CIVIL, POLITICAL, AND SOCIAL EQUALITY AFTER LINCOLN: A PARADIGM AND A PROBLEMATIC

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When it comes to Abraham Lincoln and race, there are few words more famous than the future president's 1858 assertion that he had "no purpose to introduce political and social equality between the white and the black races."[1] The statement cannot be discounted as merely an artifact of his intense struggle against Stephen Douglas for a seat in the U.S. Senate. To the contrary, in a standalone speech in Peoria four years earlier, Lincoln had said his "own feelings" did not admit of making former slaves "politically and socially our equals."[2] At the same time, of course, Lincoln also consistently argued for certain kinds of racial equality. As he said in Columbus, Ohio, in 1859, "there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness."[3]

My purpose here is not to assess whether Lincoln was racist, or how racist. Nor is it to chart how his own views on equality changed over the course of the Civil War. Rather, it is to reflect on the meanings of the separate categories of equality that Lincoln mentioned—natural (or civil), political, and social—as they took shape after his death. The historian James Oakes has recently made the interesting argument that Lincoln separated natural and civil rights from political and social ones because he believed the federal government had power to enforce civil

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1. *First Debate with Stephen A. Douglas at Ottawa, Illinois*, CHI. PRESS & TRIB., Aug. 21, 1858, *reprinted in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 16 (Roy P. Basler et al. eds., 1953) [hereinafter COLLECTED WORKS].

2. Abraham Lincoln, *Speech at Peoria, Illinois*, ILL. J., Oct. 21, 23–28, 1854, *reprinted in* 2 COLLECTED WORKS, *supra* note 1, at 247, 256.

3. Abraham Lincoln, *Speech at Columbus, Ohio*, ILL. STATE J., Sept. 24, 1859, *reprinted in* 3 COLLECTED WORKS, *supra* note 1, at 400, 402. *See also Sixth Debate with Stephen A. Douglas, at Quincy, Illinois*, CHI. PRESS & TRIB., Oct. 13, 1858, *reprinted in* 3 COLLECTED WORKS, *supra* note 1, at 245, 248–49 (illustrating Lincoln's view regarding equality); *Fourth Debate with Stephen A. Douglas at Charleston, Illinois*, CHI. PRESS & TRIB., Sept. 18, 1858, *reprinted in* 3 COLLECTED WORKS, *supra* note 1, at 145, 145–46 (same).

rights but not to regulate political or "social" equality.[4] I agree with Oakes's contention that Lincoln had considerable respect for the conventional prerogatives of states.[5] And yet, I argue, it was not only the proper relationship between the federal government and the states that was at issue when people of the era distinguished between civil, political, and social equality. The categories of equality that Lincoln evoked when talking about African Americans' future in the United States were, in fact, malleable and unstable in the early postwar years. Defining their content was one of the central projects of Reconstruction.[6]

Much of the evidence used in this paper emerged during my research on race and equality in Civil War-era Washington, D.C.[7] The District of Columbia is an excellent place to study political ideas apart from federalism because Congress has exclusive jurisdiction there. Time and again after the Civil War, congressional debates about policy toward the District dealt in sweeping terms with the crucial question of what racial equality would mean in the reconstructed nation.

Postwar Republicans shared with Lincoln a broad consensus that African Americans should enjoy civil equality with whites. Republicans generally agreed that civil equality meant equal treatment by laws and, implicitly, security of property.[8] Lincoln had said that he believed in the *natural* equality of black and white people. The natural rights he mentioned, the ones described in the Declaration of Independence as

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4. James Oakes, *Natural Rights, Citizenship Rights, States' Rights, and Black Rights: Another Look at Lincoln and Race*, *in* OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 109, 109–34 (Eric Foner ed., 2008).

5. *See id.* at 125–34.

6. Recent works on contemporary categories of equality include JANE DAILEY, BEFORE JIM CROW: THE POLITICS OF RACE IN POSTEMANCIPATION VIRGINIA 85–93 (2000); Elizabeth Dale, *"Social Equality Does Not Exist among Themselves, nor among Us":* Baylies vs. Curry *and Civil Rights in Chicago, 1888*, 102 AM. HIST. REV. 311 (1997); Nell Irvin Painter, *"Social Equality," Miscegenation, Labor, and Power*, *in* THE EVOLUTION OF SOUTHERN CULTURE 47 (Numan V. Bartley ed., 1988); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 153–73 (1999); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 122–55 (2001); Hannah Rosen, *The Rhetoric of Miscegenation and the Reconstruction of Race: Debating Marriage, Sex, and Citizenship in Postemancipation Arkansas*, *in* GENDER AND SLAVE EMANCIPATION IN THE ATLANTIC WORLD 289 (Pamela Scully & Diana Paton eds., 2005); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777 (2008).

7. KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. (2010).

8. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 290–91 (2d ed. 1995).

the rights to "Life, Liberty and the pursuit of Happiness," were the basis for this concept of civil rights. That is, natural rights, when translated into the world of laws and men, were civil rights, which were also often considered fundamental rights. Making policy for the capital, Republicans in Congress put the principle of civil equality into practice in the spring of 1862, first by abolishing slavery and then, weeks later, by overturning the antebellum black codes, which had created separate categories of crime for blacks and whites.[9]

Lincoln and many other moderate Republicans had long distinguished between civil equality and political equality, supporting the former but not the latter.[10] But African-American activists and some white radical Republicans insisted on a far more expansive vision of fundamental *equality before the law*. Many argued that civil equality should include the vote, which they considered a fundamental right whose origins, like the origins of other civil rights, were in natural law.[11] Many also believed the principle of civil equality to require that African Americans have equal access to public schools, common carriers (such as streetcars, railroads, and steamers), and other public accommodations.[12] In part because of disagreements among Republicans over the definition of civil rights, Congress's two major statements about civil rights in 1866—the Civil Rights Act and the Fourteenth Amendment—left considerable ambiguity about the boundaries of federally enforceable civil rights.[13]

During the postwar debate about equality, whenever radicals pushed the bounds of racial equality—for example, by demanding the equal right to vote, hold office, or enjoy access to public schools or public accommodations—opponents charged them with seeking something that just about everyone professed to despise: social equality. Unlike the terms "civil equality" and "political equality," "social equality" had no

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9. *See* Act of Apr. 16, 1862, ch. 54, 12 Stat. 376; Act of May 21, 1862, ch. 83, 12 Stat. 407.

10. FONER, *supra* note 8, at 290–91; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 881–83 (1986).

11. MASUR, *supra* note 7, at 132–33; *see also id.* at 7–8; Donald G. Nieman, *The Language of Liberation: African Americans and Equalitarian Constitutionalism, 1830–1950*, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 67–81 (Donald G. Nieman ed., 1992); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 58, 88–89, 96–98 (2000).

12. MASUR, *supra* note 7, at 105, 164–65, 227–30.

13. Kaczorowski, *supra* note 10, at 926; Earl Maltz, *The Civil Rights Act and the* Civil Rights Cases*: Congress, Court, and Constitution*, 44 FLA. L. REV. 605, 620–22 (1992).

true content, no concrete existence. Instead, people used social equality as a gloss for inappropriate government interference in whatever relationships they believed should properly be considered private matters of personal taste. Maryland Senator Reverdy Johnson, for example, argued in 1864 that a law forbidding racial discrimination on Washington's streetcars amounted to a social-equality measure.[14] Protection of African Americans' "life and property" was acceptable, he argued (alluding to natural or civil rights), but the government should not intervene in matters of "political rights and social enjoyment," which had to do with the "preference on our part for the society of those whom we deem God has created our equals."[15] One conservative newspaper insisted that Congress should not enfranchise black men in the District because the vote was a "purely social question."[16]

When people mobilized the specter of social equality, they were not merely distinguishing between rights that were fundamental and those that were not, or between the proper scope of the federal government and that of states or localities. They were also demarcating the spaces where private preferences, not public policy, should reign. For example, in 1869, when a Republican-dominated Washington City Council passed a law barring racial discrimination in the city's theaters and restaurants, the Republican *Chicago Tribune* derided it, insisting that hotels and theaters "offer entertainments and amusement merely," and that the "only function the government has in relation to them is to preserve order, not to regulate the class of people who shall go to them."[17] Meanwhile, a moderate Republican newspaper in Washington predicted that few "colored people will avail themselves of the privileges given them by the law," since they "are acquiring a good deal of self-respect, and are not disposed to thrust themselves, *socially*, where they are not wanted."[18]

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14. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1156–57 (1864).

15. *Id.* at 1157.

16. Editorial, NAT'L INTELLIGENCER (Wash., D.C.), Jan. 11, 1866, at 2.

17. Editorial, *The Admission of Colored People to Places of Amusement*, EVENING STAR (Wash., D.C.), June 17, 1869, at 2 (quoting the *Tribune*).

18. Editorial, *Equality at Places of Amusement*, EVENING STAR (Wash., D.C.), June 7, 1869, at 2 (emphasis added). *See also The Colored Citizen*, WORLD (N.Y.), June 5, 1869, at 1; *How the Negroes Will Legislate*, WORLD (N.Y.), June 14, 1869, at 5; *Social Equality*, WORLD (N.Y.), Dec. 1, 1869, at 3; Editorial, WASH. EXPRESS, July 20, 1869, at 1; Phineas Indritz, *Post Civil War Ordinances Prohibiting Racial Discrimination in the District of Columbia*, 42 GEO. L.J. 179, 187–89 (1954). For the traditional role of local governments in chartering and regulating corporations, see William J. Novak, *The American Law of Association: The Legal–Political Construction of Civil Society*, 15 STUD. AM. POL. DEV. 163, 180–82 (2001).

When Democrats and Republican moderates charged African Americans who demanded access to theretofore-white-only institutions with seeking dreaded "social equality," they were offering an expansive vision of the private realm and a concomitantly narrow vision of the public. Indeed, the genius or power of the discourse of social equality was that it evoked a large and heterogeneous realm—whether considered social, private, or sociable—where Americans had long imagined that they had liberty to choose with whom to associate. Before the Civil War, the author of an antebellum New York society manual, reflecting on the differences between democracy in political life and exclusivity in "society," had stated that political equality "'does not extend to the drawing-room.'"[19] The author continued: "'None are excluded from the highest councils of the nation, but it does not follow that all can enter into the highest ranks of *society*.'"[20] The social realm was defined by personal choice and hierarchy, and it remained cordoned off from the political arena, in which white men were formally equal.

So sacrosanct was the social realm that Reconstruction radicals typically attempted to deny that they sought social equality, even as they argued for an expansive definition of equality before the law that included equal rights to attend public schools and to use public accommodations. For example, Washington's radical Republican *Chronicle* used images of two well-known New York neighborhoods to dramatize the distinction between political equality, which that paper supported, and social equality, which it did not. "Fifth avenue and the Five Points are politically equal," an editorial commented, "but in a social point of view they are as far removed from each other as the poles."[21]

Disavowing an interest in social equality, radicals sought to emphasize the publicness of institutions such as public schools and public accommodations, arguing that these were institutions regulated by government and obligated to serve a public that now included not only whites but African Americans as well. For example, in an 1872 debate over Senator Charles Sumner's supplemental Civil Rights Act,

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19. SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 45 (2001) (quoting THE LAWS OF ETIQUETTE OR, SHORT RULES AND REFLECTIONS FOR CONDUCT IN SOCIETY 10 (2d ed., Phila., Carey, Lea & Blanchard 1836)).

20. *Id.* (emphasis added).

21. Editorial, *Social Equality*, DAILY MORNING CHRON. (Wash., D.C.), Mar. 2, 1865, at 2. *See also* Editorial, *Social Equality*, DAILY MORNING CHRON. (Wash., D.C.), Jan. 22, 1866, at 2.

which proposed a federal ban on discrimination in public accommodations, Senator Lot Morrill, a moderate Republican from Maine, argued against the bill on grounds that it concerned "rights of a strictly domiciliary character."[22] In response to Morrill's use of the term "domiciliary" to invoke the home and the private realm more generally, black activist George T. Downing countered (in a letter that Charles Sumner later read to the Senate):

> A man's private domicile is his own castle . . . . But the public inn, the public or common school, the public place of amusement, as well as common carriers, asking the special protection of law, created through its action on the plea and for the benefit of the public good, have no such exclusive right as the citizen may rightfully claim within his home . . . .[23]

Morrill himself had argued that "equality before the law" was a constitutional right, Downing pointed out.[24] The Sumner bill simply represented a codification of that reasoning.[25] Downing's case was cogent, and the Sumner bill would eventually pass. In the end, however, such arguments for an expansive definition of the public realm—and for a vision of constitutional equality that extended to public accommodations—would fail.

An 1872 decision by the Supreme Court of the District of Columbia illustrated the logic and institutional power of those who argued for an expansive private realm in which racial discrimination could not be prohibited by government. In a decision overturning a local public accommodations law, the District's highest court held that the municipal government had stepped outside its bounds in forbidding racial discrimination in restaurants, theaters, and other public accommodations.[26] In fact, the court concluded, "[t]he proprietor of a hotel or restaurant was the proper judge of who should have either refreshments or lodgings in his house, and no one could dispute his authority in that matter."[27] The local court thus also rejected the argument, advanced both by Sumner and local black activists, that

22. CONG. GLOBE, 42d Cong., 2d Sess. App. 4 (1872).

23. George T. Downing, Letter to the Editor, DAILY MORNING CHRON. (Wash., D.C.), Jan. 31, 1872, at 3. *See also* CONG. GLOBE, 42d Cong., 2d Sess. App. 729 (1872).

24. *See* Downing, *supra* note 23, at 3.

25. *See id.*

26. *See A Man's House His Castle—Sebastian A man's Case Decided*, DAILY MORNING CHRON. (Wash., D.C.), Dec. 7, 1872, at 4.

27. *Id.*

licensed public accommodations were institutions of a different stature from conventional private property. Rather, the judge's use of the term "house" to describe restaurants and inns signaled his conviction that public accommodations were akin to private homes and that the law was essentially a social equality measure.

United States Supreme Court decisions of the 1870s and 1880s helped end the postwar debate about the content of the categories of civil, political, and social equality. Most significantly, in 1883, the U.S. Supreme Court would codify the distinction between the acceptable rights outlined by the 1866 Civil Rights Act and the unacceptable government incursions into private life mandated by the 1875 Civil Rights Act. In the *Civil Rights Cases*, the Court declared that the right to racially equal access to public accommodations was not among the "fundamental rights which appertain to the essence of citizenship."[28] Any arenas not explicitly mentioned in the 1866 law, the Court held, concerned "what may be called the *social rights* of men and races in the community."[29] The Court thus categorized access to public accommodations as "social rights" that were, by definition, not "fundamental."[30] The federalism piece of the reasoning was that only local governments could decide how to regulate such "social rights of men and races" (implying, for example, that Massachusetts could have its public accommodations laws and Tennessee could have its Jim Crow laws).[31] But as we have seen, the power of the federal government was not all that was at issue here. Also implicated was the question of where Americans would fix the boundary between the realm of the state and the realm of private interest.

Arguments against social equality—arguments that insisted on a very broad definition of private relationships and a relatively narrow vision of the public realm—were central to the architecture of twentieth-century Jim Crow. "Perhaps nothing perplexes the outside observer more than the popular term and the popular theory of 'no social equality,'" wrote the Swedish sociologist Gunnar Myrdal in 1944.[32] Myrdal had been "made to feel from the start" of his research on the "American dilemma" of race that social equality had "concrete

28. 109 U.S. 3, 22 (1883).

29. *Id.* (emphasis added).

30. *Id.*

31. *Id.*

32. 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 586 (1944).

implications and a central importance for the Negro problem in America."[33] Yet he observed that its meaning was always "kept vague and elusive, and the theory loose and ambiguous."[34] Myrdal wrote:

> One moment [the theory] will be stretched to cover and justify every form of social segregation and discrimination, and, in addition, all the inequalities in justice, politics and breadwinning. The next moment it will be narrowed to express only the denial of close personal intimacies and intermarriage. The very lack of precision allows the notion of "no social equality" to rationalize the rather illogical and wavering system of color caste in America.[35]

That powerful "notion," which Myrdal found so central to twentieth-century segregation, had its foundation in the Civil War-era debate about racial equality. From the beginning, opponents of expansive racial equality invoked "social equality" with the same opportunistic inconsistency as they would in the mid-twentieth century.

When Abraham Lincoln said in 1858 that he believed that black and white people had equal natural rights but that he did not support political or social equality between the races, of course he could not have imagined the Civil War's dramatic impact on the nation. We cannot know how Lincoln ultimately would have defined political and social equality had he lived into the postwar period. What is clear, however, is that the three categories of equality he invoked in the 1850s represented not only a paradigm for thinking about equality, but also a problematic. Before the war, no one needed to press Lincoln on exactly what those categories would include or exclude, because the question of the status of African Americans after emancipation was purely hypothetical. After the war, however, it was an urgent matter of policy. And after the war, the argument against "social equality" became a powerful tool for those who sought to limit the period's most egalitarian aspirations.

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33. *Id.*
34. *Id.*
35. *Id.*