colored Convention to the People of Alabama*, *supra* note 153, at 2.

his own ideas, and associates with whomever he pleases—provided they are willing to associate with them.”<sup>235</sup> But in public life, there was no room for racial prejudice. Black Americans had to enjoy the right to participate in all aspects of civil society free from the sting of hatred and enmity because of the color of their skin.

#### *D. Colorblindness and Race-Consciousness*

Black Americans were vociferous advocates for the end of race-based laws. During Reconstruction, Black Conventions insisted that, with the abolition of slavery, “[t]he word white is stricken from our laws, and every privilege which white men were formerly permitted to enjoy, merely because they were white men, . . . we are entitled to on the ground that we are men.”<sup>236</sup> In this sense, state-sponsored racial discrimination was a badge and incident of enslavement that should wither away and die. The 1865 mass meeting of Black Norfolks made the point this way, asking “now, that slavery has been crushed, . . . on what pretext can disabilities be perpetuated that were imposed to protect an institution which has now, thank God, passed forever away?”<sup>237</sup> To Black Americans, the law had to recognize their “full enjoyment of those privileges of full citizenship.”<sup>238</sup> At a time when white Republicans were still willing to accept race-based laws in some contexts, such as voting, Black Americans demanded racial equality across-the-board.

At the same time, Black Conventions rejected the idea that race was irrelevant and could not be considered. Legal rights had to take into account the reality of race and continuing forms of racial oppression and racial prejudice. Consider two examples. First, a number of Reconstruction-era Black Conventions demanded equal participation on jury pools in cases involving Black defendants accused of crime, reasoning that “the white man is not our peer, so long as legal distinctions are made between persons on account of color or race.”<sup>239</sup> Black defendants should be tried “before a Jury of their own color, and not before men who yet believe that black men have no rights which white men are bound to respect.”<sup>240</sup> Far from being purely color-blind, race-consciousness was baked into the right to participate as a juror. The law, they argued, should take account of race to ensure Black defendants were tried by their peers. Second, post-war Black Conventions

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, *supra* note 63, at 1.

<sup>238</sup> *Id.*

<sup>239</sup> PROCEEDINGS OF THE FREEDMEN’S CONVENTION OF GEORGIA, *supra* note 139, at 29.

<sup>240</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, *supra* note 168, at 19.

offered a race-conscious understanding of the right to vote, repeatedly emphasizing that Black citizens needed the right to vote for their protection.<sup>241</sup> Black Americans understood that the political system was sharply divided along racial lines and they viewed the right to vote as critical to their ability to protect themselves from anti-Black racism. They had witnessed white-dominated state legislatures enact Black Codes that aimed to re-establish enslavement without the name and strip Black Americans of the freedom they had fought to win.<sup>242</sup> What hope of freedom was there unless Black Americans were accepted as full members of the body politic? Race mattered in politics and that was why the right to vote was essential.

As these examples suggest, Black demands that race-based laws should be eliminated, thus, did not mean that race was irrelevant and could not be considered. The law should not be blind to continuing racism and racial prejudice held by most white Americans. As Black abolitionist George Downing observed during the 1869 National Convention, white America owed a “great debt, justly due and of longstanding, contracted by centuries of measureless wrongs and enforced ignorance” that sometimes required race-conscious efforts to repair the long legacy of racial subjugation, dehumanization, and violence.<sup>243</sup> The constitutional vision urged by Black Americans of the Reconstruction era—unlike the colorblind constitutionalism that dominates the work of the Roberts Court—adopted an uncompromising commitment to racial equality, while also taking account of all the ways race and racial prejudice continued to matter in the world they lived in.

The Black Conventions of the Reconstruction era provide a fascinating lens into Black constitutionalism and the aspirations Black Americans held for the nation that had been torn asunder by their enslavement. But do Black understandings of freedom and equality bear on the proper interpretation of the Reconstruction Amendments? The next part turns to consider that question.

### III. WHOSE TEXT, WHOSE HISTORY? TOWARD AN INCLUSIVE CONSTITUTIONALISM

Courts currently ignore the work of Reconstruction-era Black Conventions in discussing the meaning of the three Reconstruction

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<sup>241</sup> See *supra* text accompanying notes 209-211.

<sup>242</sup> See Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 314 (2020) (“[A] South without Black suffrage was a South with the Black Codes.”).

<sup>243</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, *supra* note 168, at 16.

Amendments, presenting history as if white voices and views were the only ones that mattered. This impoverishes our understanding of the Reconstruction Amendments. It also ignores the ways that Black activism helped shape the Amendments that congressional Republicans championed. In this sense, Black Americans were “co-creators of American constitutional law.”<sup>244</sup> Efforts to construct the meaning of these foundational Amendments by attending only to what elite white people said and thought is likely to lead to crabbed understandings that shortchange the transformational guarantees written into the Reconstruction Amendments and perpetuate the exclusions and democratic deficits those Amendments sought to end. If courts brush aside Black aspirations for freedom and equality reflected in the Black Conventions of the Reconstruction era, they cannot hope to capture what the Reconstruction Amendments meant to all Americans.<sup>245</sup> In other words, Black Americans were a key part of the public, without whom the Reconstruction Amendments would not have been possible. The stories we tell about the Thirteenth, Fourteenth, and Fifteenth Amendment—what Jack Balkin and Reva Siegel call our constitutional memory—have to account for the Black activism for freedom and equality that shaped the Reconstruction Amendments.<sup>246</sup>

As this Part details, the work of the Black Conventions is a crucial part of the history of the Reconstruction Amendments. Black leaders continuously pushed white Republicans to meet their demands for full and equal citizenship, including voting rights. In some respects, they succeeded; in others they fell short. But the historical record shows that their activism helped shape both the substance of the Reconstruction Amendments and their ratification. First, newspapers widely reported on their deliberations and published their addresses, informing white Americans of their constitutional aspirations. In this way, the Black Conventions were a part of the public debate about how to realize constitutional values of freedom and equality. Second, congressional Republicans introduced their petitions into the congressional record and, quite often, voiced their concerns and worked to meet their demands. Third, between 1867-1870, following passage of the First Reconstruction Act—an act of lawmaking shaped by Black demands for the ballot—Black votes in the reconstructed states of the former Confederacy were crucial to ratifying the Fourteenth and Fifteenth Amendments. Black

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<sup>244</sup> See Ablavsky & Allread, *supra* note 5, at 10.

<sup>245</sup> See Evan D. Bernick, Paul Gowder, & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORNELL L. REV. ONLINE 101, 113 (2025); Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CON. L. 379, 413 (2018).

<sup>246</sup> See, e.g. JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL ADJUDICATION* 222-23 (2024); Reva B. Siegel, *Foreword: Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1023-25 (2025).

Americans, in other words, were not merely the intended beneficiaries of the Reconstruction Amendments. In a very real sense, Black Americans were constitution-makers, whose activism helped ensure that the Amendments that secured their freedom and equal citizenship bore their imprint to the greatest extent possible.

*A. The Black Conventions in the Popular Press*

During Reconstruction, Black Conventions were notable and newsworthy and papers across the country regularly reported on their demands for freedom and equality.<sup>247</sup> Contemporaneous press coverage of Black Conventions left no doubt just how unprecedented these assemblies of Black citizens were. In the winter of 1865, for example, the *Chicago Tribune* informed its readership about the Colored People’s Convention held in South Carolina, celebrating the fact that “[t]he addresses and resolutions exhibit the negro in a new *role*, in the assertion of his rights as a free citizen of the United States.”<sup>248</sup> “No person,” the editorial continued, “can read through these glowing and eloquent addresses, warm from the heart and brain of men lately bought and sold as chattles without confessing that their authors deserve a vote and voice in the affairs of government.”<sup>249</sup> The paper went on to suggest that “had the men who formed this Charleston Colored Convention sat in the white reconstruction convention, the latter would have been far better done, and a constitution would have been adopted which would have done justice to all.”<sup>250</sup> The *New York Herald* also praised the work of the South Carolina Convention, observing that it had “been marked by a display of ability and decorum that won for its members great credit from even those who see in such gatherings only some ominous forebodings of insurrection,” while the *Brooklyn Union* added that the convention’s documents “have the merits of putting the case of the colored men in the strongest light” and “show an

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<sup>247</sup> See, e.g., THE LIBERATOR, Oct., 14, 1864, at 3 (reprinting proceedings and Declaration of Wrongs and Rights from 1864 National Convention of Colored Men); CHICAGO TRIB., Aug. 8, 1865, at 1 (reprinting resolutions from the Convention of the Colored People of Virginia); N.Y. TRIB., Oct. 9, 1865, at 1,8 (reprinting resolutions and proceedings from the North Carolina Freedmen’s Convention of 1865); NEW YORK HERALD, Nov. 29, 1865, at 5 (commentary and excerpts from the Colored People’s Convention of South Carolina); THE LIBERATOR, Dec. 8, 1865, at 3 (reprinting addresses from the Colored People’s Convention of South Carolina); WILMINGTON JOURNAL, Oct. 18, 1866, at 4 (reprinting addresses from Freedmen’s Convention of 1866); PHILADELPHIA INQUIRER, May 4, 1867, at 4 (reporting on resolutions from the Alabama Colored Convention of 1867); BALTIMORE SUN, Jan. 19, 1869, at 4 (reprinting address from the 1869 National Convention of the Colored Men of America).

<sup>248</sup> See *South Carolina in Convention*, CHICAGO TRIB., Dec. 2, 1865, at 2.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

intelligent appreciation of the principles of republican government” and “a love of rational liberty and order.”<sup>251</sup>

Other Black Conventions were commended in the press, as well. In the fall of 1866, the *New York Times* observed that “quite a number of State Conventions of the Colored people are being held in various sections of the country, East, West and South.”<sup>252</sup> The paper, in particular, praised the work of the North Carolina Freedmen’s Convention held that year, calling its proceedings “wise and moderate” and highlighting its demand for laws “to furnish” Black Americans “sufficient protection.”<sup>253</sup> In 1867, the *Raleigh Tri-Weekly Standard* reprinted parts of the Alabama Colored Convention’s Address, offering this enthusiastic recommendation to its readers: “This document should have a wide circulation. Read these extracts and then hand the paper to your neighbor.”<sup>254</sup>

Not all newspapers were forthcoming with praise. The *Raleigh Daily Sentinel* “saw nothing but evil” to come out of the 1865 Freedmen’s Convention in North Carolina. The way forward for Black people to obtain their rights, according to the paper, was “not by holding colored Conventions, not by loud, exciting, and threatening speeches, not by impertinent and unreasonable demands.”<sup>255</sup> Likewise, one Alabama paper called the work of the 1867 Alabama Colored People’s Convention “a foul slander on the whites” and chided Black Alabamians for putting themselves in “direct antagonism with the whites of the State.”<sup>256</sup> Rather than claiming the right to participate as equals throughout civic life, the paper suggested, Black people should confine themselves “to the work . . . of making corn and cotton.”<sup>257</sup> But whether they praised or pilloried the work of the Black Conventions, the newspaper coverage underscored just how important the convenings and the Black activism they represented were. As the nation was roiled with the question how to rid our foundational charter of the stain of slavery and establish a new republic that recognized the equal citizenship of Black Americans, how Black communities understood and made claims on constitutional principles of freedom and equality mattered. They were a part of the public debate over how to vindicate fundamental principles of liberty and equality that, for too long, had been betrayed by the institution of slavery.

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<sup>251</sup> NEW YORK HERALD, Nov. 29, 1865, at 5; *The South Carolina Colored Convention*, BROOKLYN UNION, Nov. 29, 1865, at 2.

<sup>252</sup> *Colored Conventions and Colored Ideas—Grave and Gay*, N.Y. TIMES, Oct. 23, 1866, at 4.

<sup>253</sup> *Id.*

<sup>254</sup> See *Republicanism in Alabama*, TRI-WEEKLY STANDARD, May 25, 1867, at 2.

<sup>255</sup> *The Colored Convention*, DAILY SENTINEL, Oct. 2, 1865, at 2.

<sup>256</sup> *The Platform of the Mobile Convention of Freedmen*, ALA. BEACON, MAY 18, 1867, at 2.

<sup>257</sup> *Id.*

*B. The Black Conventions in Congress: How Black Activism Shaped the Reconstruction Amendments*

In the halls of Congress, Republican champions of Reconstruction were familiar with the work of the Black Conventions and often introduced Black-authored petitions into the congressional record and referred them to the Joint Committee on Reconstruction, the body charged with formulating new constitutional amendments. As the 39<sup>th</sup> Congress met in the winter of 1865 to consider how to respond to Black Codes that sought to impose new forms of racial servitude and strip Black Americans of fundamental rights, leading Republicans made sure that Black demands for freedom and equality were a part of the debate.

For example, in December 1865, Senator Charles Sumner, long a champion of racial equality, offered a memorial from 280,000 Black Tennesseans which had been adopted in the State Convention of the Colored Men of Tennessee held that summer in Nashville.<sup>258</sup> The memorial urged Congress to refuse to seat Senators and Representatives from Tennessee until the state’s legislature acted to secure the rights of Black people in the state, emphasizing that “we are at a loss to understand that to be a republican government which does not protect the rights of all citizens, irrespective of color.”<sup>259</sup> Senator Sumner not only introduced their memorial, but also vouched for it, telling his colleagues that “[t]he colored memorialists are right” that “a community which despoils two hundred and eighty thousand people of their rights cannot expected to be recognized as a republican government.”<sup>260</sup>

That same day, Michigan Senator Jacob Howard, a key member of the Joint Committee on Reconstruction, introduced a petition signed by 3,740 Black South Carolinians, which urged Congress to ensure that “in the exercise of our high authority over the reestablishment of civil government in South Carolina their equal rights before the law may be respected.”<sup>261</sup> As Howard described, the petition insisted that, without the right to vote, “we will have no security for our personal rights and no means to secure the blessings of education to our children”—one of the central arguments for equal voting rights repeatedly made in the Black Conventions of this period.<sup>262</sup> The remarkable petition—fifty four feet in length—was signed by many Black Americans who had participated in the 1865 Colored

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<sup>258</sup> CONG, GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 107 (1865).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 108.

Convention.<sup>263</sup> The following month, Senator Charles Sumner introduced the memorial to Congress from the South Carolina Colored Convention held in 1865.<sup>264</sup> Sumner highlighted some key aspects of the memorial—the demand for protection so that “life and property may be secure,” the insistence that government in South Carolina could not rest on “the consent of the governed,” unless Black Americans had “equal suffrage,” as well as that “colored men should not be tried by white men, but that they should have juries for themselves.”<sup>265</sup>

This pattern played out repeatedly over the course of Reconstruction. In the period Congress was considering making far-reaching changes to the Constitution to ensure freedom and equal citizenship for Black Americans, Republican senators, usually Senator Sumner, introduced into the congressional record petitions from the Alabama Colored Convention of 1865, the Mississippi Colored Convention of 1865, the Florida Colored Convention of 1865, the National Equal Rights League Convention of Colored Men of 1867, the Kentucky Colored Convention of 1866, the Georgia Colored Convention of 1868, along with countless petitions from groups of Black citizens.<sup>266</sup> The relationship between congressional Republicans and Black convention leaders went in more than one direction. On rare occasions, white Republican leaders took part in the work of the Black Conventions themselves, such as during the National Convention of Colored Men of 1869, when a committee of the convention held interviews with the House Judiciary Committee, future President Ulysses Grant, and House Speaker Schuyler Colfax.<sup>267</sup> Through meetings such as these, Black leaders had, as the historian Manisha Sinha has observed, a “direct conduit to convey concerns about Reconstruction to the federal government.”<sup>268</sup> They used these opportunities to hammer home their demands for “protection in the exercise of all political rights belonging to us as American citizens” and to insist that it was essential to act now to “remov[e] the rubbish, the

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<sup>263</sup> See Michael Ruane, *In 1865, Thousands of Black South Carolinians Signed a 54-Foot-Long Freedom Petition*, WASH. POST, Sept. 23, 2021, <https://www.washingtonpost.com/history/2021/09/23/african-american-freedom-petition-museum-reconstruction/>.

<sup>264</sup> CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 337 (1866).

<sup>265</sup> *Id.*

<sup>266</sup> See *id.* at 127-28, 734, 913; CONG. GLOBE, 39<sup>th</sup> Cong. 2d Sess. 539 (1867); CONG. GLOBE, 40<sup>th</sup> Cong. 2d Sess. 1310 (1868); CONG. GLOBE, 40<sup>th</sup> Cong. 3d Sess. 3-5 (1868); see also CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 128 (1866) (petition from colored citizens of Colorado); *id.* at 264 (petition from colored citizens of Montgomery, Alabama); CONG. GLOBE, 39<sup>th</sup> Cong. 2d Sess. 1709 (1867) (petition from colored citizens of South Carolina).

<sup>267</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, *supra* note 168, app., at iii-x.

<sup>268</sup> SINHA, *supra* note 1, at 163.

accretions of the now dead slaveholding oligarchy.”<sup>269</sup>

White congressional Republicans did not forget what they learned from reading the petitions of Black Conventions when it came time to the task of writing new constitutional language to guarantee freedom and equality. The amendments they wrote took the form they did, at least in part, because of the tireless activism of Black Americans continuously pushing for the broadest understanding of freedom and equal citizenship possible. In fact, when congressional Republicans discussed the constitutional amendments and landmark legislation they introduced to enforce the promise of freedom, they often echoed key points made in Black Conventions. Republicans in the 39<sup>th</sup> Congress, for example, spoke of the need to write the Declaration of Independence into the Constitution, broadly guarantee fundamental rights, including rights often discussed during Black Conventions such as the right to bodily integrity and the right to testify, redress deep-seated racial prejudice, guarantee protection for Black Americans and ensure access to education—all ideas repeatedly discussed in the Black Conventions held in 1864-1869.<sup>270</sup> Many of these ideas, of course, were deeply familiar to leading Republicans who had been profoundly influenced by the abolitionist struggle to eradicate human bondage, but they also reflected what Black Americans, the intended beneficiaries of the new Amendments, vociferously demanded in convenings that exploded in frequency in the wake of the Confederacy’s demise.

On some matters, white Republicans needed more convincing. As discussed above, Black Americans made the fight over voting rights central to the promise of freedom and eventually persuaded white Republicans, who had previously stressed that political rights were fundamentally different than civil rights, to guarantee the right to vote free from racial discrimination. By 1869, congressional Republicans repeatedly insisted that the right to vote was fundamental to protecting freedom, the very point the Black Conventions had long been making.<sup>271</sup> The right to serve on a jury underwent a similar transformation. Early in Reconstruction, as James Forman has shown, “[p]utting blacks on juries was a radical idea” and congressional Republicans went to great lengths to insist that civil rights laws “regarding blacks as witnesses would not put blacks on juries.”<sup>272</sup> As on voting rights, Black

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<sup>269</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA, *supra* note 168, app., at iii, ix.

<sup>270</sup> *See supra* Part II.B, II.C. On the right to testify, see CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 41-42, 322, 833, 1266, 1293, 1478-79, 2094, 2459 (1866); on education, *see id.* at 111, 322, 341, 586-89, 630, 652, 2773; CONG. GLOBE, 40<sup>th</sup> Cong. 1<sup>st</sup> Sess. 167-69 (1867); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 765-800 (2018); Gans, *supra* note 47, at 270-77.

<sup>271</sup> *See supra* text accompanying notes 209-211.

<sup>272</sup> Forman, *supra* note 124, at 895, 910.

Conventions that demanded equal representation in the jury box were in the vanguard, developing arguments that congressional Republicans later made their own. In the 1870s, Republicans pushed for federal legislation outlawing racial discrimination in the jury box, which culminated with the passage of the Civil Rights Act of 1875.<sup>273</sup> When Republicans in the 1870s stressed that Black defendants could not have a fair trial when their freedom “is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them,”<sup>274</sup> they were making a crucial point that Black Conventions had urged throughout Reconstruction. The 1875 Act did not entirely realize Black aspirations for equal jury rights—it forbade discrimination against jurors because of race rather than guaranteeing that Black jurors enjoyed a right to serve—but it represented another area where Black activism played a decisive role in shaping constitutional meaning.

*C. The Black Conventions and Ratification: The Critical Role of Black Suffrage in the Ratification of the Fourteenth and Fifteenth Amendments*

The Black Conventions not only shaped the substance of the Reconstruction Amendments, but also their ratification. Black voting rights were critical to the ratification of the Fourteenth and Fifteenth Amendments. As a result of the passage of the First Reconstruction Act of 1867,<sup>275</sup> reconstructed Southern state legislatures, chosen in elections in which Black men enjoyed the right to vote and turned out in record-breaking numbers, cast make-or-break votes to ratify. The Fourteenth and Fifteenth Amendments could not have been added to the Constitution without the votes of Black Americans.<sup>276</sup> None of this would have been possible without the sustained activism demanding the ballot.

The crucial moment occurred in March of 1867, nine months after Congress passed the Fourteenth Amendment and sent it to the states for ratification. All but one of the states of the former Confederacy—still controlled by white-dominated state legislatures that had enacted Black Codes to oppress Black Americans—opposed the ratification of the Fourteenth Amendment.<sup>277</sup> Their votes, together with a number of border states that had sanctioned enslavement but had remained in the Union, were enough to kill the Fourteenth Amendment.<sup>278</sup> The former slaveholding states seem poised to lock in white supremacist rule in the South.

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<sup>273</sup> *Id.* at 926-30 (discussing debates).

<sup>274</sup> 3 CONG. REC. 1795 (1875).

<sup>275</sup> Act of Mar. 2, 1867, ch. 153, 14 Stat. 428-29.

<sup>276</sup> DAVIS, *supra* note 6, at 221.

<sup>277</sup> FONER, *supra* note 1, at 268-69.

<sup>278</sup> EGERTON, *supra* note 7, at 220.

Congress responded by passing the Reconstruction Act, launching what Eric Foner has called “a stunning and unprecedented experiment in interracial democracy.”<sup>279</sup> The Reconstruction Act set aside existing state governments, divided the former Confederacy (with the exception of Tennessee) into military districts, and required Southern states to establish new state constitutions that granted the right to vote to Black men and to ratify the Fourteenth Amendment.<sup>280</sup> Further, ex-rebels disqualified from office under the third section of the Fourteenth Amendment would be barred from voting for delegates or serving in the new constitutional conventions.<sup>281</sup>

In mandating Black male suffrage, Congress recognized what Black Conventions had long maintained: ex-Confederate state governments were based on “an oligarchy of the skin,” not on republican principles.<sup>282</sup> In a triumph for what W.E.B. DuBois called abolition democracy,<sup>283</sup> Congress transformed what was formerly a slaveholding society into a multiracial democracy, remaking Southern governments so that they reflected the consent of the governed, as so many Black Conventions had demanded. The changes wrought by the Act were nothing short of revolutionary. As the historian Steven Hahn has observed, “[n]ever before in history . . . had so large a group of legally dependent people been enfranchised.”<sup>284</sup>

The Reconstruction Act required new Southern state governments to ratify the Fourteenth Amendment, and Black Southerners were happy to oblige. Newly enfranchised Black citizens—many who had participated in Black Conventions—mobilized en masse to vote for new constitutional conventions that would write into law the constitutional aspirations of Black Americans, hopes for true freedom and full equality that had long been expressed in Black Conventions. As Travis Crum has noted, “[a]cross the South, Black voters accounted for between 66 percent and 97 percent of the votes in favor of the constitutional conventions” and “Black turnout was . . . high, ranging from 70 percent to nearly 90 percent.”<sup>285</sup> Across the South, in the spring and summer of 1868, legislatures chosen by a multiracial electorate in one ex-Confederate state after another voted to ratify the Fourteenth Amendment, culminating in the Amendment’s formal ratification in 1868. As Kermit Roosevelt has observed, “[t]he legislatures that ratified the Fourteenth Amendment were pro-equality legislatures, because they were

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<sup>279</sup> FONER, *supra* note 1, at 278.

<sup>280</sup> *Id.* at 273-80; SINHA, *supra* note 1, at 100-02.

<sup>281</sup> FONER, *supra* note 1, at 275-76.

<sup>282</sup> PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 19.

<sup>283</sup> DUBOIS, *supra* note 1, at 184-87; *see also* SINHA, *supra* note 1, at 77-78, 104.

<sup>284</sup> HAHN, *supra* note 1, at 163.

<sup>285</sup> Crum, *supra* note 242, at 303.

representatives of a new political community.”<sup>286</sup> Without the Black political activism in the South, beginning with the work of the Black Conventions demanding the vote, there would be no ratification of the Fourteenth Amendment. Black organizing, Black political mobilization in the wake of the passage of the Reconstruction Act, and finally the turnout of the huge numbers of Black Southerners, exercising their rights as full members of the Southern body politic for the first time, were all critical to adding the Fourteenth Amendment to the Constitution.<sup>287</sup>

The Fifteenth Amendment, too, reflected both the influence of Reconstruction-era Black Conventions and the power of Black votes. The sustained arguments made by Black Conventions convinced Congress to propose a constitutional prohibition on racial discrimination in voting, and, during the ratification push, “biracial governments in the South, elected in large measure by black voters, proved crucial to ratification.”<sup>288</sup> Six formerly Confederate states that had been reconstructed all quickly voted to add the Fifteenth Amendment to the Constitution, while, in a handful of others, Congress conditioned their readmission on ratification.<sup>289</sup> A year after its congressional passage, the Fifteenth Amendment formally became part of the Constitution.

In all these ways, Black Americans participated in the making of the Reconstruction Amendments and ensuring their ratification. Black activism during Reconstruction, including the work of the Black Conventions, is an integral part of the story of the Second Founding. In other words, Black Americans were a key part of the public, whose understandings and aspirations are a part of American constitutional law. To be faithful to constitutional text and history, courts cannot treat elite white audiences as if they represented the entire public. They have to broaden the lens to take account of Black constitutional demands and aspirations reflected in the work of the Black Conventions. How, then, should courts employ the Black Conventions of the Reconstruction era in interpreting the Reconstruction Amendments? The next part considers that question.

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<sup>286</sup> Kermit Roosevelt, III, *Reconstruction as Revolution: The Fourteenth Amendment and the Destruction of Founding America*, 25 U. PA. J. CON. L. 1073, 1094 (2023).

<sup>287</sup> See HAHN, *supra* note 1, at 163-215.

<sup>288</sup> See FONER, *supra* note 22, at 108; see also Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1607 (2022) (“The Fifteenth Amendment not only protected black men’s right to vote, but its existence was also attributable to those black men who could already vote.”).

<sup>289</sup> FONER, *supra* note 22, at 108.

#### IV. RECOVERING BLACK CONVENTIONS: TOWARD AN INCLUSIVE CONSTITUTIONAL JURISPRUDENCE

Courts should take seriously the text and history of the Reconstruction Amendments—all of it. That includes the work of the Black Conventions of the Reconstruction era, whose demands for freedom, equal citizenship, and the right to be full members of the body politic shaped the Reconstruction Amendments. At a minimum, in interpreting the Reconstruction Amendments, courts should examine the congressional debates that led to the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments and contemporaneous landmark civil rights legislation, such as the Civil Rights Act of 1866 and the Freedmen’s Bureau Act, ratification debates, as well as the work of the Black Conventions of 1864-1869 that put centerstage the constitutional aspirations of Black Americans and their understandings of what freedom, equal citizenship, and republican government entailed. This list is hardly exclusive, but it underscores that understanding the meaning of the Reconstruction Amendments requires grappling with both white and Black voices and views. In doing so, courts should focus particularly on the many areas where congressional Republicans and Black Americans saw eye to eye as well as those in which Black activism helped convince congressional drafters to take a more muscular view of what freedom and equality entailed.

In short, constitutional interpretation should not give pride of place to any one part of the public but should take a holistic view of constitutional history. It should recognize that Black activism represented by the wave of conventions that exploded in the postwar period is just as much a part of the story of the Reconstruction Amendments as the congressional debates over the Amendments that unfolded in our nation’s capital. Our constitutional narrative about this critical moment should reflect both the contributions of congressional Republicans schooled in the abolitionist movement who wrote the Amendments and the work of the Black Conventions that pushed congressional framers toward embracing a sweeping vision of freedom and equality. We cannot properly understand the Reconstruction Amendments without grappling with both.

Skeptics might suggest that there is nothing in the work of the Black Conventions that speaks to constitutional meaning. But that is a blinkered view. In their Reconstruction-era conventions, Black Americans made claims on America’s constitutional past. They re-envisioned the Declaration of Independence as the foundation for a multiracial democracy of equal citizens and, like their white congressional allies, urged America to recommit itself to the promises of the Declaration, which had long been betrayed by the nation’s complicity with the institution of slavery. They shared what the

freedom promised by the abolition of human bondage meant, demanding to participate as equals in civic life. They discussed at length the meaning of the three core concepts—citizenship, rights, and protection—that would be embedded in the Fourteenth Amendment, pushing white America to treat them with respect and dignity. They demanded a multiracial democracy in which they were full members of the body politic. In all these respects, the work of the Black Conventions bears directly on the meaning of the Reconstruction Amendments.

Indeed, this term’s Supreme Court docket is chock full of cases where the Court would benefit from grappling with the work of the Black Conventions of the Reconstruction era. Consider, in this regard, *Louisiana v. Callais*,<sup>290</sup> the latest in a long-running series of cases raising challenges to the Voting Rights Act. In *Callais*, a group of white voters in Louisiana argue that the intentional use of race to remedy a racially discriminatory map and to comply with the Voting Rights Act is unconstitutional—a result that would render the Act essentially a dead letter. This argument ignores that race-consciousness is baked into the text and history of the Fifteenth Amendment. The leading arguments for Black suffrage were race-conscious at their core. The argument for voting rights made in Reconstruction-era Black Conventions helps show why the colorblindness arguments being employed in *Callais* to attack the Voting Rights Act are fundamentally flawed.

As discussed above, one of the primary arguments for Black suffrage made by Black Conventions during Reconstruction was that Black Americans needed the right to vote for their protection. Against the backdrop of a racially polarized politics, the right to vote was critical to their ability to protect themselves from racist laws and entrenched racial prejudice. In the former Confederacy, Black Americans who had won their freedom had seen white southerners return to power and enact Black Codes that sought to strip Black Americans of nearly every freedom and force them into new forms of racial servitude. To Black Americans, the take-away was plain—there was no hope of real freedom until Black Americans were equal citizens in fact, including at the polls. Through their activism, Black Americans convinced previously skeptical congressional Republicans to add to the Constitution a sweeping prohibition on all forms of racial discrimination in voting. The Fifteenth Amendment recognized that Black citizens had a right to fully participate in selecting their political leaders. But it did not rest on the colorblind notion that race was irrelevant. In fact, both Black Americans who participated in the conventions and congressional framers understood that race still mattered, and that made it essential to give Congress broad power to safeguard the multiracial democracy guaranteed by the Fifteenth

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<sup>290</sup> 145 S. Ct. 2698 (2025) (ordering re-argument).

Amendment.<sup>291</sup>

Understanding this part of our constitutional story should provide the impetus for strengthening the Court’s underdeveloped Fifteenth Amendment jurisprudence, not hollowing it out.<sup>292</sup> For example, although the Fifteenth Amendment forbids both denying and abridging the right to vote on account of race, the Court has not treated racial vote dilution as a violation of the Fifteenth Amendment. Rather, as Travis Crum has pointed out, “the Fifteenth Amendment is missing from the Court’s current approach to race and redistricting.”<sup>293</sup> Under a Fifteenth Amendment informed by the Black Conventions’ insistence on enjoying the right to cast a ballot and exercise “free choice of those who shall govern us,”<sup>294</sup> state maps that pack and crack communities of color and, due to racially polarized voting, cancel out their votes, should be considered an abridgement of the right to vote on account of race.<sup>295</sup> From this perspective, the results test contained in the Voting Rights Act, added in 1982 to guarantee to citizens of color the equal right to elect representative of choice, is critical to ensuring full enforcement of the Fifteenth Amendment. Remedies to ensure fair maps—far from representing a form of racial discrimination as the plaintiffs in *Callais* claim—help realize the multiracial democracy our Constitution demands.

Consider a second example. In *Little v. Hecox* and *West Virginia v. B.J.P.*,<sup>296</sup> the Court is considering as-applied challenges to state laws forbidding transgender women from participating on women’s athletic teams or sports. One of the issues raised in the cases is whether state-sponsored discrimination against transgender people is subject to heightened scrutiny under the Equal Protection Clause, an issue the Court sidestepped in *United States v. Skrametti*.<sup>297</sup> In *Skrametti*, Justice Amy Coney Barrett wrote a concurring opinion, which was joined by Justice Clarence Thomas, that claimed that transgender status should not be a protected class. One of her arguments was that there was no history of state-mandated discrimination

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<sup>291</sup> See *supra* text accompanying notes 207-216.

<sup>292</sup> FONER, *supra* note 22, at 170 (observing that “the Fifteenth plays only a minor role in constitutional law”); Crum, *supra* note 288, at 1045-46 (noting the Court’s “refus[al] to answer core questions about the Fifteenth Amendment”).

<sup>293</sup> Travis Crum, *The Riddle of Race-Based Redistricting*, 124 COLUM. L. REV. 1823, 1848-49 (2024).

<sup>294</sup> PROCEEDINGS OF THE COLORED PEOPLE’S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 25, at 25, 27.

<sup>295</sup> See Crum, *supra* note 293, at 1908 (noting that “[t]he concepts of dilution and abridgement both touch on situations in which a right is not outright denied but is curtailed or diminished in some fashion”).

<sup>296</sup> *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024), *cert granted*, 145 S. Ct. 2871 (2025); *B.J.P. v. West Va. Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024), *cert granted*, 145 S. Ct. 2871 (2025).

<sup>297</sup> 145 S. Ct. 1816 (2024).

against transgender people. She insisted that “[f]or purposes of the Fourteenth Amendment, the relevant question is whether the group has been subject to a longstanding pattern of discrimination *in the law*. In other words, we ask whether the group has suffered a history of *de jure* discrimination.”<sup>298</sup> She argued that “[t]he distinction between *de jure* discrimination and private animus is consistent with the Fourteenth Amendment’s text and purpose.”<sup>299</sup>

Barrett’s view, however, is wholly incompatible with the text and history of the Fourteenth Amendment, particularly once we consider the views expressed in Reconstruction-era Black Conventions that helped shape the Amendment. The abuses that led to the Fourteenth Amendment were not limited to discriminatory laws. The Fourteenth Amendment was also a response to all the ways unchecked private racial prejudice made freedom and equal citizenship an impossibility. In guaranteeing equal protection, the Fourteenth Amendment sought to redress the failure of states to protect Black Americans from white supremacist violence and other legal wrongs by southern whites.<sup>300</sup>

Black Conventions during Reconstruction hammered home that Black Americans would not be truly free without protection from racial prejudice. Racial prejudice was the “shadow of slavery.”<sup>301</sup> Convention after Convention spoke at length of the evils of racial prejudice and how they thwarted the Declaration’s promises of life, liberty, and the pursuit of happiness.<sup>302</sup> On this point, congressional Republicans who wrote the equal protection guarantee agreed. The Joint Committee’s report, congressional debates on the Amendment, and contemporaneous landmark enforcement legislation all affirmed the need to protect Black Americans from the pernicious effects of entrenched racial prejudice.<sup>303</sup> Equal citizenship required more than the elimination of discriminatory laws. It demanded the government act to protect Black Americans from ingrained racial prejudices that denied them the ability to participate as equals across civil society. Justice Barrett’s account in *Skrmetti* ignored this aspect of Reconstruction constitutionalism shared by Black Americans and congressional Republicans alike. Under a proper reading of the Fourteenth Amendment, informed by the work of the Black Conventions, a long history of private prejudice against a marginalized group should bear on whether heightened scrutiny applies.

These examples drawn from the current term’s docket are just the tip of

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<sup>298</sup> *Id.* at 1853 (Barrett, J., concurring).

<sup>299</sup> *Id.* at 1854 (Barrett, J., concurring).

<sup>300</sup> See *supra* text accompanying notes 228-233.

<sup>301</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 48.

<sup>302</sup> See *supra* Part II.C.

<sup>303</sup> See *supra* text accompanying notes 228-233.

the iceberg. There are many other contexts in which the Black Conventions of the Reconstruction era can illuminate the many ways the Supreme Court has squelched the liberatory promises of the Fourteenth Amendment. The rich material produced by the Black Conventions can provide resources to vindicate the promises of freedom, equal citizenship, and protection that the Supreme Court has, all too often, betrayed. In the remainder of this section, I consider four foundational principles that could be strengthened by taking seriously the work of the Black Conventions of the era.

First, consider the Fourteenth Amendment’s protection of unenumerated fundamental rights. Unenumerated rights were fundamental to Black constitutionalism. Many of the rights demanded by Reconstruction-era Black Conventions were aspects of freedom and equal citizenship not found elsewhere in the four corners of our foundational charter. Rather, they represented aspirations for freedom directly responsive to the horrors of enslavement. Black Americans who convened to fight for their rights spoke of how they had been denied ownership of their bodies, subjected to unending violence, denied the right to have a family and raise children, kept in ignorance and denied education, and had the fruits of their labor stolen from them. Congressional Republicans, too, invoked many of these same rights.<sup>304</sup> Although nowhere explicitly listed elsewhere in the Constitution, Reconstruction constitutionalism put a premium on these fundamental rights that had been systematically denied to enslaved Black men and women.

Reconstruction-era Black Conventions claimed a broad set of fundamental rights. First, they repeatedly demanded the right to bodily and family integrity, insisting on the right to control their bodies and lives, choose for themselves their families, and raise their children,<sup>305</sup> bearing witness to how they had been “denied the ownership of our bodies, our wives, homes, children,” and forced to witness “our sons groaning under the lash, our daughters ravished, our wives violated” and other horrors.<sup>306</sup> Second, they insisted on the right to education, demanding an end to their enforced ignorance. The Black Conventions of the era repeatedly railed against the fact that Black people continued to be denied schooling for their children, even as white-run governments taxed them to support schools for white children. Black Americans understood that education was fundamental to freedom and equal citizenship. Third, the Black Conventions regularly invoked rights connected to economic justice, such as the right to the fruits of their labor. They insisted that “proper rewards should be given for our services” and “the enjoyment of the fruits of honest industry and economy

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<sup>304</sup> See *supra* Part II.B.

<sup>305</sup> See *supra* text accompanying notes 203-205.

<sup>306</sup> PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 23, at 41.

that are enjoyed by other men,” castigating how their former enslavers systematically tried to drive them off the land and cheat them out of their wages.<sup>307</sup>

The conservative supermajority of the Roberts Court, in manifest disregard of text and history, has viewed the protection of unenumerated fundamental rights as presumptively illegitimate. In *Dobbs v. Jackson Medical Center*, the Roberts Court’s conservative supermajority decimated the Fourteenth Amendment’s protection of fundamental rights, turning to “history and tradition” to stop courts from safeguarding unenumerated rights, beginning with the right to abortion.<sup>308</sup> To the *Dobbs* majority, courts should be extremely loath “to recognize rights not mentioned in the Constitution” for fear that they will “usurp authority that the Constitution entrusts to the people’s elected representatives.”<sup>309</sup>

In turning its back on the Fourteenth Amendment’s broad protection of substantive fundamental rights, *Dobbs* ignored a central feature of Reconstruction constitutionalism illuminated by the Black Conventions: unenumerated rights were fundamental to the freedom promised by the abolition of slavery. The specific rights listed in the Bill of Rights were necessary but not sufficient to the task of ensuring full freedom to Black Americans and redressing the horrors of human bondage. A broader set of rights were necessary—including rights to bodily integrity, to establish a family and raise children, to education, and other rights invoked by the Reconstruction-era Black Conventions. Perhaps congressional Republicans could have tried to update the Bill of Rights to capture these rights. But no one thought the effort made sense given the impossibility of accounting for all the fundamental rights possessed by Americans.<sup>310</sup>

This helps make clear why *Dobbs* is egregiously wrong. The decision cast aside the fundamental role unenumerated rights play in American constitutionalism. It turned a blind eye to the fact that the right to bodily integrity, the right to have a family, and the right to decide whether to bear and raise children all were a part of the Fourteenth Amendment’s promise of freedom.<sup>311</sup> *Dobbs* tragically is the law today, but in the years to come, courts can and should build off the rich material in Reconstruction-era Black

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<sup>307</sup> *Id.* at 42; PROCEEDINGS OF THE FREEDMEN’S CONVENTION OF GEORGIA, *supra* note 139, at 29.

<sup>308</sup> See *Dobbs v. Jackson Women’s Medical Center*, 597 U.S. 215, 237-40 (2022). The literature on *Dobbs*’ invocation of history and tradition is immense. For some noteworthy treatments, see Siegel, *supra* note 2; Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J. L. & PUB. POL’Y 563 (2024); Cary Franklin, *History and Tradition’s Equality Problem*, 133 YALE L.J. F. 946 (2024).

<sup>309</sup> *Dobbs*, 597 U.S. at 239-40.

<sup>310</sup> CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1072, 2765 (1866).

<sup>311</sup> See Gans, *supra* note 204, at 199; Murray, *supra* note 189, at 851.

Conventions to construct a constitutionally faithful jurisprudence that recognizes the right to bodily integrity, the right to choose one's family, and the right to enjoy reproductive freedom is protected by the Constitution.

Second, the work of the Reconstruction-era Black Conventions can help recover the constitutional ideal of protection embedded in the Fourteenth Amendment's Equal Protection Clause. Black Americans demanded the right to protection, cataloging all the ways white-run governments turned a blind eye to the horrific white supremacist violence they experienced and other violations of their rights. They insisted that the government not only had to respect their rights, but also meet their needs, and one of their most basic needs was a government that acted to protect their life, liberty, and pursuit of happiness. They demanded the "protection we so much need, and for which freemen in all ages have contended," recounting how "our people are daily subjected to the most cruel abuses by men who, in defiance of law and authority, violate and outrage the simplest form of moral justice."<sup>312</sup> The Fourteenth Amendment answered their pleas, guaranteeing the equal protection of the laws to all persons. Rather than attack the problem of race-based laws and other kinds of discriminatory lawmaking, the Fourteenth Amendment wrote the right of protection into our national charter, imposing an affirmative constitutional obligation on states to protect all persons equally, whether due to heavy-handed discrimination or state neglect.<sup>313</sup>

The Supreme Court has effectively written the affirmative constitutional command of protection out of the Fourteenth Amendment, producing a crabbed jurisprudence more concerned with halting efforts to redress our country's long legacy of white supremacy than with protecting the marginalized from state-sponsored discrimination and neglect.<sup>314</sup> The Court's doctrinal framework, designed to eliminate the use of race and other invidious classifications, ignores a central part of what the equal protection guarantee aimed to accomplish.

What would equal protection jurisprudence look like if it was informed by the work of the Black Conventions of the Reconstruction era? It would aim to eradicate a wide range of forms of unequal protection, recognizing, in the words of Robin West, that "protection is the nub of equal protection. The

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<sup>312</sup> PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VIRGINIA, *supra* note 80, at 9; PROCEEDINGS OF THE FREEDMEN'S CONVENTION OF GEORGIA, *supra* note 139, at 29.

<sup>313</sup> See Gans, *supra* note 26, at 908-13.

<sup>314</sup> See Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Based State Action*, 49 STAN. L. REV. 1111, 1131-46 (1997); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1833-37, 1847-1874 (2012); Roberts, *supra* note 6, at 75-93; Catherine A. MacKinnon & Kimberlé Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 347-51 (2019).

state must protect, and it must protect equally.”<sup>315</sup> Rather than asking whether the state classified on account of race or engaged in intentional discrimination, courts would focus on the kinds of state failures to protect repeatedly discussed in Black Conventions during Reconstruction. They would ask whether the state failed to honor its constitutional obligation to protect all persons equally, not whether it did so out of malice to harm communities of color or other marginalized groups.<sup>316</sup> Instead of the modern Supreme Court’s hostility to positive rights,<sup>317</sup> courts would understand that protection by the government is an affirmative right critical to full citizenship,<sup>318</sup> and, in line with the Black Conventions, courts would put special emphasis on the government’s duty to protect all persons from violence and stamp out the pernicious effects of prejudice and hatred.<sup>319</sup> In short, rather than the ineffectual understanding of equal protection that has dominated the law since *Washington v. Davis*,<sup>320</sup> courts would have meaningful tools to redress systemic inequalities that fly in the face of our constitutional promise of equal citizenship for all.<sup>321</sup>

Third, the work of the Black Conventions can help recapture the principle that Congress has the authority to enact nationwide civil rights legislation regulating private persons in order to enforce the commands of the Reconstruction Amendments. As noted above, during Reconstruction, Black Conventions demanded protection from private racial violence and private forms of discrimination and, in their petitions to Congress, pushed for muscular federal action to curb all the ways that white southerners acted to keep Black Americans in a state of unfreedom.<sup>322</sup> Congressional framers agreed on the necessity of attacking deeply entrenched racial prejudice, recognizing that willful blindness in face of deep-seated racial prejudice and

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<sup>315</sup> West, *supra* note 26, at 135.

<sup>316</sup> See Evan D. Bernick, *Equal Protection Against Policing*, 25 U. PENN. J. CON. L. 1154, 1226 (2023) (arguing that “neither the text nor the history of the Clause lends support” to the “notoriously demanding” discriminatory intent requirement). For critiques of current law’s malice requirement, see Siegel, *supra* note 314, at 1134-35; Haney-López, *supra* note 314, at 1833-37.

<sup>317</sup> See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (arguing that the Fourteenth Amendment “confer[s] no affirmative right to government aid” and “imposes no affirmative obligation” to protect basic rights).

<sup>318</sup> Bernick, *supra* note 26, at 21 (arguing that “the evidence against the Supreme Court’s interpretation of the Fourteenth Amendment as . . . conferring no positive rights is indeed overwhelming”).

<sup>319</sup> See *supra* text accompanying notes 219-220, 227-233.

<sup>320</sup> 426 U.S. 229 (1976).

<sup>321</sup> See Gans, *supra* note 26, at 934-35 (discussing how an equal protection jurisprudence centered on state failures to protect equally could redress inequalities in policing, education, and criminal justice).

<sup>322</sup> See *supra* text accompanying notes 219-220, 227-233.

hatred represented just as much of a constitutional problem as discriminatory laws.<sup>323</sup> The Fourteenth Amendment was added to the Constitution to redress all the ways in which public and private power were being employed in the former Confederacy to strip Black Americans of any real freedom and keep them in forced racial servitude to their former enslavers.

The state action requirement, introduced in the *Civil Rights Cases* by a hostile Supreme Court that viewed the 1875 federal ban on discrimination in places of public accommodation as “running the slavery argument into the ground” and making Black Americans “special favorites of the law,” ignored this fundamental tenet of Reconstruction constitutionalism that Black Americans and congressional Republicans championed.<sup>324</sup> To Black Americans, decisions like the *Civil Rights Cases* that denied Congress the power to end practices that excluded Black Americans from civil society turned a blind eye to the constitutional duty of protection. The Court’s ruling, as Frederick Douglass put it, was “an act of surrender, almost akin to treachery” that ignored “the duty of the National Government to protect and defend the rights of citizens against any infringement of their liberty.”<sup>325</sup>

The modern Court has doubled-down on the *Civil Rights Cases* and other dubious precedents decided by the post-Reconstruction Court, insisting that these rulings were deserving of heightened respect because the justices that participated in those rulings “had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.”<sup>326</sup> Far from deserving super-precedent status, the opposite is true: the *Civil Rights Cases* and its progeny have been subjected to withering criticism and for good reason. They ran roughshod over constitutional text and history.<sup>327</sup> As Jack Balkin and others have laid out, under an understanding of congressional enforcement power faithful to the text and history of the Reconstruction Amendments, Congress may directly enforce the promise of equal citizenship secured by the Citizenship Clause, which has no state action requirement, prevent private interference with constitutionally guaranteed rights, and provide private remedies against violence and other wrongs in the face of state failures to provide equal protection.<sup>328</sup>

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<sup>323</sup> See *supra* text accompanying notes 228-233.

<sup>324</sup> *Civil Right Cases*, 109 U.S. 3, 24, 25 (1883); Balkin, *supra* note 228, at 1834 (arguing that “[t]he constitutional constructions in the *Civil Rights Cases* reflected the prejudices of their time”); see also *United States v. Harris*, 106 U.S. 629, 639-40 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1876).

<sup>325</sup> Frederick Douglass, *Civil Rights and Judge Harlan*, AM. REFORMER, Dec. 8, 1883.

<sup>326</sup> *United States v. Morrison*, 529 U.S. 598, 622 (2000).

<sup>327</sup> See Roberts, *supra* note 6, at 74-75; West, *supra* note 26, at 143.

<sup>328</sup> See Balkin, *supra* note 228, at 1831-56; Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. REV. 330, 355-67 (2006); Bernick, *supra* note 26, at 55-56.

Taking account of the work of the Reconstruction-era Black Conventions deepens these longstanding critiques. As Black Conventions urged repeatedly during Reconstruction, freedom, equal citizenship, and full participation in an inclusive multiracial democracy demanded protection from the white-supremacist violence, dehumanization and discrimination produced by entrenched racial prejudice and hatred. Private prejudice and violence were just as serious a threat to freedom and equality as state-sponsored discrimination and other kinds of state abuse of power. As numerous Black Conventions insisted, racial prejudice had to be eradicated root and branch to realize the promise of freedom and equality. From this perspective, the decisions in the *Civil Rights Cases* and *Morrison* that bar Congress from regulating private action hollow out a key part of Congress's power to make real the promises of freedom and equality contained in the Fourteenth Amendment and should be overruled.

Fourth, the work of the Black Conventions of the Reconstruction era provides a fresh perspective on the constitutional ideal of colorblindness, which has been perverted by the conservative-dominated Supreme Court and used to annul efforts to redress our nation's long and tragic history of racial subjugation and oppression.<sup>329</sup> The Black Conventions were the leading voice for true racial equality, demanding an end to all racial discriminatory laws at a time when their white allies tolerated certain forms of racial discrimination.<sup>330</sup> Their commitment to ending race-based laws, however, did not mean that race was irrelevant and could never be considered. At the same time that Reconstruction-era Black Conventions insisted that “[a]ll legal distinctions between the races are now abolished,”<sup>331</sup> they recognized that race still mattered and that the law had to take account of race to make freedom and equal citizenship real in a world in which racial prejudice and hatred remained deeply entrenched.<sup>332</sup> Engaging with the work of the Black Conventions offers a historically grounded alternative to the Court's wooden interpretation of the Fourteenth Amendment that “equate[s] efforts to end white supremacy with efforts to preserve white supremacy.”<sup>333</sup> As the work of the Black Conventions illustrate, we can embrace both a robust principle of racial equality, while recognizing the need for race-conscious measures to redress and repair the long legacy of racial subordination and neglect.

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<sup>329</sup> See, e.g. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 206-08, 226-30 (2023); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224-25 (1995); *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 493-95, 505-06 (1989).

<sup>330</sup> See *supra* text accompanying notes 236-238.

<sup>331</sup> *Address of the Colored Convention to the People of Alabama*, *supra* note 153, at 2 (emphasis in original).

<sup>332</sup> See *supra* text accompanying notes 239-243.

<sup>333</sup> Roberts, *supra* note 6, at 79.

## CONCLUSION

Who counts among the Constitution's framers? All too often, the term is used to refer only to the elite white men who participated in the Philadelphia Convention or, in the case of amendments, served in the Congresses that wrote and passed amendments to our foundational charter.<sup>334</sup> But this view is exclusionary and erases from our constitutional story the struggles of marginalized men and women who successfully pushed for constitutional change from the bottom up.<sup>335</sup> The Black Conventions of the Reconstruction era provide an exemplary illustration of this. Through concerted activism, Black Americans who convened to fight for their rights in the wake of the end of the Civil War exerted powerful influence on formal constitutional lawmaking, shaping constitutional amendments that made our nation freer, more equal, and more democratic, despite not having a formal place at the drafting table. Making claims on America's constitutional past, they insisted on their right to respect and dignity, fought for control of their bodies and their right to be full members of the body politic, and demanded an end to racial prejudice and violence that kept them in a subjugated status. They fought for the fundamental ideals that lie at the core of the Reconstruction Amendments, repeatedly pushing white Americans to make the United States into a multiracial democracy that guaranteed fundamental rights, protection, and equal citizenship as an American birthright.

Tragically, this story has never received its due. Law students do not learn about the work of the Black Conventions in their constitutional law classes; constitutional lawyers rarely cite them in legal briefs; and judges almost never mention them in their opinions. Almost all constitutional scholarship that examines the text and history of the Reconstruction Amendments ignores the contributions of the Black Conventions of the Reconstruction era, sending the message that Black Americans played a passive role in the Amendments designed to ensure a new birth of freedom and erase the stain of slavery from our foundational charter. As this Article has demonstrated, this act of erasure betrays our true constitutional history. Through their convenings and mobilization, Black Americans played a

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<sup>334</sup> See Siegel, *supra* note 246, at 1023 (discussing how constitutional law “tends to showcase white men as the primary law-givers in the American constitutional order”).

<sup>335</sup> See *id.* at 1024 (urging consideration of “how law may grow out of resistance to law, as the Reconstruction Amendments sought to remedy injuries inflicted by the law of slavery”); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757 (2014) (seeking to “understand the ways that social movements enable those who are shut out of a majoritarian political process to nonetheless open up nodes in the decision-making practices of a democratic society”).

critical role in shaping the Reconstruction Amendments; through their votes, they ensured the ratification of the Fourteenth and Fifteenth Amendments.

Getting this history right opens the door to the possibility of a truly inclusive constitutionalism that recognizes Black Americans as constitution-makers, whose contributions deserve to be remembered and whose powerful affirmations of freedom, equal citizenship, and democratic participation help shape the development of constitutional law and doctrine in the courts. We can begin planting the seeds of a new kind of jurisprudence—one that recognizes that Black Americans were a part of the constitutional public that added the Reconstruction Amendments to the Constitution and insists that their voices and views have to be included. Rather than tarnishing bodily integrity as a fundamental right, fomenting attacks on voting rights, or turning a blind eye to the harms of entrenched prejudice, our law could draw guidance from Black Americans who spoke about the centrality of bodily integrity to freedom, demanded full voting rights as essential to republican government, and viewed prejudice as the shadow of slavery. This seems an impossible dream at a moment when the Supreme Court is dominated by justices bent on reading the Reconstruction Amendments in an incredibly crabbed fashion. But the hard work begins with engaging with the rich material bequeathed by the Black Conventions of the Reconstruction era and striving to recover the constitutional vision they laid out in their fight for freedom, full citizenship, and an end to the rule of white enslavers.