THE FIRST BLACK JURORS AND THE INTEGRATION OF THE AMERICAN JURY

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Supreme Court opinions involving race and the jury invariably open with the Fourteenth Amendment, the Civil Rights Act of 1875, or landmark cases like Strauder v. West Virginia *(1880). Legal scholars and historians unanimously report that free people of color did not serve as jurors, in either the North or South, until 1860. In fact, this Article shows that Black men served as jurors in antebellum America decades earlier than anyone has previously realized. While instances of early Black jury service were rare, campaigns insisting upon Black citizens' admission to the jury-box were not. From the late 1830s onward, Black activists across the country organized to abolish the all-white jury. They faced, and occasionally overcame, staunch resistance. This Article uses jury lists, court records, convention minutes, diaries, bills of sale, tax rolls, and other overlooked primary sources to recover these forgotten efforts, led by activists who understood the jury-box to be both a marker and maker of citizenship.*

INTRODUCTION

Despite the centrality of the jury to American law and civic culture—and the extensive scholarship exploring the contours of trial by jury in colonial America—the history of the jury in the United States after the ratification of the Bill of Rights remains "the subject of

 Many thanks to David Ball, Jon Booth, Josh Bowers, Darryl Brown, Jack Chin, Carla D'Arista, Don Dripps, Daniel Farbman, Eric Fish, George T. Frampton, Jr., Brenner Fissell, Amalia Garcia-Pretelt, Cynthia Godsoe, Van Gosse, Ariela Gross, Ben Grunwald, Vida Johnson, Carissa Byrne Hessick, Lee Kovarsky, Benjamin Levin, Anna Lvovsky, Sandra Mayson, Justin Murray, Cynthia Nicoletti, Kelly Orians, Itay Ravid, Alice Ristroph, Sydney Stanley, David Tanenhaus, John D. Warner, Jr., Kate Weisburd, and all those who provided careful and thoughtful feedback at CrimFest, the SouthWest Criminal Law Conference, the Neighborhood Crim Conference, Markelloquium, and the HLS Legal History Workshop. I am deeply indebted to the many librarians and archivists who made this research possible, in particular UVA Law's Ben Doherty; the staff of City Archives & Special Collections of the City of New Orleans; Mimi Miller and Nicole Harris of the Historic Natchez Foundation; Shaun Stalzer of the Mississippi Department of Archives & History; the staff of the New Bedford Free Public Library and the New York State Archives; L. Eileen Parris of the Virginia Museum of History and Culture; Wendy Essery of the Worcester Historical Museum; and Cynthia Van Ness of the Buffalo History Museum.

astonishing scholarly neglect."[1] In recent decades, the Supreme Court has regularly heard cases challenging the exclusion of Black jurors[2] and its Sixth Amendment jurisprudence has adopted a strongly originalist orientation.[3] Yet jurists and legal scholars have devoted little attention to excavating the manifold ways that white supremacy, Black citizenship, and the institution of the jury have historically shaped one another.[4]

Consider, for example, the subject-matter of this Article: jury service by people of color before the ratification of the Fourteenth Amendment in 1868.[5] When the Supreme Court announces an opinion

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[1] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 868 (1994).

[2] *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228 (2019); Foster v. Chatman, 578 U.S. 488 (2016); Berghuis v. Smith, 559 U.S. 314 (2010); Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Johnson v. California, 545 U.S. 162 (2005); Miller-El v. Cockrell, 537 U.S. 322 (2003). Other recent cases directly implicating white supremacy and jury adjudication include Ramos v. Louisiana, 140 S. Ct. 1390 (2020), Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), and Buck v. Davis, 137 S. Ct. 759 (2017).

[3] *See, e.g.*, Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53 (2011); Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL'Y 45 (2011); Khorrami v. Arizona, 143 S.Ct. 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (arguing that the functionalist approach of Williams v. Florida, 399 U.S. 78 (1970) is inconsistent with subsequent Sixth Amendment cases emphasizing preservation of "the same jury-trial right that Americans enjoyed at the founding").

[4] Consider, for example, that the racist origins of Louisiana's non-unanimous verdict system were essentially forgotten for nearly a century. The persistent work of incarcerated "jailhouse lawyers" at Louisiana State Prison, like Calvin Duncan, was responsible for the renewed scrutiny the issue ultimately received. *See* Adam Liptak, *Jailhouse Lawyer Propels a Case to the Supreme Court*, N.Y. TIMES, Aug. 5, 2019, at A9; Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1599–620 (2019). *But see Ramos*, 140 S. Ct. at 1426 (2020) (Alito, J., dissenting) (dismissing majority's discussion of Louisiana law's origins as "*ad hominem* rhetoric"). The most notable exception is Professor James Forman, Jr.'s *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 (2004). Forman compellingly argues that abolitionists' struggle against the Fugitive Slave Act of 1850 "deepened their commitment to jury trial," *id.* at 897, and that Black jury service became increasingly important during Reconstruction as a means of countering impunity for violence against Republicans and Black southerners, *id.* at 909–34. Forman's scholarship also highlights how Reconstruction-era legislation "was premised on the belief that [a juror's] race often matters" in how that juror perceives the parties and evidence, *id.* at 936–37, a race-conscious approach that stands in considerable tension with existing *Batson* jurisprudence, *id.* But, particularly in the period before 1868, Forman's essay relies almost exclusively on the perspectives of white abolitionists and lawmakers (and their opponents), *id.* at 898–914, rather than the Black jurors and activists who are the focus of this Article. Forman also echoes the belief "that 1860 was the first year in which African Americans served on juries, in either the North or the South," *id.* at 910, a misstatement made by every other historian and jury scholar (including this author), *see infra* note 7.

[5] A brief note on terminology. This Article generally refers to non-enslaved people of African descent, including those of mixed ancestry, as "Black" or "free people of color," though many of the protagonists used other terms, like "colored," to identify themselves. *See* PATRICK RAEL, EIGHTY-EIGHT YEARS: THE LONG DEATH OF SLAVERY IN THE UNITED STATES 148–50 (2015) ("Nothing better emblematized this emerging collective consciousness than changes in the

concerning race and the jury, it invariably opens with the Fourteenth Amendment, the Civil Rights Act of 1875 (barring disqualification from jury service "on account of race"), and subsequent Supreme Court cases like *Strauder v. West Virginia*.[6] Historians and legal scholars uniformly report that Black jury service was nonexistent until 1860, when two Black barbers in Worcester, Massachusetts first served as petit jurors.[7] But these narratives overlook men like Andrew Barland, a formerly

names African-descended people used to refer to themselves as a collective body."). Census records and legal documents sometimes referred to many of these individuals as "mulatto," and distinctions of "color" as well as "race" are critically important (I argue) to understanding efforts to integrate the antebellum jury; that said, I generally avoid "mulatto," "mixed race," and "interracial" insofar as "they imply that race is an internal essence, like blood, that can be mixed, two parts this and three parts that." Ariela J. Gross: What Blood Won't Tell: A History of Race on Trial in America, at ix–x (2008) (endorsing "mixed ancestry" to describe persons whose parents and grandparents held differing identities); Winthrop D. Jordan, White Over Black 167–78 (1968) (discussing the category "mulatto"). For the most part, I use terms like "enslaved person" and "enslaver" (rather than "slave" and "master" and other variants), though at times I retain the more essentializing language, including slaveowner, where intended to highlight the legal reduction of enslaved persons to property (and the violence such dehumanization rests upon). *Cf.* David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery*, 2022 Sup. Ct. Rev. 413, 416 n.5 (2023) (discussing this debate and citing Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 Cal. L. Rev. 371 (2022)).

6 100 U.S. 303 (1880). *See, e.g.*, *Flowers*, 139 S. Ct. at 2238–39; *Pena-Rodriguez*, 137 S. Ct. at 868; *Miller-El v. Dretke*, 545 U.S. at 237; Georgia v. McCollum, 505 U.S. 42, 46 (1992).

7 Sources explicitly or implicitly stating as much include: *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 474 (1968) (Harlan, J., dissenting) ("[I]t appears that Negroes were allowed to serve on juries only in Massachusetts [before 1866]."); *United States v. Clemmons*, 892 F.2d 1153, 1160 n.5 (3d Cir. 1989) (Higginbotham, J., concurring); Jamal Greene, How Rights Went Wrong 36 (2021); Cynthia Nicoletti, Secession on Trial 270 n.10 (2017); Randall Kennedy, Race, Crime, and the Law 169 (2012); Randolph N. Jonakait, The American Jury System 115 (2003); Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 216 (2002); Jeffrey Abramson, We, The Jury 2 (1994); Rogers M. Smith, Civic Ideals of Citizenship in U.S. History 254 (1997); Leon F. Litwack, North of Slavery 94 (1961); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 12 (1991), *reprinted in* Paul Finkelman, Race and Criminal Justice 60 (1992); Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 Ariz. L. Rev. 1, 19 n.109 (2021); Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 La. L. Rev. 55, 56 n.5 (2020); Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 Geo. Wash. L. Rev. 875, 899 (2019); Sanjay K. Chhablani, *Reframing the 'Fair Cross-Section' Requirement*, 13 J. Const. L. 931, 935 (2011); Sandra Guerra Thompson, *The Non-Discrimination Ideal of* Hernandez v. Texas *Confronts A "Culture" of Discrimination: The Amazing Story of* Miller-El v. Texas, 25 Chicano-Latino L. Rev. 97, 102 (2005); Forman, *supra* note 4, at 910; Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1280 (2000); Kenneth S. Klein, *Unpacking the Jury Box*, 47 Hastings L.J. 1325, 1342 n.91 (1996); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 704, 714 n.49 (1995); Alschuler & Deiss, *supra* note 1, at 884–85. The high caliber of these jurists, historians, and legal scholars makes my own repetition of the standard account less embarrassing. *See* Frampton, *The Jim Crow Jury*, *supra* note 4, at 1601.

enslaved man—himself a slaveowner as an adult—who regularly served as a grand juror and petit juror outside Natchez, Mississippi in 1820;[8] like Abner Francis, a lifelong activist and organizer in the Colored Convention Movement, who served as a petit juror in Buffalo, New York in 1843;[9] like John D. Berry, later a sergeant in the 5th Massachusetts Cavalry (Colored), who served as a petit juror in a small village in the Finger Lakes region in 1855;[10] and like Joseph Cox, who was wrongfully arrested for his alleged involvement in a Richmond riot while a member of the petit jury venire for the prosecution of Jefferson Davis in 1867.[11] They also do a disservice to the memory of William H. Jankins and Francis Clough, the (invariably unnamed) Worcester barbers, who spent decades battling white supremacy—even though their first jury service actually came six years later than is universally reported.[12]

Recovering their stories, and the ways that these men and others understood jury service to be both a marker and maker of their citizenship in antebellum America, is the most basic aim of this Article. Each Part centers on a particular place and time—Jefferson County, Mississippi, 1820;[13] Buffalo, New York, 1843;[14] Worcester, Massachusetts, 1860;[15] Richmond, Virginia, 1867[16]—where the jury-box served as a vector for citizenship claims and as an inflection point for racial anxiety.[17] There were, of course, important differences between these settings: A granular study of these individuals' efforts to serve as jurors (and the resistance they faced) underscores that "freedom for [antebellum] African Americans was highly contingent and to be found in discrete geopolitical zones."[18] In some places, activists faced *de jure* bars on Black jurors; in others, no formal legal impediments existed, but custom dictated that Black jurors be omitted from jury lists. But important similarities also

8 *See infra* Part I.
9 *See infra* Part II.
10 *See infra* Part IV.
11 *Id.*
12 *See infra* Part III.
13 *See infra* Part I.
14 *See infra* Part II.
15 *See infra* Part III.
16 *See infra* Part IV.
17 I am indebted to Daniel Farbman for suggesting this particular characterization.
18 VAN GOSSE, THE FIRST RECONSTRUCTION 13 (2021); *accord* STEVEN HAHN, THE POLITICAL WORLDS OF SLAVERY AND FREEDOM 14 (2009) ("If we can think . . . about emancipation as an ongoing process initiated during the Revolutionary era, although one that was uneven, haphazard, and nonlinear—we may discover new interpretive possibilities, or at least a new orientation and set of perspectives on American development."); *see also* Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 416–17 (1986) (arguing earlier, bleaker accounts "overlooked nuances and countervailing tendencies in the antebellum North").

emerge. Early Black jurors from Mississippi to Massachusetts "grabbed hold of the rhetoric of rights and citizenship—and took advantage of the opening offered by law and the courts—to claim freedom itself[.]"[19] Like the protagonists of Professor Martha S. Jones's study of antebellum Baltimore, their persistent efforts to serve as jurors within hostile legal environments help illuminate "the everyday ways in which African Americans approached rights and citizenship. . . . how people without rights still exercised them."[20] Noting the pronounced resistance to Black jury service even after ratification of the Fourteenth Amendment, Albert W. Alschuler and Andrew G. Deiss once observed that "the path to citizenship marked only part of the journey to the jury box."[21] Recentering the forgotten antebellum jurors inverts the relationship: The journey to the jury-box was, first, a core part of the arduous path to citizenship.

As noteworthy as these individuals' stories are, however, each instance of antebellum Black jury service (except for Andrew Barland in 1820s Mississippi) was connected to, embedded in, and the product of *collective* Black-led efforts to integrate the jury-box. While instances of antebellum Black jury service were rare, campaigns insisting upon Black citizens' admission to the jury-box were not. From the late 1830s onward, Black activists across the country gathered, petitioned, debated, lobbied, and publicly decried their exclusion from the jury-box. And white Americans, even many within anti-slavery and abolitionist circles, opposed them: To paraphrase W.E.B. Du Bois, Black jurors were "a contradiction, a threat and a menace" to an ideology premised on Black unsuitability for republican self-governance.[22] The exceptional occasions where Black men succeeded at being seated as jurors become legible only within the political contexts that allowed such victories: Abner Francis's jury service in Buffalo in 1843 immediately followed two mass

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19 Kate Masur, Until Justice Be Done 370–71 (2021).

20 Martha S. Jones, Birthright Citizens: A History of Rights and Race in Antebellum America 10 (2018). *See also* Dylan C. Pennington, Before the Movement: The Hidden History of Black Civil Rights 3–54 (2023) (exploring how free and enslaved Black people turned to law, to courts, and to rights in the antebellum period, "hammer[ing] out their relationships with one another and with white people within the law, not just in struggle against it"); Kimberly M. Welch, Black Litigants in the Antebellum South 6-10 (2018) (exploring "free and enslaved African Americans' use of the local courts in the antebellum American South [and their experience] as litigators—wielders of law who successfully sued in court to protect their interests").

21 Alschuler & Deiss, *supra* note 1, at 884 n.87.

22 W.E.B. Du Bois, Black Reconstruction in America, 1860–80, at 5 (1935) ("[A] free negro was a contradiction, a threat and a menace. As a thief and a vagabond, he threatened society; but as an educated property holder, a successful mechanic or even a professional man, he more than threatened slavery. He contradicted and undermined it. He must not be.").

gatherings in Buffalo (a National Colored Convention and the Liberty Party's national convention) that focused on racial equality; William Jankins and Francis Clough were added to Worcester's jury lists after two statewide campaigns to reform Massachusetts's jury selection process in the late 1850s.[23] From Ohio to North Carolina, Black activists spent decades collectively demanding admission into "the *sanctum sanctorum* of justice—the jury box."[24] A more ambitious aim of this Article, then, is to situate their individual stories within broader antebellum organizing efforts that articulated a radical vision of racial equality in America in the decades before the Fourteenth Amendment (and to emphasize the persistent importance of the jury-box to these campaigns).

This broader perspective offers a different way of thinking about the relationship between race, rights, citizenship, and this central American institution. When the history of Black jury service opens with the ratification of the Fourteenth Amendment or cases like *Strauder v. West Virginia*, the integration of the jury is, at least implicitly, the work of Congress and the Court.[25] But a narrative that begins several decades earlier—and that ends on the eve of the Fourteenth Amendment's ratification, as this Article does—undermines the centrality of these actors.[26] The movements that fought to integrate the jury shaped ideas of what full Black citizenship would come to mean during Reconstruction and beyond.[27] To be sure, during Reconstruction, the jury-box was opened to Black citizens in ways that it had not been

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[23] *See infra* notes 230–39 and accompanying text.

[24] William Henry Grey, *Address at the Arkansas Constitutional Convention of 1868* (Jan. 7, 1868), *in* ARKANSAS CONSTITUTIONAL CONVENTION, DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7TH, 1868 95–96 (John G. Price ed., 1868).

[25] *See, e.g.*, *McCollum*, 505 U.S. at 46 ("Over the last century, in an almost unbroken chain of decisions, this Court gradually abolished race as a consideration for jury service. In *Strauder v. West Virginia* . . . .").

[26] *Cf.* Gregory Ablavsky, *Akhil Amar's Unusable Past*, 121 MICH. L. REV. 1119, 1129 (2023) ("The point of the newest political history, though, is that lots of people *did* speak, constantly and voluminously, and had a lot to say—about politics, law, and the Constitution. Moreover, this literature suggests, their views mattered: mass mobilization profoundly shaped the course of early American law . . . ."); *id.* at 1142–44 (surveying recent scholarship).

[27] Put in slightly different terms, some originalists have argued that post-political rights (paradigmatically, suffrage and jury service) might come to be understood as fundamental rights of citizenship—and, thus, protected by the Privileges or Immunities Clause of the Fourteenth Amendment—once a stable national consensus coalesces concerning their importance to the defense of natural rights and civil equality. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 24 (2021). Whether or not one accepts such a methodology, the question of *how* such a consensus emerges is critically important for anyone interested in racial equality, the law, and social change.

previously.[28] But it was Black citizens themselves, through decades of outside-the-courtroom agitation, who opened it.

None of the foregoing is intended to minimize another critical through-line that links these stories: Class, color, and sex all profoundly shaped the nineteenth-century jury. Nearly all of the forgotten Black jurors profiled in this Article were exceptionally wealthy, particularly as compared to other people of color in their communities.[29] The formerly enslaved Andrew Barland, for instance, would himself become a wealthy slaveowner; when Mississippi stripped him of his ability to serve as a juror in 1824, he protested that he "holds slaves and can know no other interest than that which is common to the white population. . . ."[30] We have limited information about their complexion, but those profiled in Parts I, II, and III (as well as John Berry, introduced in Part IV) were all, at various times, described as "mulatto" in bills of sale, census records, newspapers, or other legal documents.[31] And they were all men: While some antebellum Black activists and white abolitionists also argued for the rights of women to serve as jurors, such efforts did not gain traction until well after the Civil War.[32] Even as activists pushed for a democratic remaking of the jury, their victories illuminate how the institution continued to reinforce and entrench other salient hierarchies.

A brief disclaimer concerning the title of this piece. Although this Article identifies people of color who served as jurors decades before the earliest previously known examples—a fact that, by itself, should

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[28] *But see* Frampton, *supra* note 4, at 1599–611 (noting halting progress in integrating the jury, and continuing outside-the-courtroom activism, during Reconstruction and beyond).

[29] *See infra* notes 62–63 (Barland); 150–54 (Francis); 278–80 (Berry); 204–05 (Jankins and Clough); and accompanying text.

[30] *See infra* note 88 and accompanying text.

[31] *See infra* notes 64–69 (Barland); U.S. Census, Free Inhabitants in 4th Ward of Buffalo in the County of Erie State of New York Enumerated September 21, 1850, at 439 (listing Francis's "color" as "mulatto"); *Colored Men of California*, Pac. Appeal (S.F.), July 4, 1863, at 2 (noting Francis's "brown complexion"); Census of the State of New York, for 1855, Schuyler Co., Town of Dix, at 190 (listing Berry's "color" as "B," before alteration to "M"); Manumission: William E. Taylor to Henry Jenkins (aka William Henry Jenkins) (Mar. 20, 1851), *in* Deed Book 32, at 117 ("I . . . have manumitted . . . a mulatto man slave named Henry Jenkins . . . ."); Massachusetts State Census, 1855, Worcester County, Worcester City, Ward 4 (listing Clough's "color" as "mulatto").

[32] In the late 1860s, the exclusion of women from juries became a political issue championed by women's suffrage activists. *See* Holly J. McCammon, The U.S. Women's Jury Movements and Strategic Adaptation: A More Just Verdict 1 (2012); Janolyn Lo Vecchio, *Western Women's Struggle to Serve on Juries, 1870–1954*, 21 W. Legal Hist. 25 (2008); Grace Raymond Hebard, *The First Woman Jury*, 7 J. Am. Hist. 1293–341 (1913); *see also* Martha S. Jones, All Bound Up Together: The Woman Question in African American Public Culture, 1830–1900, at 90 (2007) (noting Abner Francis's toast to "The Ladies—. . . entitled to an equal participancy in all the designs and accomplishments allotted to man during his career on earth.").

inspire some humility regarding definitive historical claims—Andrew Barland probably was not "the first Black juror" in American history. I have not attempted to provide a comprehensive account of Black jury service "at the Founding" or in subsequent decades,[33] and further inquiry will hopefully uncover additional examples.[34] Rather, I take my title from the fact that nearly all of this Article's protagonists from the 1840s onward were at one point (erroneously, it turns out) celebrated or reviled as "the first Black jurors." This project takes up an invitation first floated by Black abolitionist and activist William C. Nell—a colleague of several of the jurors discussed here—who mused in 1869: "The reminiscenses [sic] of colored jurors in the United States" would make an "interesting and instructive" lens through which to understand the fight of Black people to become "citizens equally before the law."[35]

I
Jefferson County, Mississippi (1820)

Defending himself in court against a "bad man" named Joseph Hawk was probably not how Andrew Barland wanted to start the year.[36] But on January 5, 1824, whatever unease Barland felt about Hawk's lawsuit likely faded when he saw the jurors summoned to the county seat of Greenville, Mississippi, just up the road from Natchez. They were twelve men like Barland. All of them (like Barland, and unlike Hawk) owned land in Jefferson County; most of them (like Barland, and unlike Hawk) were enslavers of Black men, women, and children.[37]

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[33] *Cf.* Kellen Funk & Sandra G. Mayson, *Bail at the Founding* 1–83 (Univ. of Pa. Carey L. Sch., Public L. and Legal Theory Rsch. Paper Series, Rsch. Paper No. 23-11, 2023); Jacob Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. (forthcoming 2024); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021).

[34] Black men voted in many states at the time of the American Revolution, and formal juror qualification rules often tracked suffrage requirements. *See* Masur, *supra* note 19, at 51; Gosse, *supra* note 18, at 6; Alschuler & Deiss, *supra*, note 1, at 877 n.52. That many states enacted laws barring Black jurors in the late-eighteenth and early-nineteenth centuries suggests (but certainly does not prove) the possibility that Black citizens occasionally served as jurors in these jurisdictions. *See infra* note 119 and accompanying text. Moreover, even in jurisdictions where formal legal prohibitions existed, it is entirely possible that Black jurors participated in juries; Black voting appears to have been widespread in parts of antebellum Ohio after 1830, for example, despite being outlawed. *See* Gosse, *supra* note 18, at 502–20.

[35] William C. Nell, Letter to the Editor, *Colored Jurors in the Northern States*, Nat'l Anti-Slavery Standard (N.Y.C.), Jan. 30, 1869, at 3 [hereinafter *Colored Jurors in the Northern States*].

[36] Petition of Andrew Barland of Jefferson County to the Mississippi General Assembly (1824) (on file with Mississippi Department of Archives & History (MDAH), Series 2370, Box 6813, Folder 12 (Emancipation Petitions)).

[37] The juror list appears in Hawk v. Barland, *in* Court Records—Superior Court, Rough Minutes Book 25 (1822–1835) (on file with MDAH, Series 2050, Box 10056). Jefferson County tax rolls from 1823 and 1824 offer a revealing snapshot of these jurors, listing the

And on numerous occasions, Barland had been seated where these men now sat, as jurors in the Jefferson County courthouse.[38]

But Hawk and the jurors shared something in common: They were white. And, as everybody knew, Barland—the acknowledged eldest son of a prominent Scottish landowner and a then-enslaved "mulatto woman named Elizabeth"—was not.[39] Hawk emphasized this critical fact when litigating his case.[40]

The jurors ended up finding against Hawk, but Barland's vindication proved short-lived: The dispute set into motion a series of events that would fundamentally alter Barland's legal standing in the community, including his ability to serve as a juror. As will become clear, Barland's efforts to preserve his legal right to serve as a juror were radically different from those of Black activists in the North in subsequent decades. But Andrew Barland's story—stitched together from extant court minutes, jury lists, tax rolls, censuses, legislative petitions, and marriage records—illuminates how race, class, and law shaped one another in antebellum Mississippi, and the role of the jury in making and marking citizenship.

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For the first five years of his life, from September 9, 1785 to May 17, 1790, Andrew Barland was enslaved in Natchez, Mississippi.[41] His young mother, Elizabeth, was likely born in Virginia and brought to the area by her enslaver, Benjamin Marcus Eiler.[42] Black people were first forcibly brought to the region by the French around 1720, but a series of bloody conflicts with the Natchez people decimated these

number of slaves and acres owned by each. *See Jefferson County Combined Assessments Series 1202*, MDAH, https://da.mdah.ms.gov/series/osa/s1202/jefferson [https://perma.cc/GS42-33E6].

38 *See* Petition of Andrew Barland, *supra* note 36; Certification by Clerk and Sheriff (July 4, 1824) (on file with MDAH, Series 2050 (Jefferson County), Box 10056).

39 Petition of Andrew Barland, *supra* note 36; Sale of Elizabeth and Four Children from Jonas Eiler to William Barland, May 17, 1790, *in* Adams County, Office of Chancery Clerk, Spanish Record Book B 446 [hereinafter Spanish Record Book B]. On the English adoption of the Spanish word *mulatto* and its role (or lack thereof) as a meaningful legal category in colonial America, *see* Jordan, *supra* note 5, at 167–78.

40 *See* Petition of Andrew Barland, *supra* note 36.

41 The dates of Barland's birth and death appear on his headstone in Barland Cemetery, a small, abandoned patch west of Fayette, Mississippi. *See* 1 Jefferson County Mississippi: Cemeteries, Etc. 159 (1995).

42 *See* Spanish Record Book B, *supra* note 39, at 446 (describing Elizabeth as "native of America"); *see also* May Wilson McBee, The Natchez Court Records, 1767–1805, Abstracts of Early Records 597 (1953) (identifying Virginia records indicating Marcus and son left Shenandoah County, Virginia for New Spain).

early settlements and most of the region's indigenous population.[43] The territory known as the "Natchez District" was under French, British, and Spanish control in subsequent decades, though it was not until the late eighteenth century that white settlers like Eiler began returning to the region in larger numbers.[44] Like his white friend William Barland, Eiler amassed hundreds of acres in the region though land grants offered to subsidize settlement.[45] As tobacco, indigo, and later cotton—and, most importantly, the forced labor that made these crops profitable—transformed the region's fertile geography in the coming decades, the value of these tracts would increase exponentially.[46]

William Barland probably knew Elizabeth from the time she was a young girl.[47] At what point William decided to make their relationship sexual—and at what point Elizabeth realized the relationship carried with it some possibility of freedom—is unknown; she would, of course, have had no say in the matter.[48] But birth and probate records tell fragments of the story. Elizabeth was around nineteen years old when she became pregnant with Andrew by William. Six months after his birth, Elizabeth was pregnant again, this time with twin girls. Soon after the girls' birth, she was carrying William Barland's fourth child, another son, who was born in 1789.[49] That same year, Marcus Eiler died intestate, which left his son Jonas with a knotty problem: Before he could inherit his father's estate (which included Elizabeth, Andrew, and his three younger siblings), Spanish authorities would have to be convinced that

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[43] *See generally* Elizabeth Ellis, *The Natchez War Revisited: Violence, Multinational Settlements, and Indigenous Diplomacy in the Lower Mississippi Valley*, 77 WM. & MARY Q. 441 (2020); RONALD L.F. DAVIS, THE BLACK EXPERIENCE IN NATCHEZ, 1720–1880, at 1 (1993).

[44] *See* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 88–90, 195 (1998) ("Following the Natchez revolt in 1729, the nascent plantation order unraveled, as the importation of Africans ceased and the great concessions fell into disarray.").

[45] *See, e.g.*, ADAMS COUNTY DEED RECORD, BOOK B (COMMENCING THE 29TH MARCH, 1789) 190 (noting grant of 105 arpents, or 88 acres, of land from Spanish Government to "Guillo Barland" in 1782); MCBEE, *supra* note 42, at 384 (noting grant of 400 acres, Claim No. 369, on St. Catherine's Creek to Eiler).

[46] *See* CHRISTIAN PINNEN, COMPLEXION OF EMPIRE IN NATCHEZ: RACE AND SLAVERY IN THE MISSISSIPPI BORDERLANDS 158–74 (2021) (discussing Natchez's transition to cotton production by late 1790s).

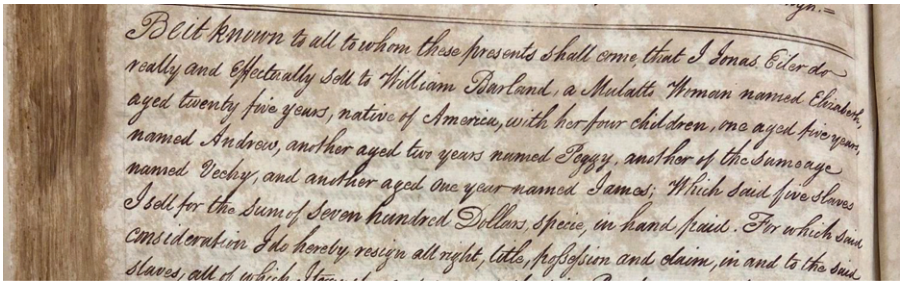
[47] Probate records for the estate of Benjamin Eiler include sworn testimony from William Barland that he had been well acquainted with Eiler for several years. *See* Benjamin Eiler Probate Record, *in* NATCHEZ COURT RECORDS, BOOK B 247–48.

[48] *See* NIK RIBIANSZKY, GENERATIONS OF FREEDOM: GENDER, MOVEMENT, AND VIOLENCE IN NATCHEZ, 1779–1865, at 51–52 (2021) (speculating as to the nuances of William and Elizabeth's relationship); TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 4 (2017) (noting complicated ways that "partners of subordinate status struggled to define and express the terms and conditions of a relationship over which they had no control").

[49] SPANISH RECORD BOOK B, *supra* note 39, at 446.

Jonas was his father's sole heir. His father's friends, including William, offered supporting declarations.[50] A year later, William Barland finally committed to the course of action that would radically reshape Andrew's life: He purchased Elizabeth and their children from the younger Eiler for $700,[51] and he granted each of them their freedom. In the span of a few moments, Andrew's father became his owner and then his emancipator.

FIGURE 1. Sale of Elizabeth and four children, including "one aged five years, named Andrew," 1790 (SPANISH RECORD BOOK B, HNF)


Be it known to all to whom these presents shall come, that I Jonas Eiler do
really and effectually sell to William Barland, a Mulatto Woman named Elizabeth,
aged twenty five years, native of America, with her four children, one aged five years,
named Andrew, another aged two years named Peggy, another of the Samoaye
named Vechy, and another aged one year named James; Which said five Slaves
I sell for the Sum of Seven hundred Dollars, Specie, in hand paid. For which Sum
consideration I do hereby resign all right, title, profession and claim, in and to the said
Slaves, all of which

Andrew's father ensured that Andrew and his younger siblings received the same opportunities and advantages that they would have enjoyed as (very wealthy) white children, making the Barland clan part of the "aristocracy" of the free people of color in the Natchez area.[52] Andrew's parents did not marry—Mississippi law would recognize only the marriages of "free white persons"[53]—but they lived together as husband and wife until William's death in 1816.[54] Elizabeth eventually

50 *See* Benjamin Eiler Probate Record, *supra* note 47, at 248.

51 *See* SPANISH RECORD BOOK B, *supra* note 39, at 446.

52 ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 26 (2000); *see also* EDWIN ADAMS DAVIS & WILLIAM RANSOM HOGAN, THE BARBER OF NATCHEZ 242 (1954) ("The free people of color had their own aristocracy—the Johnsons, the McCarys, the Barlands, the Fitzgeralds, and the family of George Winn.").

53 *See* HUNTER, *supra* note 48, at 101; *An Act to Regulate the Solemnization of Marriages; Prohibiting such as Are Incestuous, or otherwise Unlawful—June 29, 1822*, *in* CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848 (1798—1848) 492 (A. Hutchinson ed., 1848). Spanish law, which governed at the time of William's purchase of Elizabeth, did not forbid a union between a white man and a woman of color, but the practice was socially disfavored. *See* PINNEN, *supra* note 46, at 150. There is no evidence William and Elizabeth attempted to formally marry before control of Natchez passed to the United States in 1798.

54 In his 1811 will, William Barland affectionately described Elizabeth as his "friend and companion." WILL OF WILLIAM BARLAND (PROVEN AT APRIL TERM 1816) (1816) *in* ADAMS CNTY. CHANCERY CT., WILL REC. 1, 132–38 (on file with the Historic Natchez Foundation). In an 1830 petition, Andrew and his siblings refer to themselves as "the issue of . . . William Barland and Lisey his wife who was a colored woman." PETITION OF CHILDREN OF WILLIAM BARLAND,

gave birth to twelve Barland children, all of which William acknowledged as his own.[55] Such relationships were unusual, but not totally unique: William was one of a several white men in Natchez to acknowledge paternity of children of mixed ancestry.[56] As Andrew's father later explained, Elizabeth "[w]as the agent through God of bringing [my children] into existence[, so] I thought it my duty to my Country[,] to my God and myself to raise them industriously and virtuously[.]"[57]

And so, Andrew Barland received from his father that which a young white man would need on his way to becoming a leading Natchez citizen: an education, a substantial amount of fertile land, and, eventually, enslaved persons. When William died, his property included some five hundred acres of land, seventeen additional lots in Natchez worth $9,100, and sixteen enslaved people,[58] all of which eventually came to Elizabeth and the children.[59] Or almost all of it: A December 1819 newspaper notice reflects the disappearance of a twenty-year-old "negro wench named MARY . . . belong[ing] to the estate of William Barland, deceased," suspected to have been "stolen off by a free negro."[60] And William's "taxable property" records do not reflect the value of Natchez real estate that William had been slowly selling off for years, including three hundred and twenty acres of plantation land along the Mississippi River transferred to Andrew (for $1 consideration) in 1808.[61] At twenty-three-years-old, Andrew moved onto his new estate,

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in BARLAND FAMILY COLLECTION (1830) (on file with the Historic Natchez Foundation).The 1830 petition is cited in various secondary sources as "Series I, No. 97," but the Mississippi Department of Archives and History can no longer locate the original; a photostat duplicate appears in the Historic Natchez Foundation. *See, e.g.*, WILLIAM JOHNSON, WILLIAM JOHNSON'S NATCHEZ: THE ANTE-BELLUM DIARY OF A FREE NEGRO 334 (William R. Hogan & Edwin A. Davis eds. 1993) (discussing same document).

55 *See* WILL OF WILLIAM BARLAND (PROVEN AT APRIL TERM 1816), *supra* note 54, at 134.

56 *See* RIBIANSZKY, *supra* note 48, at 45; *see also* Loren Schweninger, *Prosperous Blacks in the South, 1790–1880*, 95 AM. HIST. REV. 31, 34–35 (1990) (discussing same patterns across Lower South).

57 *See* WILL OF WILLIAM BARLAND (PROVEN AT APRIL TERM 1816), *supra* note 54, at 137.

58 *Adams County, Taxable Property, 1815*, *Series 0510, Box 142*, MDAH, https://da.mdah.ms.gov/series/510/adams-county-taxable-property/territorial/1815/detail/102572 [https://perma.cc/8V9P-BTXT].

59 *See generally* WILL OF WILLIAM BARLAND (PROVEN AT APRIL TERM 1816), *supra* note 54.

60 The estate offered $50 for the apprehension of the thief or thieves, "or Twenty Dollars for the Wench alone." Intriguingly, the notice was signed by two of the three co-administrators of the Barland estate; the third co-administrator, Andrew Barland, did not sign. *Fifty Dollars Reward*, NATCHEZ GAZETTE (Dec. 18, 1819), https://www.newspapers.com/article/natchez-gazette/134890329 [https://perma.cc/EY6Y-9KHN].

61 *See* JEFFERSON COUNTY DEED RECORD B-1 270 (1804–1813), *microformed on* Jefferson Cnty. Ct. House, Jan. 12, 1972, 64 ES, Red. 17, Exp. 69 (The Genealogical Soc'y). Barland's 1824 legislative petition notes that he has been a resident of Jefferson County "about sixteen years," suggesting he took possession of the property immediately in 1808. Petition of Andrew Barland, *supra* note 36.

where he remained for the rest of his life. Andrew's holdings would grow substantially larger in later decades,[62] but even during his earliest years in Jefferson County, he always held at least a few enslaved people on his land.[63]

But for all his privilege and prosperity, Andrew's status as a free person of color meant that his own freedom remained precarious. To be sure, census records intermittently listed Andrew and his siblings as "white" (as well as "mulatto" or "free people of color"),[64] but decades of legal records related to Andrew's emancipation reflect the insecurity engendered by his birth. In 1797, the Barland house was destroyed by fire, and among the losses was the manumission instrument for Elizabeth and the children. In August 1800, William Barland had a will prepared, in which he took pains to "recognize and confirm the said freedom and manumission of my said friend and companion Elizabeth and our natural begotten children."[65] His final will (drafted in 1811 and proven in 1816) once again "in the most solumn, unequivocal and ample manner, confirm[ed]" Andrew's "entire freedom and exemption from Slavery."[66] But as the Mississippi Territory began to more closely regulate the manumission of enslaved persons, even that was not enough. Spanish law erected fewer barriers to manumission and "self-purchase," but with American control, owners of enslaved people could only confer freedom on their property with permission of the Mississippi Legislature, and only with proof of a "meritorious act."[67] So, in 1814, William felt compelled to petition the Legislature for passage of a private act authorizing him to free "certain persons of color," namely Andrew, his mother, and his now eleven siblings.[68] The act passed on Christmas Eve. Andrew's father then registered freedom papers for

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[62] *See infra* notes 98–102 and accompanying text.

[63] *See, e.g.*, *Jefferson County, Taxable Property, 1810, Series 0510, Box 139*, MDAH, https://da.mdah.ms.gov/series/510/jefferson-county-taxable-property/territorial/1810/detail/101811 [https://perma.cc/M8M3-M6NH] (listing 1 slave); *Jefferson County, Combined Assessment, 1824, Series 1202, Box 3667*, MDAH, https://da.mdah.ms.gov/series/osa/s1202/jefferson/1824-combined/detail/328248 [https://perma.cc/R6TE-L4EE] (showing four slaves).

[64] *Compare* Spanish Census Old Natchez District 1792, MDAH (listing William Barland as white head of household with several "Mulato" children), *and* Johnson, *supra* note 54, at 514 (noting David Barland was listed in the U.S. Census as head of Negro family of six and the owner of eighteen slaves), *with Jefferson County, Combined Assessment*, *supra* note 63 (listing Andrew Barland as "white").

[65] *See* Will of William Barland (Proven at April Term 1816), *supra* note 54, at 132–33 (discussing previous wills and manumissions).

[66] *Id.* at 133.

[67] *See* Pinnen, *supra* note 46, at 110; *see also* Warren Eugene Milteer, Jr., Beyond Slavery's Shadow 75 (2021).

[68] George Poindexter, *An Act, to Authorise William Barland to Manumit Certain Persons of Color, Passed December 24, 1814*, *in* Revised Code of the Laws of Mississippi, in Which Are Comprised All Such Acts of the General Assembly, of a Public Nature, as Were in

Andrew (yet again) at the Natchez courthouse—twenty-five years after Andrew was ostensibly "free"—along with an assurance that he had "complyed with the provisions of said act by giving bond and security approved of by the Governor of [Mississippi] Territory."[69]

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Andrew Barland was a regular juror at the time Mississippi achieved statehood in 1817, just as his father had been.[70] Barland asserted in 1824 that "he ha[d] been summoned as a juror very often and served as Grand & Petit Juror,"[71] and his account was corroborated by the Jefferson County clerk of court and sheriff, who certified that Andrew "served at different courts as one of the Grand jurors empaneled for said County and as a petit juror in many instances."[72] Most of the court records related to Barland's jury service have been lost or destroyed, and it is all but impossible now to reconstruct the details of the cases in which Barland participated. But one of the remaining record books from the Jefferson County Superior Court definitively confirms these accounts; Barland was Grand Juror No. 9 for the March 1820 term of court.[73]

FORCE AT THE END OF THE YEAR 1823, at 578 (1823) [hereinafter REVISED CODE OF THE LAWS OF MISSISSIPPI].

69 Entry from William Barland, William Barland to Andrew Barland and Others (Received June 2, 1815), *in* [H] ADAMS COUNTY DEED RECORD 369, 369–70 (on file with the Historic Natchez Foundation).

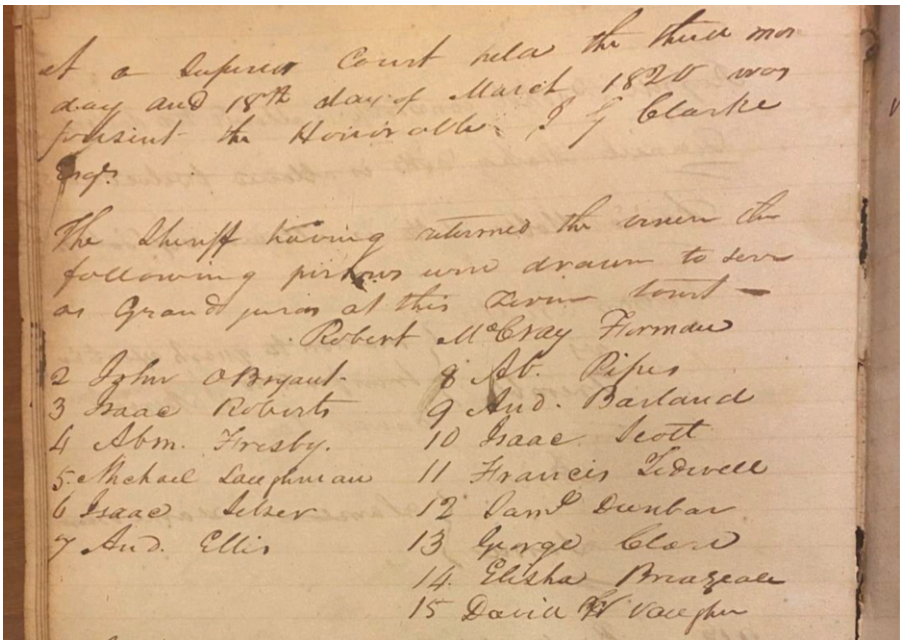
70 *See, e.g.*, MISS. HIST. RECS. SURV., WORK PROJECTS ADMIN., TRANSCRIPTION OF COUNTY ARCHIVES OF MISSISSIPPI, NO. 2 ADAMS COUNTY, VOL. II, MINUTES OF THE COUNTY COURT, 1802–1804, at 235, 239, 247, 255, 257, https://www.familysearch.org/library/books/records/item/446097-transcription-of-county-archives-of-mississippi-no-2-adams-county-natchez-v-02?offset= [https://perma.cc/HK9Q-MZM6] (1942) (listing William Barland as juror).

71 Petition of Andrew Barland, *supra* note 36.

72 *Certification by Clerk and Sheriff, July 4, 1824*, *supra* note 38.

73 *List of Jurors*, *in* JEFFERSON COUNTY ORIGINAL RECORDS B1-R27/B7-S6, SERIES 2050, BOX 10056, MISSISSIPPI DEPARTMENT OF ARCHIVES & HISTORY (1820).

FIGURE 2. Grand jurors drawn March 18, 1820 (Jefferson Co. Superior Court Records, MDAH)


At a Supreme Court held the third Monday and 18th day of March 1820 was present the Honorable J. F. Clarke Judge

The Sheriff having returned the annexed following pickes were drawn to serve as Grand jurors at this term court—

Robert McCray Foreman

2 John O Bryant
3 Isaac Roberts
4 Abm. Fresby.
5 Michael Laughman
6 Isaac Selser
7 And. Ellis
8 Jos. Pipes
9 And. Barland
10 Isaac Scott
11 Francis Tidwell
12 Danl Dunbar
13 Jurge Clark
14 Elisha Brazeale
15 Davis Vaughn

But Barland's time as a juror would come to an end in 1824 with Joseph Hawk's lawsuit. While the details of the dispute are unknown, the case evidently turned on a swearing contest between Hawk and Barland, and Hawk objected to Barland taking the stand "on account of his blood."[74] The judge sustained Hawk's objection. Under Mississippi law, no "negro or mulatto, bond or free" was allowed to serve as a witness in a case in which a white person was a party.[75] Similar laws limited Black testimony not just throughout the South, but also in Illinois, Ohio, Indiana, Iowa, and California.[76] As Professor Ariela Gross has observed, however, while "[r]ules of evidence and the language of legal argument shaped local disputes" in Natchez's courtrooms, "so [too] did community norms."[77] Likely in deference to such norms and Barland's privileged standing in Jefferson County, the judge allowed

74 Petition of Andrew Barland, *supra* note 36.

75 *Id.*; REVISED CODE OF THE LAWS OF MISSISSIPPI, *supra* note 68, at 373.

76 *See* LITWACK, *supra* note 7, at 93. Such laws remained a critical point of contestation even in the immediate wake of the Civil War. *See also* JONES, *supra* note 20, at 149; DU BOIS, *supra* note 22, at 157.

77 GROSS, *supra* note 52, at 5.

Barland to offer unsworn testimony, which the jury ultimately credited over Hawk's sworn version of events.[78]

Barland did not act on his newfound legal disability immediately. Perhaps the next time he had to appear in court to litigate a land dispute or recover on an unpaid debt, his unsworn word would again suffice. That summer, however, Barland was summoned for jury duty in Greenville, Mississippi, and this time the Circuit Court "recused" him.[79] Barland's disqualification as a *witness* had not made this disqualification as a *juror* a foregone conclusion. Although Mississippi law expressly restricted the admissibility of testimony offered by Black witnesses, Jefferson County residents were qualified to serve as circuit court jurors so long as they were between the ages of twenty-one and sixty, freeholders or householders, and "citizens of the United States."[80] Hawk's successful challenge to Barland's testimony seems to have prompted new scrutiny regarding this final requirement, one that Chief Justice Roger Taney would famously purport to settle three decades later in *Dred Scott v. Sandford*: Could a free person of color be a "citizen of the United States"?[81] Up until 1824, the local Mississippi legal establishment had implicitly answered that question in the affirmative; after 1824, at least when it came to jury service, that was no longer the case.[82]

The remarkable response of the clerk of court and sheriff to Barland's disqualification suggests the significance of his exclusion from jury service. In the wake of the circuit judge's decision, the two provided a simple sworn certification, submitted into the court's records, recognizing: "That Andrew Barland . . . served at different courts as one of the Grand jurors empaneled for [Jefferson] County and as petit juror in many instances, and we view the said Andrew Barland worthy of stations in common with the free enlightened citizens of said County." The brief document says little else; it merely affirmed the officials' high assessment of Barland's character and recorded for posterity his past service. The document is dated July 4, 1824.[83]

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78 *See* Petition of Andrew Barland, *supra* note 36; *see also* Hawk v. Barland, *supra* note 37 (noting verdict against plaintiff). Gross has found records indicating that Black witnesses were sometimes permitted to testify in neighboring Natchez as late as 1830. GROSS, *supra* note 52, at 37.

79 *Certification by Clerk and Sheriff, July 4, 1824*, *supra* note 38.

80 REVISED CODE OF THE LAWS OF MISSISSIPPI, *supra* note 68, at 133–34, 136–37. *See* Byrd v. State, 2 Miss. (1 Howard) 163, 182 (1834) (reversing conviction of free person of color, for aiding enslaved person in murdering his enslaver, because jurors failed to satisfy property qualifications). Note that nothing in Mississippi law disqualified property-owning women from serving as jurors, although I have found no suggestion that women served as jurors until much later. *See also supra* note 32.

81 60 U.S. 393, 393 (1857).

82 *Cf.* Martha S. Jones, Hughes v. Jackson*: Race and Rights Beyond* Dred Scott, 91 N.C. L. REV. 1757, 1767 n.58 (2013) (discussing citizenship for antebellum free people of color as "bundle of rights" as opposed to a binary framework).

83 *Certification by Clerk and Sheriff, July 4, 1824*, *supra* note 38.

Equally revealing is Barland's response. At the beginning of the next session of the Mississippi Legislature, Barland submitted a petition protesting the unjustified erosion of his rights and seeking a private law conferring on him "such priviledges as his Countrymen may think him worthy to possess."[84] Thirteen of the area's leading white men joined the petition—including one who served on the same grand jury with Barland in 1820[85]—vouching for Barland's honesty, industry, good moral character.[86] As evidence that his community received him "as well as tho he had been a white man" throughout his adult life, Barland emphasized he had married into a white family, voted, testified in court, and—most notably, for present purposes—that he had repeatedly served as a grand and petit juror in the past.[87] Barland's appeal also underscored his class position within the political economy of slavery: "Your petitioner further sheweth to your Honorable bodies that his education, his habits, his principles and his society are all identified with your views, that he holds slaves and can know no other interest than that which is common to the white population[.]"[88]

Barland did not claim by virtue of pedigree or conduct to *be* white, nor did he explicitly seek a legislative determination that he be recognized *as* white;[89] rather, Barland's plea was that he was worthy of full citizenship, entitled to the same rights and privileges enjoyed by his white neighbors.[90] His effort nearly succeeded. The Mississippi House acted favorably on "the petition of Andrew Barland, a coloured man, praying a law may pass conferring on him certain privileges of citizenship."[91] But two weeks later the measure died in the Senate.[92]

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[84] Petition of Andrew Barland, *supra* note 36.

[85] *See id.* Abner Pipes, Grand Juror No. 8, is the petition's final signatory. *See also List of Jurors*, *supra* note 73.

[86] Petition of Andrew Barland, *supra* note 36.

[87] *Id.*

[88] *Id.*

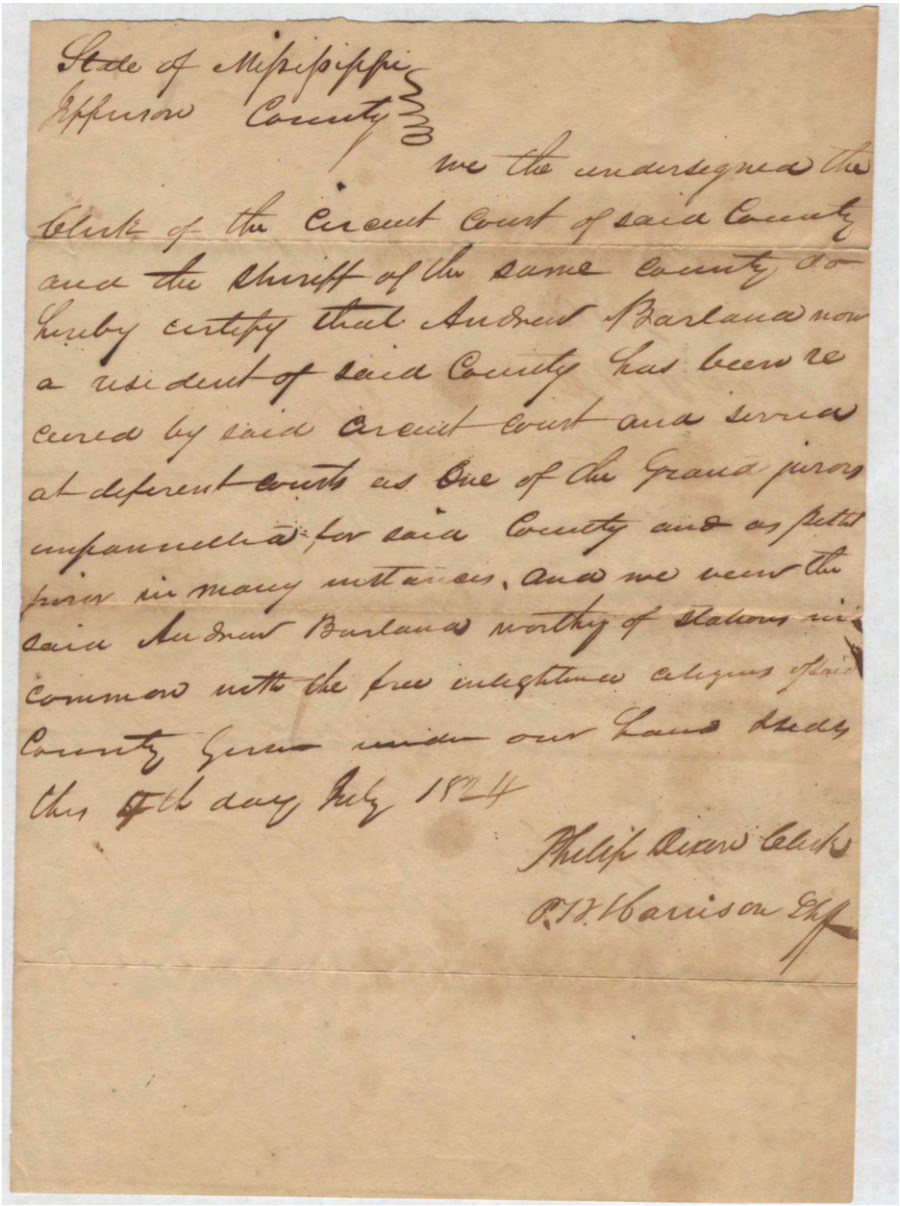
[89] *See id.*

[90] *Cf.* Ariela J. Gross, What Blood Won't Tell 3 (2008) ("While racial identity might inhere in her blood, how would blood make itself known? The participants in her trial believed that they had to read not only bodies but also actions, demeanor, character, all the ways in which Alexina might *perform* her identity . . . ."); Nancy Leong, *Enjoyed by White Citizens*, 109 Geo. L.J. 1421 (2021) (discussing significance of race-conscious phrasing of Civil Rights Act of 1866).

[91] Journal of the House of Representatives of the State of Mississippi, at Their Eighth Session, Held in the Town of Jackson 36 (1825) (on file with the Library of Congress, Early State Records Project); *id.* at 80–82 (noting the House's consideration of the measure); *id.* at 129 (noting third reading, with amendments).

[92] Journal of the Senate of the State of Mississippi, at their Eighth Session, Held in the Town of Jackson 68 (1825) (noting passage in House); *id.* at 74 (noting "some progress" on bill); *id.* at 77–78 (noting indefinite postponing of the bill).

FIGURE 3. Clerk and Sheriff's Certification of Jury Service, July 4, 1824 (MDAH)



State of Mississippi
Jefferson County

We the undersigned the Clerk of the Circuit Court of said County and the Sheriff of the same County do hereby certify that Andrew Barland now a resident of said County has been recorded by said Circuit Court and served at different terms as One of the Grand jurors unpannelled for said County and as petit juror in many instances, and we deem the said Andrew Barland worthy of Status in common with the free inhabitants citizens of said County Given under our hand this 4th day July 1824

Philip Dixon Clerk
R. B. Harrison Shff

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Even if he had never been sued by Joseph Hawk, Andrew Barland's service as a juror in Mississippi likely would not have continued much past early statehood. As exceptional as Barland's life and pedigree may have been, as much as local elites were willing to embrace Barland in decades past, economic forces would soon harden racial hierarchies and boundaries in Mississippi (and prompt greater state involvement in policing those categories). The explosive growth of an economy built upon enslaved labor and an increasingly lucrative internal slave trade compelled progressively tighter regulation of free people of color, whose very presence was feared "to excite in the bosoms of . . . [the enslaved] a feeling of dissatisfaction with their own condition."[93] Natchez's "Forks-of-the-Road" would soon become the South's largest slave market outside of New Orleans,[94] and between 1820 and 1840, Natchez's enslaved population grew at a rate that vastly outpaced the growth of its white population.[95] News reports of distant insurrections fueled periodic panics amongst Natchez's increasingly outnumbered white citizens.[96] These fears, in turn, produced new laws targeting free people of color: greater limits on manumission, on freedom of movement, on carrying weapons, on directing "abusive language" toward white Mississippians, and so on.[97]

Andrew Barland fared far better than most. For the most elite subset of the Lower Mississippi Valley's free people of color, "the late antebellum era was not a period of decline"; men like Barland maintained their economic position "in large measure because they did not pose a threat to the South's 'peculiar institution'" and by distancing themselves from "less fortunate free blacks."[98] Shortly before his death in 1850, Barland claimed ownership of fifty-five enslaved people;[99] many more may have been working on his estate, as he transferred ownership (but not possession) of numerous men, women, and children

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93 Ribianszky, *supra* note 48, at 34 (quoting *The Natchez*, Nov. 11, 1831); Ira Berlin, Slaves Without Masters 135–38 (1974) ("The maturation of the Southern slave system left little room for free Negroes . . . .").

94 Gross, *supra* note 52, at 22.

95 Ribianszky, *supra* note 48, at 34 (referencing Table 1.1).

96 *See* Ribianszky, *supra* note 48, at 31–34; *see also* Davis & Hogan, *supra* note 52, at 151–54 (discussing Natchez "Inquisition" of 1841).

97 *See* Milteer, *supra* note 67, at 89, 93; *see generally* Charles S. Sydnor, *The Free Negro in Mississippi Before the Civil War*, 32 Am. Hist. Rev. 769 (1927) (exploring the laws present in Mississippi that "govern[ed] and control[led] . . . the free [people of color]").

98 Schweninger, *supra* note 56, at 38, 40.

99 *Personal Assessment, Jefferson County, 1848, Series 1202, Box 3617*, MDAH, https://da.mdah.ms.gov/series/osa/s1202/jefferson/1848-personal/detail/306003 [https://perma.cc/43AT-FRF4] (listing fifty-five slaves).

to his son,[100] daughter,[101] and grandson[102] in his final years. But the scope of Andrew's own freedom was also always somewhat circumscribed. Around 1830, Andrew and his siblings attempted once again to petition the Legislature, insisting that although they were the "issue of . . . a coloured Woman," they were "in every other respect, besides that of Constitutional disability . . . true and good citizens."[103] Once again, the Legislature took no action.

It is easy to identify differences between Barland's fight to preserve his ability to serve as a juror in 1824 and those efforts of Black activists to become jurors in later decades. Those in subsequent generations were deeply embedded in political movements that sought, among other goals, the abolition of slavery;[104] Barland directly profited off that system of exploitation. Later activists frequently participated in a form of Black-led "parallel politics" that went beyond lobbying for full inclusion within existing (white) political structures;[105] none of the other members of "aristocracy" of Natchez's free people of color signed Barland's petition in 1824.[106] But there are also continuities, particularly when it comes to articulating the (often inchoate) linkages between rights, citizenship, and the jury-box. As Martha S. Jones has written, Black Americans in antebellum Baltimore invoked "citizenship" instrumentally as a vehicle for exercising rights, while at the same time, knew that it was through claiming and exercising rights that their citizenship would be established.[107] Barland's 1824 petition echoes this dialectic: "[C]itizen[ship]" for Barland was the gateway to rights like

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100 Andrew Barland to Charles H. Barland, *in* [E] Jefferson County Deed Record 845 (Sept. 4, 1844), https://www.familysearch.org/ark:/61903/3:1:3Q9M-CSL5-7SXM-4 [https://perma.cc/LZ4J-MQ9S] (gifting "Little Bill, and his wife Ann and her child [Violet?], Bob and his wife Dolly and her child [Troy?]").

101 Andrew Barland to Mary Ann Hammett, *in* [E] Jefferson County Deed Record 846 (Sept. 4, 1844), https://www.familysearch.org/ark:/61903/3:1:3Q9M-CSL5-7SXM-4 [https://perma.cc/LZ4J-MQ9S] (gifting "Big Bill, and his wife . . .[?], Stephen and his wife Maria and girl Amanda").

102 Andrew Barland to Charles A. Barland, *in* [F] Jefferson County Deed Record 818 (July 18, 1848), https://www.familysearch.org/ark:/61903/3:1:3Q9M-CSL5-7SXM-4 [https://perma.cc/LZ4J-MQ9S] (gifting "Sarah Ann about 15 years of age and her infant son named Ben about six months old").

103 Petition of Children of William Barland, *supra* note 54.

104 *See infra* Parts II–IV.

105 P. Gabrielle Foreman, *Black Organizing, Print Advocacy, and Collective Authorship*, *in* The Colored Conventions Movement 21, 30 (P. Gabrielle Foreman, Jim Casey & Sarah Lynn Patterson eds., 2021) ("In the face of that exclusion, Blacks not only lobbied for full civil rights within political structures that continually spurned them but also advocated for parallel developments in Black community, capacity, and institution building within the continental United States and outside of it.").

106 *See* Petition of Andrew Barland, *supra* note 36.

107 *See* Jones, *supra* note 20, at 11.

sitting as a juror, but it was also the exercise of rights like jury service "that evidenced [his] citizenship."[108]

II
Buffalo, New York (1843)

For a few dramatic weeks in the summer of 1843, downtown Buffalo, New York was the epicenter of American politics—at least for those committed to racial equality and the abolition of slavery. Some of the events that transpired that month are well known to historians and legal scholars. On August 15,[109] the National Convention of Colored Citizens was called to order at the Old Post Office,[110] the first such national gathering in eight years.[111] The convention brought together scores of established Black activists from across the country, as well as newer faces, like a recently self-emancipated 25-year-old named Frederick Douglass.[112] Then, under a massive tent in Court House Park, thousands gathered for the national convention of the Liberty Party,[113] which one local paper described as "in many respects the most extraordinary Convention that ever met in the United States."[114] In the upcoming presidential election, the upstart Liberty Party—dedicated not only to abolishing slavery, but more provocatively, to extending

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[108] *Id.*

[109] Minutes of the National Convention of Colored Citizens 4 (New York, Piercy & Reed, Printers 1843), https://omeka.coloredconventions.org/items/show/278 [https://perma.cc/9EAQ-GX93].

[110] *See Notice*, Buffalo Daily Gaz. Aug. 12, 1843, at 2. The gathering is perhaps best remembered for the controversy surrounding Henry Highland Garnet's incendiary *Address to the Slaves of the United States*, the "most forthright call for a slave uprising ever heard in antebellum America." Benjamin Quarles, Black Abolitionists 226 (1969). Though the delegates of the Buffalo convention narrowly decided against publishing the statement, the address would eventually become one of the most important texts of antebellum Black activism. *See* Derrick R. Spires, *Flights of Fancy: Black Print, Collaboration, and Performances in "An Address to the Slaves of the United States (Rejected by the National Convention, 1843)"*, *in* Colored Conventions Movement, *supra* note 105, at 125–53.

[111] Spires, *supra* note 110, at 199.

[112] *Id.*, at 126–27, 130–34 (recounting the close debate between Henry Highland Garnet, Frederick Douglass, and other abolitionist leaders during the 1843 National Convention of Colored Citizens in Buffalo).

[113] *National Liberty Convention*, Com. Advertiser (Buffalo, N.Y.), Aug. 31, 1843, at 2 ("perhaps fifteen hundred"); *see also* George Jonson, Diaries of George Jonson (July 1, 1843 – Dec. 31, 1844), M65-4, Reel 5, Buffalo History Museum (BHM) (discussing organizing and preparing for Liberty Party event within his July and August entries); *see also* Elwin H. Powell, Professor of Socio. at the State Univ. of N.Y. at Buffalo, News From the Aceldama Black and White Relations in Buffalo as Revealed by the Journal of George Washington Jonson: (1832–68), Presentation at the University's Black Faculty and Staff Association Second Annual Symposium 7 (Apr. 9–10, 1976) (transcript on file with author) (citing Jonson).

[114] *National Liberty Convention*, Com. Advertiser (Buffalo, N.Y.), Sept. 1, 1843, at 2.

"the principle of equal rights into all its practical consequences and applications"[115]—played an outsized role, arguably costing the Whig candidate New York's thirty-six electoral votes and the presidency.[116]

Abner H. Francis, a wealthy Black tailor and merchant, was involved in organizing both major events—he was a secretary of the Colored Convention and a stalwart Liberty Party supporter—but his central role in a *third* historic event that month in Buffalo has been forgotten: Beginning on September 11, 1843, he served as a petit juror in the imposing Greek Revival courthouse overlooking the park where the Liberty Party had just met. For nine days, Francis sat as a juror in Buffalo's Recorder's Court for several felony cases, most involving white defendants. Though the telegraph had not yet transformed American media, news accounts of Francis's participation spread quickly,[117] with newspapers throughout the country reprinting articles on the "first Negro juror" in Buffalo.[118]

While property qualifications excluded the vast majority of Black New Yorkers from voting and serving on juries throughout the State's history, wealthy men like Francis—those who possessed a freehold estate worth at least $250—were legally eligible to do both;[119] why then, in 1843, was Francis finally seated as a juror? Without diminishing Francis's individual contributions—and, to be clear, Francis's persistent

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115 *Liberty Party Platform, Aug. 30, 1843*, *in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 225 (Kurt T. Lash ed., 2021).

116 The Liberty Party's final vote tally in New York tripled James K. Polk's narrow margin of victory over Henry Clay, though historians and political scientists dispute whether the Liberty Party was truly a "spoiler." GOSSE, *supra* note 18, at 419.

117 *See generally* MENAHEM BLONDHEIM, NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844–1897, at 33 (1994) (exploring transformation of American press beginning with introduction of telegraph in 1844); Ryan Cordell, *Reprinting, Circulation, and the Network Author in Antebellum Newspapers*, 27 AM. LITERARY HIST. 417, 417–19 (2015) (discussing antelbellum newspapers' practice of reprinting short passages from other newspapers as early form of "virality").

118 *See infra* notes 173–87 and accompanying text.

119 *An Act for Regulating Trials of Issues, and for Returning Able and Sufficient Jurors*, *in* 1 LAWS OF THE STATE OF NEW YORK, REVISED AND PASSED AT THE THIRTY-SIXTH SESSION OF THE LEGISLATURE 327–28 (1813) (imposing age, sex, and property requirements for jury service, but no restrictions with respect to race); 2 N.Y. REV. STAT. tit. 4, §§ 22, 33 (1829), 411–17 (vol. II) (same). When legislators in 1785 first attempted to abolish slavery in the state, pro-slavery forces amended the proposed bill to disqualify Black New Yorkers from serving as jurors, witnesses, and officeholders. Abolitionists pushed back against any compromise that would enshrine Black exclusion from the body politic and the effort "collapsed." PAUL J. POLGAR, STANDARD-BEARERS OF EQUALITY 123 (2019). Fourteen years later, a new abolition bill passed, this time free from any "racialized restrictions on citizenship" that had sunk the earlier effort. *Id.* at 153; *see also* LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY 49 (2003) (discussing failure of earlier efforts). Racial restrictions did not enter New York law until 1821, when the state's new constitution imposed a $250 property qualification for Black voters (while extending suffrage to white men regardless of wealth). *See* MASUR, *supra* note 19, at 59–60; GOSSE, *supra* note 18, at 362, 372–73.

commitment to fighting for racial equality came at significant personal risk[120]—the landmark achievement owed much to mass agitation outside the courtroom. In the decades before and after Francis's jury service, Black activists protested (in meetings, conventions, newspapers, and petitions) their exclusion from juries and insisted upon equal access to the jury-box. The proximity between Francis's jury service and the previous weeks' political gatherings, in other words, was no coincidence. But the court records themselves—a catalogue of defendants sentenced to lengthy terms for economic crimes—offer additional clues that point in a less democratic direction, underscoring how class, together with race and sex, shaped the antebellum jury.[121] This Part seeks to situate Abner Francis's jury service in the political context that enabled it, interrogate what the remarkable episode might suggest about Black efforts to claim legal rights in the decades before the Civil War, and explore what Francis's jury service meant to Black activists in New York and around the country.

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The two conventions that met in Buffalo immediately preceding Francis's jury service represented two distinct currents of antebellum political activism around race, rights, and equality. Both, ultimately, proved instrumental in integrating Buffalo's jury.

While the imposition of a property requirement on Black suffrage and jury service in New York faced pushback and protest in 1821,[122] the most direct antecedent for the Colored Convention that met in Buffalo in August 1843 was a meeting at the A.M.E. Church in Philadelphia in 1830.[123] There, in response to recent white terrorism in Cincinnati, Ohio, Black leaders from across the country "gathered . . . to protest and plan."[124] The Philadelphia meeting was primarily aimed at supporting

120 *See, e.g.*, Kenneth Hawkins, "*A Proper Attitude of Resistance": The Oregon Letters of A.H. Francis to Frederick Douglass, 1851–1860*, at 121 Or. Hist. Q. 378, 380 (2020) (offering detailed biographical overview and noting Francis's fears in 1838 "after defending 'respectable' Blacks in Buffalo from attacks just weeks after the murder of abolitionist Elijah Lovejoy").

121 *See infra* notes 166–72 and accompanying text.

122 *See* Masur, *supra* note 19, at 60 (discussing Black protest and arguments of Peter Jay that property requirement abridged "privileges and immunities" of citizenship).

123 *See* Foreman, *supra* note 105, at 26 (describing the meeting at the A.M.E. Church, during which the delegates committed themselves to future meetings). *But see id.* at 33–34 (noting difficulties in periodization and characterization in assessing the "Colored Convention Movement").

124 *Id.* at 21; *see also* Nikki M. Taylor, Frontiers of Freedom: Cincinnati's Black Community, 1802–1868, at 20–64 (2005) (discussing growth of Black community in Cincinnati and impact of racial violence in 1829); Gosse, *supra* note 18, at 502. *But see* Richard C. Wade,

those Ohioans fleeing to Canada, but it "would become the first of hundreds of national and state Colored Conventions" over the next seven decades, involving tens of thousands of participants, insisting upon legal equality for Black Americans.[125] The events in Ohio also inspired a militant young pamphleteer named David Walker to issue an *Appeal* that soon became a national sensation.[126] His searing indictment of slavery and racial inequality opened with a challenge to those white Americans who might second-guess the utter degradation of his fellow (Black) citizens: "Not, indeed, to show me a coloured President [or] Governor . . . [b]ut to show me a man of colour . . . who sits in a Juror Box, even on a case of one of his wretched brethren, throughout this great Republic!!"[127]

A comprehensive retelling of the Colored Convention Movement is beyond the scope of this Part, but one facet of such activism warrants emphasis: Ending *de jure* and *de facto* prohibitions of Black jury service was a persistent focus and demand of these protests. In Ohio, for example, activists campaigned tirelessly throughout the 1830s and 1840s against the state's odious "Black Laws"—amended in 1831 to disqualify free people of color from jury service[128]—eventually winning the repeal of most discriminatory provisions in 1849.[129] At the last minute, however, white opponents insisted that the prohibition on Black jury service remain.[130] The repeal was, in some sense, a political coup, "a triumph of decades of activism by Black and white Ohioans [whose] relentless pursuit of repeal . . . had helped fragment both the Whigs and the Democrats."[131] But the continuing prohibition on jury service infuriated many Black Ohioans, as one correspondent to the *North Star* explained:

> As a choice, I had sooner dwell in the depths of obscurity, and be the passive object of political persecution, than to know the humiliating

The Negro in Cincinnati, 1800–1830, 39 J. Negro Hist. 43 (offering revisionist account of Ohio expulsion).

125 Foreman, *supra* note 105, at 21.

126 David Walker, Walker's Appeal, in Four Articles 10 (1830); *see* Gosse, *supra* note 18, at 502 (explaining that white mobs attempting a mass expulsion of Black Ohioans prompted Walker to issue his *Appeal*); *see also* Manisha Sinha, The Slave's Cause: A History of Abolition 205–11 (2016) (discussing reception of Walker's *Appeal*).

127 Walker, *supra* note 126, at 9–10.

128 *See* Stephen Middleton, The Black Laws in the Old Northwest: A Documentary History 47–48 (1993).

129 *See* Masur, *supra* note 19, at 219–23.

130 *Id.* at 222; L. Diane Barnes, *"Only a Moral Power": African Americans, Reformers, and the Repeal of Ohio's Black Laws*, 124 Ohio Hist. 7, 7, 21 (2017); Frederick J. Blue, Salmon P. Chase: A Life in Politics 71 (1987).

131 *Id.* at 223.

> fact that we are indebted to such a pandering set of graceless demagogues for this mock equality so recently bestowed. . . . By them he is, regardless of intelligence or capacity, debarred the privilege of a seat as a juror, even in litigating upon the rights of other colored persons.[132]

Ohio activists would remain particularly focused on the bar against Black jurors in later years, as well, focusing not just on the injury to excluded jurors, but also to Black (and white abolitionist) defendants.[133]

Equality in the jury-box had been a priority for Black activists in New York throughout the 1830s and 1840s, too.[134] The country's first legal treatise on the *Rights of Colored Men*—a popular volume published in 1838 by a Troy, New York abolitionist—emphasized that it

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132 A.J. Anderson, *Colored Citizenship in Ohio*, North Star, Mar. 23, 1849, at 3. For more on the correspondent, A.J. Anderson, and his continuing involvement in fighting for legal rights, see *Suffrage in Ohio.; The Right of Mulattoes to Vote Confirmed*, N.Y. Times, Feb. 17, 1860, at 4.

133 The controversial federal prosecution of activists involved in the "Wellington-Ohio Rescue" helped crystalize the concerns. *See, e.g.*, *Eloquent Speech of Langston*, Liberator (Bos.), June 3, 1859, at 88 ("Those jurors . . . were neither impartial [nor] a jury of my peers . . . . I should not be subjected to the pains and penalties of this oppressive law, when I have *not* been tried, either by a jury of my peers, or by a jury that was impartial.") (emphasis added); *Remarks of J.M. Langston of Oberlin*, The Anti-Slavery Bugle, Sept. 24, 1859 ("[N]o colored man is ever tried by a jury of his peers."). But Black activists articulated similar arguments well before that particular episode. *See, e.g.*, Proceedings of the State Convention of Colored Men, Held in the City of Columbus, Ohio, Jan. 16th, 17th and 18th, 1856, at 5 (1856) (decrying "the facility with which convictions are obtained against colored men" who were deprived of the "inestimable privilege and protection of a trial by a jury of our peers."); *Address to the People of Ohio*, *in* Proceedings of the State Convention of the Colored Men of the State of Ohio, Held in the City of Columbus, January 21st, 22d and 23d, 1857, at 17 (Columbus, John Geary & Son 1857) ("[T]here is one institution [unlike the jury-box] wherein we are admitted, but not on terms of equality—we mean the Penitentiary. [A] person charged with crime is entitled to a fair hearing by a jury of his peers. How can a colored person get such a hearing." (alteration in original)). Previous scholarship has emphasized how the "abolitionist experience with the fugitive slave laws [which denied purported fugitive slaves a right to trial by jury] reinforced the colonial understanding of the jury as the People's last check against oppressive government and arbitrary official power." Forman, *supra* note 4, at 899 (alteration in original). A close reading of both Colored Convention records and those of (predominantly white-led) Anti-Slavery Society sources provides abundant support for this thesis. But it wasn't just "trial by jury" that grew in importance to abolitionists; Black activists in the 1840s and 1850s, like brothers John Mercer Langston and Charles Henry Langston, also demanded a trial by a "jury of [their] peers."

134 Fights over access to the jury-box often played out at the local or state level, but these efforts were linked by the network of activists who attended conventions. To highlight just one of many examples, Buffalo's Abner Francis had played a prominent role organizing the National Convention of Colored Freemen that was held in Cleveland in September 1848, immediately before the successful push to repeal Ohio's Black Laws. *See* Report of the proceedings of the Colored National Convention Held at Cleveland, Ohio, on Wednesday, September 6, 1848, at 3 (1848) (listing Francis's role).

was unlawful to abridge eligibility for jury service on the basis of race (reviving debates from New York's 1821 Constitutional Convention), and further, that the "practical exemption" of Black jurors amounted to an unjust denial of "the rights of free citizens."[135] Statewide conventions occurred annually from 1836 to 1850,[136] and throughout the 1830s, Black citizens regularly petitioned the Legislature to remove restrictions on suffrage and jury service, earning contempt and derision from white opponents. Upon the introduction of legislation "to allow colored people to vote at elections and to sit on juries" in 1837, for example, the *New York Herald* sarcastically commented: "They already have balls, masquerades, *soirées*, riots and rows.—Why not let them have all the privileges of civilization."[137]

The decision to hold the 1843 National Convention of Colored Citizens in upstate New York (and the large contingent of New York attendees) reflected the relative strength of Black political organizing in the region.[138] The convention's object was simple: "secur[ing] to [the colored man] the privileges of an American citizen."[139] For several days, delegates delivered ardent addresses and debated strategies for claiming equal rights, emphasizing that such goals would never be attained by "waiting for [white abolitionists], or any other class of men to do our

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135 *See* WILLIAM YATES, RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP AND TRIAL BY JURY 18–19 (1838); *id.* at 25 ("The exclusion of the blacks from militia duty, and from juries is founded only on considerations of feeling and taste in the whites . . . but it is not on any such principles that we can justify withholding from them the first of our general political rights."). On Yates and his influence, see JONES, *supra* note 20, at 1–5.

136 James McCune Smith, *Sketch of the Life and Labors of Rev. Henry Highland Garnet*, *in* A MEMORIAL DISCOURSE BY REV. HENRY HIGHLAND GARNET 17, 33 (1865). Unfortunately, many of these records appear to have been destroyed by fire in New York City's race riots of 1863. Carla L. Peterson, *Reconstructing James McCune Smith's Alexandrine Library*, *in* THE COLORED CONVENTIONS MOVEMENT, *supra* note 105, at 105.

137 *See Abolition Movements*, N.Y. HERALD, Jan. 11, 1837, at 2. Such agitation continued in New York well after Francis's jury service, too. Francis led Buffalo's Black community in pressing Erie County's delegates, which included Horatio Snow, to abolish "all laws which make distinctions on account of Color." *See* Letter from Absolom Bull to Abner Francis (April 22, 1846) (MSS.B2017-01 B1 F6, Absolum Bull Papers, BHM); *see also* William G. Bishop & William H. Attree, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 3–6 (1846) (listing Erie County attendees); *see also, e.g.*, *Call for a Colored National Convention*, *in* PROCEEDINGS OF THE COLORED NATIONAL CONVENTION, HELD IN ROCHESTER, JULY 6TH, 7TH AND 8TH, 1853, at 3, 3–4 (1853) (noting "exclusion of colored citizens from the jury box" as part of the "Call" for the convention); *Address, of the Colored National Convention, to the People of the United States*, *in* PROCEEDINGS OF THE COLORED NATIONAL CONVENTION, HELD IN ROCHESTER, JULY 6TH, 7TH AND 8TH, 1853 7, 8–9 (1853) ("[W]e address you as American citizens, asserting their rights on their own native soil. . . . We ask that . . . colored men shall not be either by custom or enactment excluded from the jury-box.").

138 *See* GOSSE, *supra* note 18, at 399 (explaining that the Liberty Party had reached its peak by 1843, with 15,000 voters in the state).

139 *Convention*, LIBERATOR (Bos.), July 21, 1843, at 115.

own work."[140] The gathering caused a sensation in Buffalo; the event had "given [white Buffalonians] a higher idea of the ability and worth of the colored people . . . it has changed contempt for them into admiration," one white observer privately noted.[141] Just the existence of such a gathering was enough to cause a stir, though. As Frederick Douglass remarked years later (at another national Colored Convention in upstate New York), white passersby often reacted to the assembled delegates by asking: "Where are the damned n[*****]s going?"[142]

While the Colored Convention Movement may thus be best understood as a form of "parallel politics," the Liberty Party gathering in Court House Park represented an alternative avenue through which Black activists could sometimes wield political influence.[143] In the early 1840s, the Whigs and Democrats both had strong support across New York state, but by a narrow margin, the Colored Convention in Buffalo passed a resolution declaring it "the duty of every lover of liberty to vote the Liberty [Party] ticket."[144] The endorsement disappointed not only abolitionists subscribing to Garrisonian abstention from party politics; it also served as a rebuke to the Whigs, with whom most Black New Yorkers (and many anti-slavery whites) had previously cast their lots.[145] One Democratic newspaper's coverage of the August conventions crowed at the new developments:

> The effect of this movement, so far as *political* policy is concerned, will be decidedly favorable to the [D]emocratic [P]arty. Four fifths of the [L]iberty [P]arty, come out from among the [W]higs, and the flattering, scolding, and coaxing of the leaders of that party show too plainly that they are fearful of the result, especially in the Eighth District, and in Erie County.[146]

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[140] *Opening Address of Samuel Davis*, *in* MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS: HELD AT BUFFALO, ON THE 15TH, 16TH, 17TH, 18TH AND 19TH OF AUGUST, 1843, at 4, 7 (1843) [hereinafter MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS].

[141] JONSON, *supra* note 113 (entry of August 19, 1843). Jonson was a partisan and sympathizer, to be sure, but his sentiments were echoed in the local press. *See, e.g.*, *National Liberty Convention*, *supra* note 113 (criticizing the Liberty Party for lacking the "wisdom, dignity, order, intellect, and eloquence" on display at the Colored Convention two weeks prior). *See also* Powell, *supra* note 113, at 6 (citing Jonson).

[142] *Speeches*, *in* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, HELD IN THE CITY OF SYRACUSE, N.Y., OCTOBER 4, 5, 6, AND 7, 1864, at 13, 13 (1864).

[143] *See* GOSSE, *supra* note 18, at 3–7 (discussing the rise of Black political activism during this time period); *see also* Sean Wilentz, *Forging an Early Black Politics*, N.Y. REV. BOOKS, July 1, 2021 ("[P]olitical histories of the era—including . . . my own—have [largely ignored] Black participation in and influence over the major political parties. . . . [H]istorians have generally assumed that Black voters were so thoroughly shut out that their participation at this level of politics was marginal.").

[144] *Resolution No. 5*, *in* MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS, *supra* note 140, at 16.

[145] *See* GOSSE, *supra* note 18, at 416–18.

[146] *Liberty Convention*, DAILY GAZETTE (Buffalo, N.Y.), Sept. 1, 1843, at 2.

The presiding judge of the Recorder's Court, where Francis served, was the Honorable Horatio Snow, a "sonorous, dictatorial, arrogant" Whig who was remembered years later for "t[aking] more than ordinary interest" in the election of 1844.[147] If party leaders were indeed "flattering, scolding, and coaxing"[148] those lured by the Liberty Party's banner of equal rights, seating a respected Black citizen as a juror immediately following the Liberty Party convention would be a sensible strategic concession.

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Surviving original records from the cases in which Francis served as a juror tell another part of the story. To be sure, Francis's position as a prominent activist and leader (in both Black and white-led abolitionist circles) likely contributed to his being summoned and seated in 1843.[149] But, as with Andrew Barland, Francis's status as one of the region's wealthiest Black men was another salient part of his identity. Francis had arrived in Buffalo eight years earlier, in his early twenties,[150] and quickly achieved success as a tailor and merchant. His shop, Francis & Garrett Co., offered something for everyone in the booming city: ready-made clothing for boatmen and farmers, gloves for ladies, and custom-tailored frocks and dress coats for Buffalo's "[m]erchants, [l]awyers, [and] [d]octors."[151] From modest beginnings, the store was soon doing tens of thousands of dollars of annual business.[152] Francis garnered a reputation as "a man . . . of easy manners, and gentlemanly deportment . . .; fond of good living, of refined and cultivated taste."[153] By his early thirties, Francis had become a fixture of the Buffalo community: He was celebrated for his "integrity and ability" as a businessman and

147 SAMUEL M. WELCH, HOME HISTORY: RECOLLECTION OF BUFFALO 307–09 (Buffalo, Peter Paul & Bro. 1891).

148 *Liberty Convention*, *supra* note 146.

149 *See* Hawkins, *supra* note 120, at 378–83 (discussing Francis's political activism and eventual seating on a jury in 1843); 4 BLACK ABOLITIONIST PAPERS 106–07 (C. Peter Ripley, Roy E. Finkenbine, Michael F. Hembree & Donald Yacavone eds., 1985) (noting Francis's leadership in local Anti-Slavery Society); GOSSE, *supra* note 18, at 404 (exemplifying Francis's activism by noting his presence at the 1840 Convention of the Colored Inhabitants of the State of New York).

150 *See* Hawkins, *supra* note 120, at 381.

151 Francis & Garrett, *Citizens of Buffalo [Advertisement]*, DAILY COURIER AND ECONOMIST (Buffalo, N.Y.), May 29, 1843, at 1; *see also I Do Not Wish to Intrude [Advertisement]*, DAILY NATIONAL PILOT (Buffalo, N.Y.), July 25, 1845, at 1.

152 *See* MARTIN R. DELANY, THE CONDITION, ELEVATION, EMIGRATION, AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES, POLITICALLY CONSIDERED 139 (1852).

153 *Colored Men of California*, PACIFIC APPEAL (S.F.), July 4, 1863, at 2.

he established a home on Buffalo's well-heeled Swan Street.[154] The antebellum jury reflected and reproduced class and gender hierarchies, not just racial ones, and the defendants whose cases Francis tried were overwhelmingly members of the lower classes—"from the vagrant portion of community."[155] The local press was sounding the alarm about the threat posed by these criminals: "No city in America is more exposed to predation and annoyance, from the vagrant portion of community by their vices, than Buffalo—and nowhere is an efficient and vigilant police more important than here."[156] Abner Francis fought against the discriminatory property requirements that disenfranchised Black citizens less wealthy than he,[157] but if he harbored any special solicitude for the Recorder's Court defendants, one would not know it from the verdicts jurors returned during the September 1843 term of court. Indeed, by the end of the session, the county's deputy sheriff "had an extra *cage* fitted up in one of the cars for the accommodation of his charge," a modification necessary to transport all fourteen prisoners from the Buffalo jail to Auburn Prison in a single trip.[158] Jurors acquitted only two defendants during the session: Timothy McGowan, accused of being part of a "beastly brutalizing gang," was acquitted "for want of being identified,"[159] while John Earley was acquitted of attempting to pass counterfeit or altered bills "at a house of ill-fame."[160] Earley's acquittal received praise in the local papers: The man "had heretofore

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154 *Id.*; *see also* Hawkins, *supra* note 120, at 378–83 (discussing Francis's prominent role in the Buffalo community); Horatio N. Walker, Walker's Buffalo City Directory 103 (1844) (listing Francis as living on Swan Street in 1844); Angela Keppel, *A Case Study in Urban Renewal–JFK Park*, Buffalo Sts. (Nov. 10, 2020), https://buffalostreets.com/2020/11/10/jfk-park [https://perma.cc/XM9E-8RKN] (describing Swan Street as a fashionable neighborhood where "important people" lived).

155 *City Police*, Buffalo Com., Aug. 1, 1843, at 2 (noting that, despite the work of the Recorder's Court, "it appears that the thieves, the gamblers, the licentious, and the pickpockets, are but partially held in check").

156 *Id.* At the time, Buffalo's "police force" consisted of just a captain and eight watchmen, patrolling a city of approximately 30,000 people. Sidley L. Harring & Lorraine M. McMullin, *The Buffalo Police Force 1872–1900: Labor Unrest, Political Power and the Creation of the Police Institution*, 4 Crime & Soc. Just. 5, 7 (1975).

157 *See* Hawkins, *supra* note 120, at 382 (noting Francis's push to amend voting laws requiring property ownership); *Form of Petition*, Colored Am. (N.Y.), Jan. 9, 1841, at 1 ("[A]n equality, not of property or favor, but of rights, is the firmest foundation of liberty . . . yet . . . while [the New York Constitution] acknowledges [less wealthy Black New Yorkers] as citizens, [it] denies them the rights which all others possess as attached to that honorable appellation."); *see also supra* note 137.

158 *Deputy Sheriff Gates*, Buffalo Daily Gazette, Sept. 22, 1843, at 2.

159 *Recorder's Court*, Buffalo Daily Gazette, Sept. 16, 1843, at 3 (indictment); *Recorder's Court*, Buffalo Com., Sept. 20, 1843, at 2 (trial underway); *Recorder's Court*, Buffalo Daily Gazette, Sept. 21, 1843, at 3 (acquittal).

160 *Recorder's Court*, Buffalo Daily Gazette, Sept. 16, 1843, at 3.

borne an unblemished character, and the principal witness against him [was] a woman of the town."[161]

The criminal charges against Earley were not unique: *Most* of the trials that Francis participated in involved counterfeit negotiable instruments—the fraudulent bills themselves affixed to the indictments (see Fig. 4 below)[162]—and it would be surprising if Francis were sympathetically inclined toward those accused of circulating bogus paper in Buffalo.[163] Two trials, in particular, stand out as cases in which an aggressive prosecutor might have preferred a wealthy Black clothing merchant in the jury-box rather than a white laborer or farmer. In one, a youth named Jedediah Clark was accused of preparing "for the approaching cold weather, by pilfering several pair of woolen stockings to protect his trotters from the pinching frost."[164] In the other, James Washburn was charged with passing counterfeit bills to several shops around town, including Efner & Kennett's Clothing Store ("for a vest, worth 14 shillings").[165] Jurors convicted both defendants.

To serve as a juror meant to authorize—and to help legitimate—harsh punishment for such offenses. Each of the defendants convicted and sentenced for crimes involving counterfeit bills received sentences between five and seven years at Auburn Prison.[166] Only in one case, involving a "fair and ruddy" 21-year-old convicted of altering a $1 bill to appear as though it were a $5 bill, did the jurors appear to balk. After Judge Snow sentenced the defendant to five years' imprisonment, the

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161 *Id.*

162 Although not organized by terms of court, many of the original indictments from September 1843 can be found in *Erie County Clerk's Office Records, 1808–1926*, Mss. C00-1, Boxes 14 and 15, BHM [hereinafter *Erie County Clerk's Records*].

163 At the time, the paper money supply in the United States consisted of bank notes issued by over 700 state-chartered banks, and Buffalo, along the Canadian border where skilled counterfeiters set up shop, was awash with worthless money. "COUNTERFEITS are getting abundant" the *Buffalo Commercial Advertiser* complained in August 1843, warning its readers of a crop of circulating $5 bills purporting to be issued by the Albany Exchange Bank (without the authentic red backs). *See Counterfeits*, BUFFALO COM. ADVERTISER, Aug. 28, 1843, at 3. As historian Stephen Mihm writes, "[i]t staggers the imagination to comprehend the extent and ubiquity of counterfeiting during the first half of the nineteenth century." STEPHEN MIHM, A NATION OF COUNTERFEITERS 3–6 (2007).

164 *Police Office*, BUFFALO DAILY GAZETTE, Aug. 22, 1843, at 2.

165 *Police Office*, BUFFALO DAILY GAZETTE, Aug. 29, 1843, at 2.

166 In addition to court records and newspaper accounts, the original "Discharge Books" of Auburn Prison provide an invaluable source of information, reflecting dates of admission, discharge (often due to pardon), and other demographic information. *See* AUBURN PRISON, REGISTER OF MALE INMATES DISCHARGED 144 [ca. 1816–1894], New York State Archives (Albany, N.Y.) [hereinafter AUBURN PRISON RECORDS]. Elisha Van Velsor, a 52-year-old clock maker, for example, received a six-year sentence for possessing $36 in counterfeit money (which he claimed to be holding for a friend, with no intent to circulate); others received sentences of five or six years despite exchanging as little as a few dollars. *See id.*; *Indictment of Elisha Van Velzor*, *Erie County Clerk's Records*, *supra* note 162.

petit jurors who had just convicted the young man circulated a petition asking the Governor to show mercy.[167] (Their efforts proved successful: A conditional pardon was granted on August 19, 1844, less than a year after the prisoner's arrival.)[168] Less fortunate were the two defendants expressly identified as Black in court records and newspapers, neither of whom appears to have benefited from Francis's presence. Emeline Williamson, an orphaned 14-year-old girl, pleaded guilty to burglary;[169] she was sentenced to the House of Refuge, the country's first juvenile reformatory, located in New York City.[170] Emma Roberts, accused of stealing $150 from a "Canadian gentleman" and fleeing to New York City, opted to go to trial; the jury convicted her of grand larceny.[171] She was sentenced to Sing Sing Prison to serve five years.[172]

[167] *See Recorder's Court*, Buffalo Daily Gazette, Sept. 18, 1843, at 3.

[168] Auburn Prison Records, *supra* note 166, at 144 (reflecting George W. William's admission on Sept. 16, 1843, sentence of five years, and conditional pardon on Aug. 19, 1844).

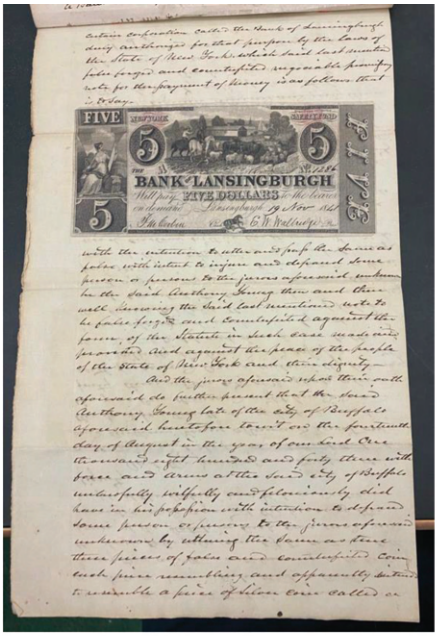
[169] *See Recorder's Court*, Buffalo Daily Gazette, Sept. 18, 1843, at 3.

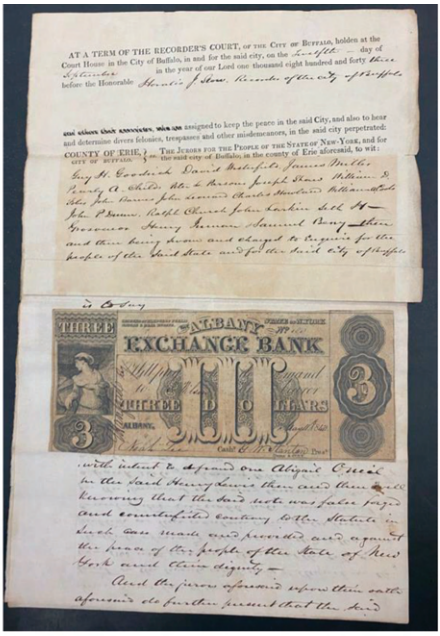
[170] *See* Robert S. Pickett, House of Refuge: Origins of Juvenile Reform in New York State, 1815–1857, at v (1969) (cataloging the history of the House of Refuge).

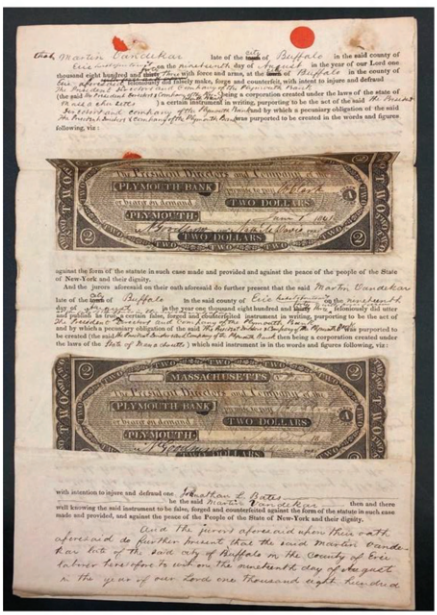
[171] *Recorder's Court*, Buffalo Daily Gazette, Sept. 18, 1843, at 3.

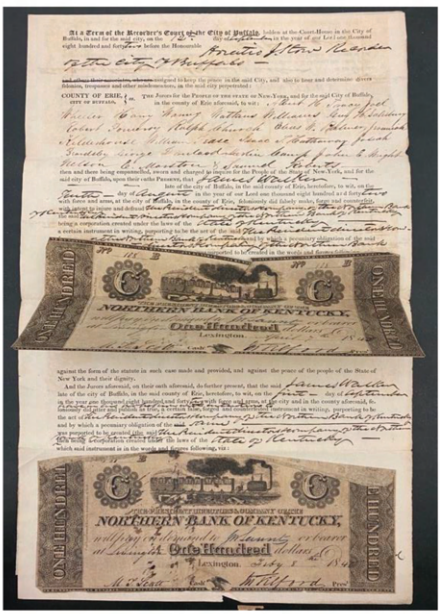
[172] *Id.*; *Recorder's Court*, Buffalo Com., Sept. 20, 1843, at 2.

FIGURE 4. Indictments from the Sept. 1843 Term of Recorder's Court in Buffalo, 1843 (BHM)









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It is a testament to the importance of jury service—and the anxiety provoked among many white Americans by the specter of Black jurors—that the events in Buffalo's Recorder's Court quickly became national news. In the days that followed, reports of Francis's jury service were reprinted in Rochester,[173] New York City,[174] Philadelphia,[175] and Washington, D.C.[176] Word reached as far as Kentucky[177] and Mississippi[178] the following week. Eventually, articles appeared from New England[179] to the Deep South,[180] and moved west through Indiana[181] to the Wisconsin Territory.[182]

Usually these articles were straightforward reproductions of earlier accounts (either from Buffalo's *Daily Gazette* or the *Courier and Enquirer*, depending on the paper's editorial bent), but sometimes editors appended their own commentary. Louisville's *Courier-Journal*, for instance, derided Black jury service as the natural and logical result of "Van Burenism," rehashing a frequent critique of the former President from New York (whose efforts to portray himself as a "northern man with southern principles" never fully mollified pro-slavery forces).[183] If New Yorkers truly believed in racial equality, why should only Black jurors be subject to the $250 property requirement? Van Buren "turns

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173 *A Colored Juryman*, Rochester Republican (Rochester, N.Y.), Sept. 19, 1843, at 1.

174 *A Black Juror*, N.Y. Herald, Sept. 16, 1843, at 2 ("A 'n[*****]' juror sat on the trial of civil suits, in which white men were the parties, the other day at Buffalo. His fellow jurors were all white men."); *see also A Black Juror*, Brother Jonathan (New York, N.Y.), Sept. 23, 1843, at 112 (same).

175 *By the Eastern Mail*, Inquirer & Nat'l Gazette (Phila.), Sept. 15, 1843; *see also A Black Juryman*, Jeffersonian Republican (Stroudsburg, Pa.), Sept. 21, 1843, at 2.

176 *Correspondence of the Courier and Enquirer*, Madisonian (Washington, D.C.), Sept. 18, 1843, at 4.

177 *Van Burenism*, Courier-Journal (Louisville, Ky.), Sept. 26, 1843, at 2.

178 *A Negro Juryman*, Wkly. Courier (Natchez, Miss.), Sept. 27, 1843, at 3.

179 *Freemen's Rights*, Emancipator & Free Am. (Bos.), Oct. 26, 1843, at 102; *A Colored Juror*, Liberty Standard (Hallowell, Me.), Oct. 5, 1843; *A Colored Juryman*, Vt. Religious Observer, Nov. 28, 1843, at 1 (Middlebury, Vt.); *Reformatory*, Liberator (Bos.), Oct. 6, 1843, at 160.

180 *A Negro Juryman*, Baton Rouge Gazette (Baton Rouge, La.), Sept. 30, 1843, at 2; *see also Correspondence of the (N.Y.) Courier and Enquirer*, Tarboro Press (Tarboro, N.C.), Sept. 30, 1843, at 1.

181 *A Colored Juror*, Richmond Palladium (Richmond, Ind.), Sept. 30, 1843, at 2.

182 *A Colored Juryman*, Southport Tel. (Kenosha, Wisc.), Oct. 3, 1843, at 1; *A Colored Juryman*, Milwaukie Com. Herald (Milwaukie, Wisc.), Oct. 2, 1843, at 3; *A Colored Juryman*, Milwaukie Sentinel (Milwaukie, Wisc.), Oct. 7, 1843, at 2.

183 Eric Foner, *The Wilmot Proviso Revisited*, 56 J. Am. Hist. 262, 268 (1969) ("The northern man with southern principles was deserted by virtually the entire South. Years of conciliatory efforts toward the southern Democrats were outweighed by his position on Texas . . . .").

up his nose at a *poor* negro," the *Courier-Journal* wrote, "but thinks the smell of a rich one a perfect fragrance."[184] Racist commentary in the *Baton Rouge Gazette* similarly invoked smell: To mask the purported stench of a Black man in the jury-box, "[w]e would advise the [white] jurymen to provide themselves with a supply of cologne."[185] Anti-slavery publications in Boston, meanwhile, responded with understated approval: "Well, what of that?" asked William Lloyd Garrison's *The Liberator*.[186] The main organ of the Liberty Party reported news of a Black juror with faux-outrage: "Horrible!"[187]

Activists on the ground in Buffalo, however, recognized Francis's service as historic. The following Fourth of July, abolitionists from across the region held a picnic celebration in East Aurora, about twenty-five miles outside Buffalo. Black abolitionists typically eschewed the parades and speeches of July 4th in favor of August 1st celebrations, marking the emancipation of the enslaved people of the British West Indies.[188] But Erie County abolitionists held an integrated event that year to mark the holiday. Tradition dictated that thirteen toasts should be given, a nod to the original states,[189] but the gathering put their own spin on the ritual.[190] Toast No. 8 was to American Slavery: "Palsied be the arm that would defend, and confounded the tongue that would advocate it; and let every friend of freedom respond, Amen!" And Toast No. 9 was to Erie County: "Hers is the honor of having furnished to the country the first colored juror . . . ."[191]

Francis remained a vocal advocate for Black equality for the remainder of his life, and after their first meeting that summer in 1843, he and Frederick Douglass maintained a warm and close working

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184 *Van Burenism*, COURIER-JOURNAL (Louisville, Ky.), Sept. 26, 1843, at 2.

185 *A Negro Juryman*, BATON ROUGE GAZETTE (Baton Rouge, La.), Sept. 30, 1843, at 2; *see also A Black Juryman*, THE JEFFERSONIAN REPUBLICAN (Stroudsburg, Pa.), Sept. 21, 1843, at 2 ("Glad we have nothing of the kind in Pennsylvania!—We should not like to have blackmen to be the judges of our life and property.").

186 *Reformatory*, LIBERATOR (Bos.), Oct. 6, 1843, at 160.

187 *Freemen's Rights*, EMANCIPATOR & FREE AM. (Bos.), Oct. 26, 1843 at 3.

188 *See* William B. Gravely, *The Dialectic of Double Consciousness in Black American Freedom Celebrations, 1808–1863*, 67 J. NEGRO HIST. 302, 304 (1982) (describing the popularity of August 1st as a freedom holiday among Black communities).

189 David Waldstreicher, *Rites of Rebellion, Rites of Assent: Celebrations, Print Culture, and the Origins of American Nationalism*, 82 J. AM. HIST. 37, 51–52 (1995).

190 *See Liberty Party Celebration.—East Aurora*, BUFFALO DAILY GAZETTE, July 10, 1844, at 2 (recounting the toasts raised at the gathering); *see also* JONSON, *supra* note 113 (entry of July 4, 1844) (providing detailed description of festivities, toasts, and "opposition proslavery celebration in the village"). Another modification from tradition: The toasts were water, as most abolitionist attendees abstained from alcohol. *Id. See also* Powell, *supra* note 113 at 9 (citing Jonson's descriptions of the festivities).

191 *Liberty Party Celebration.—East Aurora*, BUFFALO DAILY GAZETTE, July 10, 1844, at 2.

relationship.[192] One key area where the friends initially disagreed, however, was how to understand the U.S. Constitution: Francis insisted that it was an anti-slavery document,[193] while to young Douglass it represented a "covenant with evil."[194] In 1851, Douglass famously revised his view, a shift that coincided with his break from his early mentor, William Lloyd Garrison.[195] Francis sent Douglass a warm letter when he heard the news: "[S]ince the Constitution has appeared to you in a new light, you will be able to wield a more powerful influence. My prayer is that you may live to witness the consummation of this great struggle, to behold all men free. Ever yours, A.H. Francis."[196]

III
Worcester, Massachusetts (1860)

The two Black barbers from Worcester referenced in most histories of the jury—William H. Jankins and Francis A. Clough—were not the country's first Black jurors. In fact, they may not have been *Massachusetts's* first Black jurors: By the time Clough actually served as a petit juror in 1866, there is evidence that others had been seated in Boston.[197] But, in many ways, these historical errors are minor in comparison to the larger ways that the standard account has elided forms of Black struggle, both individual and collective, that integrated Massachusetts's juries (and the entrenched white resistance such efforts encountered even in liberal-minded Massachusetts).

In certain respects, Massachusetts was far ahead of most other antebellum jurisdictions in recognizing its Black residents as equal citizens. Apart from its deserved reputation as an abolitionist hub, Massachusetts embraced equal suffrage, repealed its ban on interracial marriage, and, by the mid-1840s, had done away with segregated trains,

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192 *See* Hawkins, *supra* note 120, at 382 (describing Francis and Douglass's first introduction and subsequent partnership).

193 *Id.*, at 409 n.27 (noting that Francis saw the Constitution as a document one could use to argue for slavery's abolition).

194 David W. Blight, Frederick Douglass 215 (2018).

195 *See id.* at 216 (noting the tension between Douglass and Garrison following Douglass's shift in views).

196 *Letter from Abner H. Francis*, North Star (Rochester, N.Y.), June 12, 1851, at 2.

197 Robert Morris, Letter to the Editor, *Colored Jurors*, Nat'l Anti-Slavery Standard (N.Y.), Jan. 30, 1869, at 2 ("Since then [eight or ten years ago] there has hardly been a term of our Superior Court, criminal or civil, but that more or less colored citizens have served as traverse jurors."). The letter's author, Robert Morris, was among the country's first Black lawyers. *See* Daniel Farbman, *Resistance Lawyering*, 107 Calif. L. Rev. 1877, 1908 (2019); Stephen Kantrowitz, More Than Freedom: Fighting for Black Citizenship in a White Republic, 1829–1889, at 137–39 (2012).

steamboats, and stagecoaches.[198] When *Dred Scott* was decided, not "a single law remain[ed] on her Statute Book, prejudicial to the rights or interests of any man, or class of men, on the ground of complexion differences."[199] A few Black lawyers appeared in Massachusetts courts,[200] and notably, Black men were active in electoral politics throughout the Commonwealth (Boston, New Bedford, Salem, Nantucket, Worcester).[201]

Yet at the outbreak of the Civil War, Massachusetts's juries remained closed to Black citizens. Custom and a system that vested local elected officials with unfettered discretion when compiling jury lists, not formal legal prohibition like in New York, maintained this exclusion.[202] But neither Jankins nor Clough idly waited for citizenship to be bestowed upon them by enlightened white anti-slavery men; to the contrary, they were among Worcester's most prominent and outspoken free people of color. And, perhaps more importantly, both men were embedded within a network of Black activists in Massachusetts and beyond who campaigned for an end to discrimination against Black jurors during the bleak and often discouraging 1850s.[203] These Black leaders in Massachusetts saw the jury-box as critical to realizing the equal citizenship Massachusetts ostensibly extended to them; so did their white opponents.

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When Jankins and Clough were added to Worcester's list of prospective jurors, their names would have been known to most residents of the city, Black and white alike. The two barbers went into business together in 1851,[204] started large families, and by the end of the decade—like Andrew Barland and Abner Francis—they were among

198 LITWACK, *supra* note 7, at 104–11.

199 *Rights of Colored Citizens*, LIBERATOR (Bos.), Jan. 21, 1859 (signed by William C. Nell "and other colored Citizens of Massachusetts").

200 *See* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 94–99 (1993); 3 BLACK ABOLITIONIST PAPERS 449 (C. Peter Ripley, Roy E. Finkenbine, Michael F. Hembree & Donald Yacavone eds., 1985).

201 GOSSE, *supra* note 18, at 282–83.

202 *See infra* notes 225–39 and accompanying text.

203 MARTHA S. JONES, ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830–1900, at 93–94 (2007) (describing a "public culture under siege" between the Fugitive Slave Act of 1850 and the Supreme Court's decision in *Dred Scott* in 1857).

204 *Jankins & Clough*, WORCESTER DAILY SPY, Feb. 15, 1851, at 4 ("hop[ing] in their union, to unite a large share of their former customers"); *Jankins & Clough*, WORCESTER DAILY SPY, Jan. 17, 1851, at 1.

the wealthiest Black men in the community.[205] But it was not just their business acumen that made them notable figures in Worcester.

Like Andrew Barland, Jankins was born enslaved.[206] In the early 1840s, around the age of 25, he escaped from William E. Taylor, a wealthy lawyer and landowner in Norfolk, Virginia.[207] He fled north soon after the birth of his first child, John, who would die of dysentery in Worcester several years later.[208] But Jankins was not content to quietly build his business and family, even after the Fugitive Slave Act of 1850 heightened the risk of being "kidnapped" back to Virginia.[209] At a packed protest meeting with "[s]ome of the most honored men in the [Worcester] community" seated on the platform, Jankins delivered a defiant address: "[H]e would never be carried out of Worcester alive; he was prepared to defend himself; [and] he cautioned anyone not to come up behind him suddenly and place a hand on his shoulder, since he would not be responsible for the consequences."[210]

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[205] In the 1860 census, Clough is listed as owning real estate valued at $700 and a personal estate of $1,000; Jankins's entry reflects no real estate, but a personal estate of $1,300. In 1865, the Massachusetts census identified a 19-year-old white "domestic" born in Ireland, Bridget Dugan, also living in the Jankins household. 32 Population Schedules of the Eighth Census of the United States, 1860, Massachusetts, 120 (1860) (Clough); 32 Population Schedules of the Eighth Census of the United States, 1860, Massachusetts, 70 (1860) (Jankins); Massachusetts State Census, Worcester County, Worcester, Ward 2, at 23, (1865); *see also* The Worcester Almanac, Directory, and Business Advertiser for 1850, at 64, 116 (1850) (listing William Perkins and Bazzil Barker as working in Jankins's shop); Janette Thomas Greenwood, First Fruits of Freedom: The Migration of Former Slaves and Their Search for Equality in Worcester, Massachusetts, 1862–1900, at 51 (2009) (speculating Jankins employed other self-emancipated men).

[206] Francis A. Gaskill, *Worcester—(Continued.) Civil and Political History*, *in* 2 History of Worcester County, Massachusetts 1449 (Phila., J.W. Lewis & Co. 1889) (D. Hamilton Hurd ed., Phila., J.W. Lewis & Co. 1889).

[207] Taylor's successful reclamation of his property, and eviction of some 600 Black residents who occupied it, has been explored by other scholars. *See, e.g.*, Edward H. Bonekemper III, *Negro Ownership of Real Property in Hampton and Elizabeth City County, Virginia 1860–1870*, 55 J. Negro Hist. 165, 174–75 (1970); Dale Kretz, Administering Freedom: The State of Emancipation After the Freedmen's Bureau 26–29 (2022).

[208] John's death record in 1847 lists his place of birth as "Virginia" and his age as eight, hinting that the child's birth may have served as the immediate impetus for Jankins to flee captivity. 33 Deaths Middlesex – Worcester 226 (1848) (on file with Massachusetts State Archive (MSA), Bos.).

[209] Within days of the measure becoming law, hundreds (perhaps thousands) of "fugitives and their families fled to Canada hoping to avoid re-enslavement," even from cities with strong abolitionist presences. *See* Martha S. Jones, All Bound Up Together 94 (2007).

[210] Thomas Street Schools, *Reminiscences of Thomas Street Schools*, in 19 Proceedings of the Worcester Society of Antiquity 112 (1903). Privately, though, Jankins worried. In a desperate 1850 letter to a white friend in Worcester, he revealed that he was in hiding in New York, temporarily safe but anticipating the arrival of slave catchers at any moment: "[Should I] return to Worcester or go to Canada – or when my pursuers come in search of me . . . have some one negotiate to buy my freedom[?] Address your [return] letter to

Worcester's white community pledged Jankins their support, and in a remarkable episode in October 1854, demonstrated it: A mob of Black and white Worcester residents very nearly killed a federal agent believed to be seeking Jankins's arrest.[211] Asa Butman, a federal deputy marshal, was reviled for his recent capture of Anthony Burns and Thomas Sims, both Black men arrested in Boston and returned to slavery.[212] When he appeared in Worcester, rumors quickly spread that the "bloodhound" was there to kidnap Jankins.[213] Noisy crowds from Worcester's vigilance committee quickly surrounded his hotel. Unnerved, Butman drew his pistol, which in turn prompted his arrest.[214] The next day, at the courthouse, Butman was met with both "a Niagara of ponderous Anglo-Saxon denunciation" and, from "the class and color he was believed to be pursing[,] . . . tiger *hate*, which the most trifling circumstances might unloose to his destruction."[215] The "kidnapper" was pelted with eggs, more solid missiles, and fists; only through the extraordinary efforts of an escort of prominent pacifists did Butman make it onto a departing train alive, on his oath never to return.[216]

There are conflicting accounts of Butman's true purpose in seeking Jankins. Most later secondary sources report that he was there to kidnap Jankins at the behest of William E. Taylor, his former enslaver.[217] But Jankins had saved sufficient money to purchase his freedom for $800 three years earlier,[218] and Taylor filed a "[d]eed [of] Emancipation" with

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Mrs. Martha Robinson who is now my wife, but afraid to use the name." Letter from William H. Jankins to Albert Tolman (Oct. 1, 1850) (on file with Worcester Historical Museum).

211 *Great Excitement in Worcester!*, Worcester Daily Spy, Oct. 31, 1854, at 1; *The Transcript is Mortified*, Worcester Daily Spy, Nov. 1, 1854, at 1 ("The *Transcript* . . . felt 'deep regret and mortification' because our citizens bespattered with eggs, mud, and tobacco quids, punched with umbrellas, kicked *a posteriore*, rolled in the gutter and pummelled Asa O. Butman, the notorious kidnapper. . . . [We rejoice] that Butman was hooted from the city . . . ."); Albert Tyler, *The Butman Riot*, in 1 Proceedings of the Worcester Society of Antiquity 89–90 (1881); Gaskill, *supra* note 206.

212 *Great Excitement in Worcester!*, *supra* note 211, at 1. For more on Butman, see Daniel Farbman, *Resistance Lawyering*, *supra* note 197, at 1924–25.

213 Gaskill, *supra* note 206, at 1449 ("[S]lave-hunters sought Worcester for the supposed purpose of securing the person of William H. Jankins, an escaped slave . . . ."); Tyler, *supra* note 211, at 89–90.

214 Tyler, *supra* note 211, at 90.

215 *Id.* at 91.

216 *Id.* at 92; *see also Great Excitement in Worcester—Arrest of An U.S. Officer*, Boston Evening Transcript, Oct. 30, 1854, at 2; *Arrest of a Kidnapper at Worcester—Great Excitement,* N.Y. Daily Times, Oct. 31, 1854, at 1; *The Worcester Disturbance—Arrest*, Boston Evening Transcript, Nov. 9, 1854, at 1 (noting arrests of Black and white protestors for riot and assault).

217 *See* Tyler, *supra* note 211, at 90 ("On the passage of the fugitive slave law, a man named Seabury . . . proposed to return [Jenkins] to his master for a stipulated sum.").

218 *See Miscellaneous*, Pittsfield Sun, May 8, 1851, at 1.

the Clerk of Court in Norfolk on March 20, 1851.[219] Butman, meanwhile, maintained that he was in Worcester as part of a federal investigation into the deadly protests that accompanied the failed efforts to halt the forcible return of Anthony Burns to slavery in June 1854.[220] Jankins, in all likelihood, was amongst the large contingent of Worcester residents who had traveled *en masse* to join the rowdy efforts to save Burns.[221] If Butman's account is accurate, it paints Jankins in a less passive light, suggesting yet another way in which his militancy on behalf of Black freedom and equality has been downplayed in the historical record.

Clough may not have been the protagonist of such a dramatic episode, but he was also prominent in racial equality activism for many decades. Twenty-five years before he served as a juror, Clough was one of the most prominent Black activists in Worcester; that year, he chaired a local committee that put out a call for a "National Convention of the colored citizens of the United States, to adopt measures for united action in our cause."[222] He remained active in organizing efforts and worked closely with better known Black abolitionists in Massachusetts like Charles Lenox Remond and William C. Nell.[223] Over several decades, he remained one of several men regularly selected as Worcester's delegate to statewide and regional Colored Conventions.[224] No less than Jankins, Clough did not wait for citizenship to come to him.

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219 Manumission: William E. Taylor to Henry Jenkins (aka William Henry Jenkins) (Mar. 20, 1851), *in* Deed Book 32, at 117 (1851). Jankins filed additional paperwork with the Worcester Clerk of Court confirming his freedom several months before the "Butman Riot." Gaskill, *supra* note 206, at 1450 (reproducing Worcester manumission instrument). The timing is noteworthy: Jankins purchased his freedom in 1851, but he registered the document in the Worcester City Clerk's office on June 9, 1854, just days after the failed effort to rescue Burns. *Id.* Under the text of the Fugitive Slave Act of 1850, Jankins would have little opportunity to introduce evidence of his freedom on his own behalf; in practice, however, "concessions that Black northerners wrangled from U.S. commissioners made fugitive slave renditions lengthy, costly, and uncertain processes." Cooper Wingert, *Fugitive Slave Renditions and the Proslavery Crisis of Confidence in Federalism, 1850–1860*, 110 J. Am. Hist. 40, 41 (2023).

220 *The New Victim of the Fugitive Slave Law*, Liberator (Bos.), Nov. 10, 1854, at 177.

221 *Great Meeting in Worcester—Rally at the City Hall*, Worcester Daily Spy, May 29, 1854, at 2 ("Not less than nine hundred people from this section, went to Boston by the special and other trains, on Saturday, and a much larger number will be there to-day."); *Arrests on Saturday*, Worcester Daily Spy, May 30, 1854, at 2.

222 *National Convention*, Liberator (Bos.), June 12, 1840, at 94; *see also National Reform Convention of the Colored Inhabitants of the United States*, Liberator (Bos.), July 10, 1840, at 110.

223 *The Festival*, Liberator (Bos.), Aug. 14, 1840, at 131 (noting toasts from Clough, Remond, and Nell at August 1st celebration).

224 *See, e.g.*, State Council of Colored People of Massachusetts, Convention, January 2, 1854, at 94 (1854); *Meeting of Colored Citizens*, Worcester Daily Spy, July 21, 1859, at 2 (noting Francis's selection as Worcester delegate to New England Colored Convention).

While Black activists in Ohio and New York trained their ire on discriminatory statutes that disqualified them from jury service, their counterparts in Massachusetts faced a somewhat different challenge: Local elected officials simply refused to include their names when compiling their annual lists of prospective jurors. Speaking to the New England Anti-Slavery Convention in 1854, Charles Lenox Remond—who shared the stage with Abner Francis in Buffalo in 1843[225]—confronted the issue head-on:

> It has become not only a part of our education, but almost part and parcel of our nature, to look upon the colored man in this country as born to the vile inheritance of slavery, from his cradle to his grave . . . . [W]hen he goes before a Court, he does not find that one of his own color can sit in the jury box; but every *white* man is presumed to be a sovereign in this country, and qualified to meet any man in the world.[226]

Remond struck a similar note at a mass meeting in Boston in December 1855, urging his audience not to get complacent with their recent victory integrating Boston's public schools while discrimination in the jury-box remained.[227] Remond emphasized that

> they were yet excluded from the jury box; and he hoped that the coloured people of Boston and of the State would commence a new agitation, and not allow it to cease until coloured men are seated in the jury box—at least, on every occasion when a coloured man is to be tried.[228]

Remond's "new agitation" commenced soon enough. In early 1857, activists began circulating a petition to support planned legislation to crack open Massachusetts's jury-boxes.[229] To counter elected officials' timidity, the petitioners urged democratizing the jury selection process: A law should require that the name of "every adult male citizen" in

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225 MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS, *supra* note 140, at 10 (listing Douglass and Remond as delegates from Massachusetts).

226 *New England A. S. Convention. Speech of Charles Lenox Remond*, LIBERATOR (Bos.), June 23, 1854, at 100. Remond's speech is also reprinted in CARTER GODWIN WOODSON, NEGRO ORATORS AND THEIR ORATIONS 234 (1925). *Cf.* CONVENTION OF THE COLORED CITIZENS OF MASSACHUSETTS, AUGUST 1, 1858, at 102 ("Dr. J.B. Smith did not consider the colored people as enjoying equal privileges with the whites in Massachusetts. No colored man sat upon the jury. He was told the law here made no discrimination in color, but when the whole tendency of the United States laws was to degrade the colored man, but little could be expected for him, even in this Commonwealth.").

227 *Meeting of Coloured Citizens of Boston*, NAT'L ANTI-SLAVERY STANDARD, Jan. 5, 1856, at 1.

228 *Id.*

229 *The Jury Box and Rights of Jurors*, LIBERATOR (Bos.), Jan. 16, 1857, at 11.

Massachusetts be automatically included in the list of eligible jurors, and it should be the jobs of "triers" (other jurors) rather than judges to decide if those drawn were impartial enough to serve.[230] The proposal was couched in constitutional language, as vindicating both the rights of the accused ("the constitutional right of every citizen to have his case . . . tried by a jury impartially") and jurors ("the constitutional right of every adult male citizen to have his name in the jury-box").[231] To argue their cause, the petition's backers sent white abolitionist lawyer Wendell Phillips to appear before the Legislature.[232] Denouncing the recent decision in *Dred Scott*, which the Supreme Court handed down just three days before the jury petition was submitted,[233] Phillips insisted that "an equal jury system" was a critical check against "despotic" political or judicial machinations.[234] "For the protection of minorities, for the right of the citizen, in the name of justice and equity," Phillips spoke for nearly two hours on the necessity of "a change in the jury system."[235]

But the legislation did not advance, and two years later, a similar petition demanding that "the names of all adult male citizens be put in the jury box" was championed by Black abolitionist William C. Nell.[236] (Nell, too, was in Buffalo at the 1843 convention with Abner Francis, and numerous Colored Conventions with Clough.[237]) Like Phillips, Nell highlighted that *de jure* equality rang hollow to free people of color in Massachusetts if, as a practical matter, they could never serve as

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230 *Id.*

231 *Id.*; *cf.* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 832 n.294 (2020) (discussing common law roots of practice of having triors, rather than judges, determine prospective jurors' partiality).

232 Phillips also vocally decried the absence of Black jurors when championing the cause of Washington Goode, a young Black sailor controversially convicted and executed for murder in 1849. Black men could not expect "full Anglo Saxon justice," he quipped, "when only Anglo Saxons [were] in the jury box." *Washington Goode*, ANTI-SLAVERY BUGLE, May 11, 1849, at 22. He spoke on the issue consistently in later years, too. *See, e.g.*, *Speech of Wendell Phillips*, LIBERATOR (Bos.), Feb. 6, 1852 ("The law that says the colored men shall sit in the jury box . . . is nothing. Why? Because the Mayor and Aldermen, and the Selectmen of Boston, for the last fifty years, have been such slaves of colorphobia . . . .").

233 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS, 1857, at 278 (1857) (noting receipt of "Petition of R. C. Holbrook and others, for a change in the manner of selecting Jurors and testing their qualifications" on March 9, 1857).

234 *Rights of Jurors*, LIBERATOR (Bos.), Apr. 3, 1857, at 55.

235 *Id.*

236 LIBERATOR (Bos.), Mar. 18, 1859, at 43; KANTROWITZ, *supra* note 197, at 231.

237 *See, e.g.*, MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS, *supra* note 140, at 20; STATE COUNCIL OF COLORED PEOPLE OF MASSACHUSETTS, CONVENTION 89, 94 (1854).

jurors.[238] And, like Phillips, he attacked the exclusion of Black jurors in constitutional terms:

> "Gentlemen, the colored citizens of Massachusetts have little to complain of, so far as her statutes are concerned. *Here* we stand equal before the law . . . the names of colored freeholders are not put into the jury box, . . . [and this] omission [we believe] to be in violation of our constitutional rights."[239]

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It was against this backdrop that in April 1860, a subcommittee of Worcester aldermen included the names of William H. Jankins and Francis A. Clough in their list of those worthy of appearing on the town's standing list of jurors.[240] As with Abner Francis's jury service, news of the development rapidly spread across the country.[241] An Indiana congressman sensed a political opening and delivered a speech on the floor of the House of Representatives, holding up "to the indignant gaze of [his] fellow-countrymen" Jankins and Clough's jury service as evidence of just how extreme Massachusetts Republicans had become in their commitment to racial equality.[242] But there are two major inaccuracies in how the events in Worcester were reported then and have been remembered since: (1) Jankins and Clough had not been added to Worcester's jury list (yet), and (2) even when they were, they did not immediately serve.

In fact, the proposed addition of two Black names to Worcester's jury list was highly controversial, even in a community that boasted of its abolitionist *bona fides*. The subcommittee's proposal still had to be approved by Worcester's Common Council, and before the May 15 vote, a councilman moved to strike Jankins and Clough.[243] The objection was not that the two barbers lacked the good character and intelligence needed to be jurors, but rather, on the legal "ground that they belonged to a race not recognized as citizens by the United States [Supreme]

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238 *Remarks of William C. Nell*, *Before the Committee on Federal Relations*, LIBERATOR (Bos.), Apr. 2, 1859, at 61.

239 *Id.*

240 *Miscellaneous*, WORCESTER DAILY SPY, Feb. 21, 1860, at 2 (noting appointment of subcommittee); *Colored Jurymen*, WORCESTER DAILY SPY, Apr. 26, 1860 at 2.

241 *See, e.g.*, *Colored Jurymen*, CINCINNATI DAILY PRESS, Apr. 28, 1860, at 2; *Negro Jurymen*, WKLY. VICKSBURG WHIG (Vicksburg, Miss.), May 9, 1860, at 1.

242 WILLIAM H. ENGLISH, THE POLITICAL CRISIS—THE DANGER AND THE REMEDY 6, 8 (1860) (reprinting speech delivered May 2, 1860).

243 *City and County*, WORCESTER DAILY SPY, May 15, 1860, at 2.

Court, and therefore not eligible to serve on United States juries."[244] Such language was undoubtedly a reference to the holding of *Dred Scott*,[245] and it was a reprise of the same legal question faced by the Mississippi Legislature thirty-five years earlier when it debated Andrew Barland's petition.[246] But others on the Common Council retorted that to base citizenship on color "was in violation of the constitution, and of every human right."[247] In the end, the vote was twelve to seven in favor of the addition, and the two men then became eligible to be drawn as Worcester jurors.[248]

Between their addition to the jury list and actual service on a petit jury, however, a full half-decade and a bloody war transpired. In 1869, William C. Nell wrote that Clough's name was first drawn from Worcester's list in late 1865, but for unclear reasons he did not actually "take his seat" as a petit juror until a trial several months later.[249] "The reminiscences of colored jurors in the United States," Nell mused, "would constitute an interesting and instructive chapter in the history of the colored citizens equally before the law."[250]

IV
Richmond, Virginia (1867)

Under the great tent at the Liberty Party convention in 1843, it is almost certain that Abner Francis crossed paths with a 35-year-old lawyer and former city councilman from Cincinnati, Ohio. The Ohioan, in 1843, was still relatively new to the abolitionist cause, and

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244 *Id.*

245 Dred Scott v. Sanford, 60 U.S. 393 (1857).

246 *See supra* notes 84–92 and accompanying text.

247 *Id.* On state-level resistance to the *Dred Scott* opinion, *see* Jonathon Booth, *Delegitimizing the Supreme Court: The Lessons of Dred Scott* (2023) (unpublished manuscript on file with author).

248 The decision seems to have inspired Black residents in other parts of the state. In July, Black citizens in New Bedford put out a call for their own "Mass Meeting" on the topic: "Let the voice go forth from this meeting that will convince our oppressors that we are entitled to *equal* political and judicial rights: that our claim to a seat in the jury box cannot justly be withheld." *Mass Meeting of Colored Citizens of New Bedford*, Liberator (Bos.), July 13, 1860, at 111; *see also Speech of Dr. John S. Rock*, Liberator (Bos.), Mar. 2, 1860 ("You say to [the colored man], you shall be free here in this old Puritan Commonwealth. . . . You give us the right of citizenship in this Commonwealth, and yet the jury-boxes are closed against us . . . .").

249 *Colored Jurors in the Northern States*, *supra* note 35. Contemporary news accounts confirm his recollection. *See A Mulatto Juror*, Chi. Trib., Feb. 15, 1866 ("[I]n Worcester . . . the names of citizens have for some time been taken without regard to race; and now the name of a respectable mulatto barber has been drawn . . . Mr. Francis Clough, is serving with eleven of lighter color in the jury box of the Superior Court."); *Miscellaneous Items*, Bangor Daily Whig and Courier, Feb. 12, 1866 (noting Clough's service as seated juror).

250 *Colored Jurors in the Northern States*, *supra* note 35.

his conviction that "[t]he Constitution of the Union d[id] not give any sanction to the idea of property in man" conflicted with the views of many Eastern abolitionists.[251] But he was energetic, politically ambitious, and a significant influence in shaping the Liberty Party's platform[252] that insisted that "the principle of equal rights [be carried] into all its practical consequences and applications."[253] George Jonson, a key Liberty Party organizer based in Buffalo, may have made the introduction: His diary reflects that he hosted the Ohio lawyer when he arrived in Buffalo,[254] and he was a close friend and ally of Abner Francis.[255] On the eve of becoming Buffalo's first Black juror, Abner Francis probably shook hands with the man who would eventually, improbably, replace Roger Taney as the Chief Justice of the United States: Salmon Chase.

Twenty-five years after his trip to Buffalo, Chase was connected to another landmark episode in the integration of the American jury: A racially mixed federal grand jury in Richmond, where the Chief Justice would co-preside over trials in his capacity as "circuit judge," indicted Jefferson Davis for treason.[256] Had Davis gone to trial, twelve petit jurors picked from a racially integrated venire would have delivered the verdict. The Supreme Court heard no cases dealing with the law of race and the jury during Chief Justice Chase's tenure, but Chase played an important (and heretofore unrecognized) role in the integration of the jury, seizing upon his duties as a circuit judge to insist that no distinction on account of race be made in the selection of jurors. As he wrote to a friend at the time, "in fact it is only as a Circuit Judge that the Chief Justice, or any other Justice of the Supreme Court has, individually, any considerable power."[257]

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[251] *Letter to Gerrit Smith*, May 14, 1842, *in* 2 SALMON P. CHASE PAPERS: CORRESPONDENCE 1823–1857, at 98 (John Niven ed., 1994); *see also* John Niven, *Introduction*, *in id.*, at xv ("At an early stage in the Liberty party's development, Chase began to move away from the 'one idea' abolitionist strategy of its Eastern leaders . . . ."); *see also* Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 55 (2019) (discussing acrimonious debates between Garrisonians and antislavery constitutionalists).

[252] WALTER STAHR, SALMON P. CHASE: LINCOLN'S VITAL RIVAL 95 (2021).

[253] *Liberty Party Platform (1843)*, *in* THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 225 (Kurt T. Lash ed., 2021).

[254] *See* JONSON, *supra* note 113 (entry of Aug. 29, 1843) (discussing casual conversation with Chase on eve of convention); *see also* Powell, *supra* note 113, at 6 (citing Jonson's Aug. 29 entry).

[255] *See Erie Co. Anti-Slavery Society*, BUFFALO DAILY GAZETTE, Mar. 13, 1843, at 2 (listing both Francis and Jonson as officers of the Erie Co. Anti-Slavery Society in 1843); JONSON, *supra* note 113 (entry of Oct. 23, 1843) ("Note from colored woman asking protection. Saw Francis, colored merchant tailor and attended to the case."); *see also* Powell, *supra* note 113, at 7 (citing Jonson's reference to Francis).

[256] *See infra* notes 322–55 and accompanying text.

[257] Letter to John D. Van Burne, Mar. 25, 1868, *in* 5 SALMON P. CHASE PAPERS: CORRESPONDENCE, 1865–1873, at 195 (John Niven ed., 1998).

Chase's views on the meaning of citizenship and the importance of jury service—he was attacked for championing "negro jurors!" earlier in his political career[258]—are undoubtedly an important part of this story, but so too are the ideas and actions of Black activists. Throughout the Civil War and immediately after, they gathered, petitioned, and assembled to insist that they not be denied the privilege of jury service as the nation headed toward reunion and reconstruction. Chase, along with other federal judges and Radical Republicans in Congress, were in constant dialogue with these activists, whose efforts built upon decades of previous struggle. This Part explores how these strands came together to result in the integration of the jury-box in the courts of the United States.

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With the creation of a federal judiciary, the First Congress was faced with the task of establishing how to select jurors for federal trials. The end result, Section 29 of the Judiciary Act of 1789, was a system that essentially deferred to state practice: Jurors in federal court would be required to "have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens" and would be designated "by lot or otherwise in each State respectively according to the mode of forming juries therein now practised."[259] The legislative history reveals a robust debate over whether the Act would preserve and protect the common law's requirement of a jury "of the vicinage," but Congress devoted little attention to the question of federal qualifications for individual jurors.[260]

Scholars have overlooked, however, that federal law *did* impose some overt racial restrictions on the antebellum jury-box in subsequent years: As the United States expanded to the south and west, Congress occasionally limited jury service in the newly acquired territories to "free male white" inhabitants. When the territory that would become the State of Louisiana was carved off from the rest of the Louisiana Purchase in 1804, Congress limited jury eligibility there to those "free

258 *See, e.g.*, *Ohio Politics*, Alexandria Gazette, Sept. 13, 1855, at 2 ("Keep it before the people, that Salmon P. Chase is in favor of negro suffrage! In favor of negro jurors! . . . This is the excess and madness of party spirit.").

259 Judiciary Act of 1789, § 29, 1 Stat. 73. For a thorough discussion of the legislative history of Section 29, with a particular focus on debates over enshrining a vicinage requirement, see Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 844–60 (1976).

260 *Id.*

male white persons" who were "housekeepers."[261] When the remainder of the vast holdings west of the Mississippi was renamed Missouri Territory in 1812, Congress omitted the property requirement, but again limited service on territorial juries to "free male white persons of the age of twenty-one years."[262] And the Act establishing the territory of Florida in 1822 copied the same language that was used for Louisiana in 1804 to define qualifications for jurors there.[263] Just as Congress's naturalization laws limited United States citizenship to "free white person[s]" arriving in the United States after 1790,[264] so too did federal juror qualifications racially demarcate citizenship as the United States expanded outward.

These provisions of federal law remained in place, effectively unchanged, as the United States approached the Civil War.[265] Though juror qualifications were largely in the hands of the states, it is a measure of the salience of the issue that two candidates for federal office, Abraham Lincoln and Stephen Douglas, sparred over the issue in 1858. Before Lincoln's remarks in Charleston, Illinois, Douglas supporters taunted Lincoln by unfurling a "Negro Equality" banner, which featured a white man, a Black woman, and their child.[266] Lincoln felt compelled to open his speech by disavowing the position: "While I had not proposed to myself on this occasion to say much on that subject . . . I will say . . . that I am not, nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people . . . ."[267] At the next debate, Douglas accused Lincoln of hypocrisy: How could Lincoln disavow his support for Black voters and jurors in Charleston, while in Chicago he

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261 Act of Mar. 26, 1804, § 9, 2 Stat. 283-89 (erecting Louisiana into two territories, and providing for the temporary government thereof). A "housekeeper" was one "in actual possession of and who occupies a house, as distinguished from a 'boarder,' 'lodger,' or 'guest.'" *Housekeeper*, BLACK'S LAW DICTIONARY (rev. 4th ed. 1968).

262 An Act Providing for the Government of the Territory of Missouri, ch. 95, 2 Stat. 743 (1812).

263 Act of Mar. 3, 1822, § 11, 3 Stat. 654 (establishing a Territorial Government in Florida). In 1832, Florida's Territorial Legislative Council also enacted a law barring any white male who attempted to "intermarry" or who was found to be "liv[ing] in a state of adultery or fornication" with a woman of color from serving as a juror or witness, "except where negroes or mulattoes are parties." An Act to Amend the Act Entitled "An Act Concerning Marriage License," Jan. 23, 1832, *in* COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 89–90 (1839).

264 *See* Naturalization Act of 1790, Pub. L. 1–3, 1 Stat. 103 (Mar. 26, 1790).

265 *See* Drew L. Kershen, *The Jury Selection Act of 1879: Theory and Practice of Citizen Participation in the Judicial System*, 1980 U. ILL. L.F. 707, 707 (1980).

266 DAVID HERBERT DONALD, LINCOLN 220 (1995).

267 CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 235 (Paul M. Angle ed., 1958).

had "proclaim[ed] as bold and radical Abolitionism as ever Giddings, Lovejoy, or Garrison enunciated"?[268]

Where Lincoln hedged, abolitionists (particularly Black abolitionists) pushed forward, advancing a vision of "abolition-democracy" that "gained in prestige and in power" throughout the war.[269] And Black jury service remained a critical component of that new democratic vision. In 1863, Frederick Douglass and other leading Black abolitionists barnstormed the country as recruiting agents once the Secretary of War authorized Black enlistment.[270] In his recruiting speeches, Douglass marshalled troops for a "double battle,"[271] a fight to end slavery in the South and also for "complete and full membership in the body politic" throughout the Union.[272] As he told a packed audience at Philadelphia's National Hall, that meant "open[ing] the doors of colleges; remov[ing] the restraints of the ballot-box, and above all, allow[ing] the black man a seat in the jury box, when the negro is to be tried . . . ."[273] Two months later, Douglass delivered similar remarks to the largely white audience at the Anti-Slavery Convention in Boston:

> We formerly argued against slavery. Now, emancipation is coming, and another question appears, What shall be done with the slaves? Where shall we, the colored people, stand? Shall we be wholly free, an equal at the ballot-box, at the jury-box, and at the cartridge-box, with the white man?[274]

In the leadup to the 1864 presidential election, impatient Radicals and abolitionists positioned to replace Lincoln (perhaps in favor of Salmon Chase or John C. Frémont) as the Republican Party's nominee.[275] In part due to his frustration with the second-class treatment that Black soldiers were receiving,[276] Douglass endorsed their call for a convention:

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268 *Id.* at 291.

269 Du Bois, *supra* note 22, at 74.

270 Blight, *supra* note 194, at 391.

271 *Id.* at 404. *Cf.* Margaret A. Burnham, By Hands Now Known: Jim Crow's Legal Executioners 108–10 (2022) (discussing Black Americans' "Double V" campaign for civil rights during World War II).

272 *Fred'k Douglass at National Hall*, Philadelphia Inquirer, Apr. 25, 1863, at 8 ("And woe to this country if they refuse to meet the question fairly! There is some fiery storm of wrath in Heaven red with uncommon vengeance for those who refuse to the blacks the rights of citizenship . . . . Do the negro justice!").

273 *Id.*

274 *New England Anti-Slavery Convention*, Liberator (Bos.), June 5, 1863, at 60.

275 Blight, *supra* note 194, at 429–30.

276 *Id.* at 430.

> I mean the complete abolition of every vestige, form and modification of Slavery . . . perfect equality for the black man in every State before the law, in the jury box, at the ballot-box and on the battlefield . . . . [S]upposing that the convention . . . means the same thing, I cheerfully give my name as one of the signers of the call.[277]

One of those Black volunteers who answered the call to military service was John Berry, a barber from the tiny hamlet of Watkins, New York;[278] he was also, it turns out, a juror. Berry was neither as wealthy nor as prominent in Black politics as Abner Francis, but he was a faithful subscriber to *Frederick Douglass' Paper*[279] and a prominent Black figure locally.[280] From the day he arrived in Watkins around 1853, Berry "labor[ed] to convince the aristocracy of that village, that he [wa]s their equal in every respect."[281] On August 13, 1855, those efforts bore fruit, when Berry sat in the jury-box for a criminal case.[282] Activists in the Finger Lakes region wrote to Douglass to share the news, one connecting the fight for equality in the jury-box in the North with the struggle to abolish slavery in the South: "[I]n future years our sons may boast that colored men have served as jurors, and for that reason they may serve.—This looks to me as if every day is a day less that slavery will be permitted to stain our Republic America. . . ."[283] The prediction proved prophetic: Eight years after his initial jury service, Berry traveled to Boston to enlist in the country's first colored cavalry.[284] Berry carried a note from his local Union League committee, recommending him to the governor as an "Advocate and Champion of his unfortunate race" and "a good Citizen,"[285] and soon Berry was a sergeant in the 5th

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277 Letter from Frederick Douglass to E. Gilbert, Esq. (May 23, 1864), *reprinted in* 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS 403 (Philip S. Foner ed., 1952).

278 CENSUS OF THE STATE OF NEW YORK, FOR 1855, SCHUYLER CO., TOWN OF DIX, at 190 (listing Berry as the owner of a home valued at $400).

279 *Prejudice Dying Out in Watkins*, FREDERICK DOUGLASS' PAPER, Aug. 24, 1855, at 2.

280 *See, e.g.*, *Twenty-Fifth Anniversary of West India Emancipation*, FREDERICK DOUGLASS' PAPER, July 22, 1859, at 3 (listing John D. Berry as co-"Marshal of the Day" and address from Frederick Douglass).

281 *Prejudice Dying Out in Watkins*, *supra* note 279, at 2.

282 *A Colored Juror*, FREDERICK DOUGLASS' PAPER, Aug. 24, 1855, at 2.

283 *Id.* Another correspondent saw Berry's jury service as a testament to Black assertiveness and a powerful argument against compromise. Berry "proves to my mind, that colored men who claim all of their rights, will obtain more than those who ask for only a part; and also that if we demand equal privileges, and show ourselves worthy of them, that they will not be long withheld from us." *Prejudice Dying Out in Watkins*, *supra* note 279, at 2.

284 Volunteer Enlistment and Declaration of Recruit for John D. Berry (Jan. 7, 1864) (on file with Massachusetts State Archive (MSA), Bos.).

285 Letter from M.M. Cass, Dec. 23, 1863. Executive Department Letters (GO1/ series 37X), Vol. W80, MSA ("I have known [Berry] personally and have ever found him an upright, honest man, a good Citizen, a firmed and devoted friend of the Administration and

Massachusetts Cavalry (Colored).[286] Less than eighteen months after that, the mounted soldiers of the 5th Massachusetts Cavalry would be among the first Union troops to parade through the reclaimed streets of a burning Richmond.[287]

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The 39th Congress reconvened in late 1865 "with the determination to control the reconstruction of the Union."[288] The session opened on December 4, 1865 with Charles Sumner of Massachusetts—"stand[ing] in the forefront of this new attempt to expand and implement democracy"[289]—impatient to seize the floor.[290] Unflagging, stubborn and sometimes self-righteous, Sumner's longstanding commitment to racial equality and close working relationship with Black abolitionists won him a privileged place in the hearts of many Black citizens.[291] He began the session by offering a suite of bills that mapped a bold vision of equality for the reconstructed country.[292] And notably, his very first was an act "[t]o preserve the right of trial by jury by securing impartial

Country. . . . He is a man of great personal strength and activity. . . . [O]ne hundred thousand such men would annihilate the whole Southern Confederacy.").

286 *See generally* John D. Warner Jr., Riders in the Storm: The Triumphs and Tragedies of a Black Cavalry in the Civil War (2022); Steven M. LaBarre, The Fifth Massachusetts Colored Cavalry in the Civil War (2016).

287 Warner, *supra* note 286, at 282–83. When the war ended, Sergeant Berry returned home, where he adorned his Watkins barber shop with a portrait of Lincoln. Watkins Express, June 3, 1869. Bigotry and discrimination remained ubiquitous, of course, but Berry would continue to jealously defend his place as citizen after the war. Writing to a white Democratic newspaper editor in 1866, he pointedly challenged him, "One hundred and eighty thousand of the colored population of the United States in the late fearful war went forth to defend and guard the flag of our country. I say *our* country, for it is now my country as it is your country. If there is any difference," he continued, "I have more to claim it as my country than you can have: I went to the battlefield and fought that the country might live, and have what I hoped a great and glorious future; leaving you, Mr. Ellis, the editor of a copperhead sheet at home . . . ." Berry harbored no illusion that Reconstruction would bring immediate justice and equality for Black citizens, but he remained confident that his "race of people [would] some day take a part in moulding and guiding the affairs of the nation. I may not live to see it, you may not live to see it, but *it will come*." John D. Berry, *A Reply*, Watkins Express, Nov. 29, 1866.

288 Du Bois, *supra* note 22, at 260.

289 *Id.* at 191.

290 *See* 13 Charles Sumner, His Complete Works 1 (George Frisbie Hoar ed., 1874) ("Mr. Sumner, on the first day of the session, as soon as he could obtain the floor, introduced the following measures . . . .").

291 *See* Manisha Sinha, *The Caning of Charles Sumner: Slavery, Race, and Ideology in the Age of the Civil War*, 23 J. Early Republic 233, 256–60 (2003) (detailing a "special relationship" between Sumner and Black abolitionists that was "cemented by his unflagging devotion to the cause of black rights in the post-Civil War years").

292 *See* Cong. Globe, 39th Cong., 1st Sess. 2 (Dec. 4, 1865) (listing the introduction of Senate Bills No. 2-7 and Senate Resolution No. 1).

jurors in the courts of the United States."[293] In all states where at least one-sixth of the population was "of African descent," all federal grand and petit juries would have to "consist one-half of persons of African descent," at least where a Black defendant or victim was involved.[294] The proposal would have no effect on federal juries in most northern states, but it would, of course, have implemented a dramatic change from past practice in the federal courts of those jurisdictions that had seceded (as well as in Delaware, Kentucky, and Maryland).[295]

Sumner's jury bill died in committee,[296] but even in the absence of a new jury law, an important benchmark had been set. On June 5, 1867, Chief Justice Chase arrived by train in Raleigh, N.C., where he would sit for the first time as a circuit judge in a formerly rebellious state.[297] In a letter to his teenage daughter, he described his arrival in Raleigh: "[A] great crowd gathered at the depot. I soon found it was a great gathering of the Freedmen to welcome me! . . . I was [then] taken to the Hotel preceded by the [Union] League & the band & followed & surrounded by the dark visaged mass."[298] The crowd of 2,000 freedmen continued cheering for him outside the Yarborough House hotel, waving banners and playing music, until finally he obliged them with a brief speech from the balcony.[299] With a prominent Black clergyman from the local A.M.E. Church at his side,[300] Chase thanked his "friends and fellow-citizens," rejoicing that finally "throughout our country all men are

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293 *Id.*

294 S. 2, 39th Cong. (1865). The proposed bill was almost certainly a nod to the English tradition of juries *de medietate linguae*: In cases involving an Englishman and an alien, the alien was entitled to demand a jury comprised half of his countrymen (or of "half[-]tongue"). *De Medietate Linguae*, BLACK'S LAW DICTIONARY (4th ed. 1951). If the South refused to recognize its Black residents as equal citizens, Sumner seemed to say, it would have to afford them the procedural advantages the common law insisted be afforded foreigners. *See* Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 789 (1994).

295 Nor did the proposal address juror qualifications in *state* courts; it would not be until 1875, well after the ratification of the Fourteenth Amendment, that Congress expressly regulated in that arena. *See* Civil Rights Act of 1875, 18 Stat. 335.

296 *See* CONG. GLOBE, 39th Cong., 1st Sess. 38 (Dec. 13, 1865) (bill referred to Committee); CONG. GLOBE, 39th Cong., 1st Sess. 3649 (July 7, 1866) (indefinitely postponing S.B. 2).

297 STAHR, *supra* note 252, at 561; NICOLETTI, *supra* note 7, at 195 (discussing Chief Justice Chase's reluctance to participate in civilian court while martial law still prevailed).

298 Letter to Janet Chase (June 7, 1867) *in* 5 SALMON P. CHASE PAPERS, *supra* note 257, at 153–54.

299 *Chief Justice Chase*, TRI-WEEKLY STANDARD (Raleigh, N.C.), June 8, 1867, at 2 (describing the Justice's arrival at Raleigh). *See also Chief Justice Chase at Raleigh*, N.Y. TRIB., June 6, 1867, at 1 (providing similar account of speech).

300 The *New York Tribune* noted that Chase was accompanied on the balcony by the Rev. Dr. G.W. Brodie, the pastor of the A.M.E. Church and a leading Black organizer. *Id.* For more on Brodie, see *Colored Celebration in Raleigh*, DAILY STANDARD (Raleigh), Jan. 3, 1867, at 3; *A Giant in the Pulpit*, WEEKLY NORTH-CAROLINA STANDARD (Raleigh), Sept. 4, 1867 at 1.

free—all equal before the law . . . Let freedom come with peace, and with freedom let there come the assurance that the rights of all are the best, and, indeed, the only guaranty of the welfare of all."[301]

The mass welcome for Chase was not a spontaneous outpouring, but rather the product of Black organizing that blossomed as soon as Union occupation made concerted political activity possible.[302] Delegates to Colored Conventions in the South had different priorities than those in the North—landownership, for instance, was a focus of Tennessee, South Carolina, and North Carolina mass meetings in 1865 and 1866.[303] Black jury service, however, remained high on the agenda. In Raleigh, the 400-person gallery of the A.M.E. Church, sometimes called the "Lincoln Church,"[304] hosted much of this activity. It was there that North Carolina's first statewide Colored Convention convened in September 1865.[305] Opening the gathering, J.W. Hood declared its objects to be to secure to the colored people of North Carolina: a right to testify in courts of justice, a seat in the jury box, and a right at the ballot box (conspicuously, in that order).[306] In October 1866, the church hosted another Freedmen's Convention over four days, culminating in the adoption of a Constitution for the statewide Equal Rights League dedicated to "the repeal of all laws and parts of laws, State and National, that make distinctions on account of color."[307] When the Chief Justice of the United States arrived in town in June 1867, it was this church that he chose to attend for Sunday services.[308] Privately, Chase wrote to his friend Gerrit Smith—the wealthy abolitionist who, in turn, had

301 *Chief Justice Chase at Raleigh*, *supra* note 299, at 1.

302 *See, e.g.*, Selena Sanderfer, *The Emigration Debate and the Southern Colored Conventions Movement*, in Colored Conventions Movement, *supra* note 105, at 284–965 (detailing the efforts of Black southern conventions after 1865).

303 *Id.* at 290–94.

304 Roberta Sue Alexander, North Carolina Faces the Freedmen 21 (1985).

305 Proceedings of the Black National and State Conventions, 1865–1900, at 177 (Philip S. Foner & George E. Walker eds., 1986) (describing North Carolina's first statewide Colored Convention).

306 *Id.* at 180 (detailing North Carolina's first statewide Colored Convention); *see also North Carolina Colored Convention*, Raleigh Sentinel, Sept. 30, 1865, at 3 (detailing the statements made at the convention); *The Colored Convention*, Raleigh Sentinel, Oct. 2, 1865, at 2. ("[T]he claim set up by these freedmen, that they have a *right* to testify in the Courts against citizens—a *right* to sit as jurors on the trial of a citizen—a *right* to vote at the polls . . . is arrant effrontery and impertinence.").

307 Minutes of the Freedmen's Convention, Held in the City of Raleigh, on the 2nd, 3rd, 4th, and 5th of October, 1866, at 27 (1866).

308 *Chief Justice Chase*, Tri-Weekly Standard (Raleigh), June 11, 1867, at 2.

worked with Abner Francis[309]—in amazement: "Just thinking of the Chief Justice at an African Church in Raleigh . . . !"[310]

The next morning, Chase opened court by delivering a brief, but extraordinary, Order:

> It being considered by the Court that all persons born or naturalized in the United States, and residing in North Carolina, are citizens, entitled to equal rights under the laws, and therefore equally concerned in the impartial administration of justice:
>
> It is Ordered That henceforth in summoning grand and petit jurors, the Marshal of the United States for the District of North Carolina make no distinction on account of color or race among citizens otherwise qualified to serve.[311]

The marshal promptly complied.[312] The first Black juror summoned—William Cawthorn, Secretary of the Freedmen's Convention the previous October—ended up being turned away. Only white freeholders had served as jurors in North Carolina, so Cawthorn, who did not own real property, was thought to fail the "otherwise qualified" proviso of Chase's order.[313] Instead, the honor of being the first Black juror in the Chief Justice's courtroom fell to Hanson T. Hughes, another political activist and leader at Raleigh's A.M.E. Church.[314]

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309 Letter from Abner Francis to Gerrit Smith (Feb. 27, 1849) (on file with Syracuse University Libraries, Gerrit Smith Papers, Box 18).

310 5 Salmon P. Chase Papers, *supra* note 257, at 161–62.

311 *The Circuit Court*, Tri-Weekly Standard (Raleigh), June 11, 1867, at 2; *No Distinction of Color in Jurors*, N.Y. Daily Herald, June 17, 1867, at 5.

312 *See Governor Holden*, The News and Observer (Raleigh), Dec. 23, 1894, at 4 (containing the recollections of the marshal). It seems highly likely that Chase was personally lobbied to issue the jury order. Chase spent his evenings in Raleigh meeting with Black and white local leaders. Stahr, *supra* note 252, at 561. Contemporary newspaper accounts reported that "it is known that many of [Raleigh's 'Union men'] personally appealed to [Chase] immediately after his arrival there to make such an order." *From Washington*, Chi. Trib., June 12, 1867, at 1.

313 The Daily Journal (Wilmington, N.C.), June 21, 1867, at 2; *see Governor Holden*, *supra* note 312, at 4 (containing the recollections of the marshal).

314 *Governor Holden*, *supra* note 312, at 4. Hughes was listed in newspaper advertisements as one of two dozen authorized agents permitted to collect money for the church. *New Advertisements*, Daily Standard (Raleigh), Mar. 2, 1867, at 2. Hughes subsequently served as a state senator. *See* Monroe N. Work, *Some Negro Members of Reconstruction Conventions and Legislatures and of Congress* 5 J. Negro Hist. 63, 77 (1920). He also served as a criminal defendant, facing several charges for leading an 1875 "riot" (in fact, a noisy parade to commemorate the Emancipation Proclamation). *See* State v. Hughes, 72 N.C. 25, 28 (N.C. 1875) ("In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social or moral. . . . [I]f such acts as are here found by the jury . . . to be indictable, [it] would put an end to all public celebrations . . . .").

That the Chief Justice regarded North Carolina's freedmen as "citizens" was unsurprising,[315] and the recently passed Civil Rights Act of 1866 had confirmed that they were, indeed, "citizens of the United States."[316] But it did not yet necessarily follow—especially a full year before the ratification of the Fourteenth Amendment—that they were "citizens of North Carolina" for purposes of sitting as jurors, or that all citizens were entitled to equal treatment under the law (particularly as to eligibility requirements for suffrage, office-holding, or jury service). The precise impact the Civil Rights Act of 1866 on Black jury service was unclear: When vetoing the bill, President Johnson fretted that Congress might usurp the states' power to "declare who, without regard to color or race, shall have the right to sit as a juror."[317] Overriding his veto, some Congressional backers of the act insisted that the law protected only *civil* rights (like the right to contract or convey property), but not *political* rights (like the right to vote or serve as a juror).[318] But by linking "citizenship," equality, and the right to serve as a juror, the Chief Justice sidestepped such formal distinctions; his order implies, without directly stating, his view that full participation as jurors was already a constituent, core feature of the Black citizenship established by some combination of the war, the Thirteenth Amendment, and affirmed by the Civil Rights Bill of 1866.[319] As Senator Sumner put it on the Senate floor a few years later:

> I insist [that all courts, state and federal] must be opened to colored jurors. Call the right political or civil, according to the distinction of

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315 *See* Barnett & Bernick, *supra* note 27, at 110–13 (describing Chase's efforts to promote the citizenship of freedmen through Attorney General Bates). At the behest of then-Secretary of Treasury Chase, Attorney General Edward Bates had issued an opinion on the topic in 1862. Chase used the opinion to promote universal suffrage (though, in fact, Bates's basic repudiation of *Dred Scott* stopped short of such a conclusion). *Id.*

316 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

317 Cong. Globe, 39th Cong., 1st Sess. 1679–80 (1865) (statement of President Andrew Johnson).

318 *See* Barnett & Bernick, *supra* note 27, at 125 (remarks of Senator Lyman Trumbull).

319 *See* Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 Duke L.J. 1609, 1637–38 (2001) ("[M]any Reconstruction congressmen thought that the Thirteenth Amendment alone could constitutionally sanction the sweeping prohibitions of the Civil Rights Act of 1866."); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 Calif. L. Rev. 171, 200 (1951) ("At the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen's Bureau and Civil Rights Bills is an idea of 'equal protection' as far flung as the problem of human rights and as substantive as any guarantee of those absolute rights could well be."); *cf. In re Turner*, 24 F. Cas. 337, 339 (C.C.D.Md. 1867) (No. 14, 247) (Chase, C.J.) (adopting broad reading of "full and equal benefit of all laws" clause and declaring Maryland law establishing additional protections for white apprentices to violate the Civil Rights Act of 1866).

> the Senator. No matter. . . . I know not if it be political or civil; it is enough for me that it is a right to be guarded by the nation.[320]

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While the Chief Justice's action in Raleigh garnered national attention and served as an important "precedent" of sorts,[321] no criminal trial in America commanded greater interest than the one unfolding in the Circuit Court for the District of Virginia: *United States v. Jefferson Davis*.[322] There, Chief Justice Chase's circuit assignment dictated that he would co-preside with a district judge named John C. Underwood, who handled most of the day-to-day oversight of the matter.[323] And, once again, Black jurors would play a central role in the drama.

It is often written that Davis's ultimately abandoned indictment was returned by Virginia's (or, sometimes, the country's) first racially integrated grand jury,[324] but this is not entirely accurate. Davis was indicted for "incit[ing] insurrection, rebellion, and war" by an all-white federal grand jury on May 10, 1866 in Norfolk, Virginia.[325] In the summer of 1867, however, the case moved to the Circuit Court in Richmond. At the same time, Judge Underwood impaneled a new grand jury and petit

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320 CONG. GLOBE, 42nd Cong., 2nd Sess. 822 (Feb. 5, 1872) (statement of Senator Charles Sumner).

321 The Chief Justice's order was soon cited around the country, with mixed success. *See, e.g.*, *Radicalism in High Places*, NEW ORLEANS TRIB., June 12, 1867, at 1 ("[W]hen the idea of seeing colored men on juries causes many pretended friends of freedom to tremble, ... The force of this illustrious example will be felt in all the courts of our country."); *Important Opinion of Hon. G.S. Bryan, Judge U.S. District Court for South Carolina: Negroes Entitled to Sit on the Jury*, CHARLESTON MERCURY, Oct. 17, 1867, at 4 (citing Chief Justice Chase's actions in North Carolina and the Civil Rights Act of 1866 as authority to integrate South Carolina juries); *The Competency of the Present Grand Jury*, NEW ORLEANS ADVOC., Jan. 11, 1868, at 2 ("Mr. Field opened the argument and . . . cited Chief Justice Chase as having allowed grand and petty juries to be composed in part of colored men in the state of North Carolina and other parts of Judge Chase's circuit."); *Grand Jury Question*, TIMES-PICAYUNE (New Orleans, La.), Jan. 11, 1868, at 2 (reporting judge's denial of motion to quash).

322 For the definitive account of the momentous prosecution and its unraveling, see NICOLETTI, *supra* note 7.

323 Indeed, Chase seemed eager to distance himself from the prosecution, which he viewed with extraordinary wariness. *See* NICOLETTI, *supra* note 7, at 192–94 (explaining Chase's wariness of the prosecution).

324 *See, e.g.*, RICHARD L. MORTON, 3 HISTORY OF VIRGINIA 86 (1924) (including a photo titled, "First Mixed Jury of Virginia Charging Jeff Davis with Treason, 1866"); *The First Integrated Jury Impaneled in the United States, May 1867*, 33 NEGRO HIST. BULL. 134 (1967) (showing an erroneous photo of purported integrated 1866 grand jury).

325 *Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871) (No. 3,621a). For information on the 1866 indictment and grand jurors, see *id.*; *United States District Court in Norfolk: The Charge of Judge Underwood to the Grand Jury*, WEEKLY STANDARD, May 23, 1866, at 4 (listing grand jurors); *Judge Underwood And His Jury*, THE CHARLESTON DAILY NEWS, May 19, 1866, at 2 (providing biographies of grand jurors).

jury venire for the coming term. Underwood had previously boasted of his ability to "pack" a jury of Virginia men willing to convict Davis,[326] and rumors quickly spread that the new array would be "arranged like a backgammon board" (i.e., racially integrated).[327] As expected, when court opened, six of the twenty-four new grand jurors were named with their race "(colored)" highlighted in national papers;[328] a few days later, a dozen more Black jurors (and an equal number of white jurors) were summoned to comprise the petit jury venire.[329] The *Richmond Times* disdainfully captured the scene:

> The rest [of the grand jurors] were then called up by fours and sworn, negroes and whites together. There was nothing remarkable in this ceremony except the avidity of the negroes to kiss the book (they could scarcely be restrained till the clerk got through repeating the oaths) and the unction with which they smacked their lips over the sacred volume when permitted to get at it.[330]

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326 Nicoletti, *supra* note 7, at 186; *see also* Joint Comm. on Reconstruction Rep. No. 30-39, pt. II, at 6–14 (1866) (testimony of John C. Underwood) ("[Q:] Could [Lee or Davis] be convicted of treason in Virginia? [A:] Oh, no; unless you had a packed jury. [Q:] Could you manage to pack a jury there? [A:] I think it would be very difficult, but it could be done; I could pack a jury to convict him; I know very earnest, ardent Union men in Virginia.").

327 *Senegambia*, Richmond Times, May 4, 1867, at 2; *see also Grand Jurors*, Alexandria Gazette, May 4, 1867, at 3 (listing three "colored men" from the region had been summoned as grand jurors for the following week in Richmond).

328 The Black grand jurors were Rozier Dulaney Beckley, Cornelius Liggon Harris, George W. Simms, Fields Cook, John Oliver, and George Seaton. *See, e.g.*, *Meeting of the United States District Court in Richmond*, N.Y. Times, May 7, 1867, at 1; *Underwood's Grand Jury*, Richmond Times, May 6, 1867, at 1; *United States Circuit Court*, Richmond Dispatch, May 7, 1867, at 1; *United States Circuit Court: Underwood's Charge to the Jury*, Norfolk Virginian, May 9, 1867, at 1; *Virginia: Special Correspondence of the Herald*, N.Y. Herald, May 11, 1867, at 5.

329 The list of "petty jurors" (separated into "Colored" and "Whites") also appeared in local papers. *Local Department: United States Circuit Court*, Richmond Times, May 10, 1867, at 3 (listing jurors); *Local Matters: Circuit Court of the United States*, Richmond Dispatch, May 10, 1867, at 1 (listing jurors). They were Joseph Cox, J.B. Miller, Edward Fox, Lewis Lindsey, Albert Brooks, Andrew Lilly, Lewis Carter, Landrum Boyd, Frederick Smith, Dr. Walter Snead, John Freeman, and Thomas Lucas. White jurors slightly outnumbered Black jurors. *Id.; see also Virginia News*, Alexandria Gazette and Virginia Advertiser, May 16, 1867, at 2 ("There being no business for the petit jury—in which the colored element largely predominated—they were given a recess . . . ."); *News of the Day*, Alexandria Gazette and Virginia Advertiser, May 11, 1867, at 2 ("In the United States Circuit Court, Judge Underwood, in Richmond, the petit jury yesterday consisted of an equal number of colored and white jurors.").

330 *Underwood's (U.S.) Court*, Richmond Times, May 7, 1867, at 2.

Jefferson Davis was controversially released from pretrial detention,[331] but for the next year, the prospect of a trial before such a "mixed jury" hung over him.

Davis and his allies faced that possibility with disgust and panic. Upon learning of the new jurors in the summer of 1867, one of Davis's attorneys, James Lyons, warned his client: "If tried you will be tried before a Jury composed of negros and the worst kind of white men, and your conviction is inevitable, and what /hope/ is there of pardon then. . . ?"[332] He later urged Davis that the defense should stall until Underwood's ouster could be arranged and "we can get a White Jury," but he conceded that Chief Justice Chase's involvement rendered this possibility remote.[333] Charles O'Conor, Davis's lead counsel, was particularly adamant in his aversion to a trial with Black jurors: "However vexatious these delays, threats, and postponements may be, I think much should be endured to avoid a trial before a mongrel jury."[334] Still another warned that Underwood "and his negroes w[ould] be grotesque" at trial.[335] Davis himself wrote to his friend and former Virginia senator James Mason bemoaning that "they now have negro jurors, and nearly all the intelligence & respectability of the community has been excluded from the jury lists . . . ."[336]

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331 *See* NICOLETTI, *supra* note 7, at 187–90 (detailing public reaction to Davis' release from pretrial detention); *Jefferson Davis, Latest Phase of the Matter of His Trial*, N.Y. TIMES, May 13, 1867, at 1 (expressing confusion at the decision to release Davis).

332 Letter from James Lyons to Jefferson Davis (May 5, 1867), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870 195–96 (Lynda Lasswell Crist ed., 2008).

333 Letter from James Lyons to Jefferson Davis (Oct. 25, 1867), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870, *supra* note 332, at 254.

334 Letter from Charles O'Conor to Jefferson Davis (Oct. 29, 1867), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870, *supra* note 332, at 254–55. O'Conor wrote several additional letters emphasizing his disdain for Black jurors, including one to Davis's wife. *See* Letter from Charles O'Conor to Varina Davis (Oct. 21, 1867), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870, *supra* note 332, at 195–96 ("Chandler professes the kindest disposition and says he will try to get a White jury. But this is impossible. Underwood is a devoted courtier at the feet of Sambo and there is no appeal from his decisions.").

335 Letter from William B. Reed to Jefferson Davis (Oct. 8, 1867), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870, *supra* note 332, at 252.

336 Letter from Jefferson Davis to James M. Mason (Apr. 16, 1868), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870 *supra* note 332, at 288–90. Mason responded in sympathy: "The disgrace of Negro jurors, is the disgrace of the brutes, who force it on the South." Letter from James M. Mason to Jefferson Davis (Apr. 22, 1868), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870, *supra*, at 332. For both Mason's and Davis's earlier views on trial by jury during debates over the Fugitive Slave Act of 1850, see Forman, *supra* note 4, at 902–05. Though he appears to have been working more as a free agent than an authorized emissary, a man who lobbied President Johnson for a pardon on Davis's behalf claimed that the President was affected by talk of Underwood's integrated jury: "I told [the President] . . . that he (Underwood) could get negroes enough on a jury with a few white men to convict him . . . . The Presdt. was very stout about the matter at first but my information from Judge U. moved him very much." Letter from Paul Bagley to Jefferson Davis (Aug. 31,

FIGURE 5. Portrait of half of petit jury venire, May 1867 term of Circuit Court in Richmond (Valentine Museum, Richmond, Va.)

Of course, the presence of integrated grand and petit juries meant something very different for the Black citizens of Richmond, both symbolically and materially. As elsewhere, Virginia activists had raised

1867), *in* 12 THE PAPERS OF JEFFERSON DAVIS: JUNE 1865–DEC. 1870, *supra* note 332, at 245. Bagley repeated his claims publicly, too. *See The Jeff Davis Trial*, BOS. EVENING TRANSCRIPT, Nov. 22, 1867.

demands to integrate the jury-box from the moment the Confederacy fell,[337] and many of those selected for service were leaders and activists in the community.[338] Richmond's racial tensions, meanwhile, were reaching a boiling point: Black activists were being arrested for refusing to exit segregated street cars, and police violence had triggered riots in April and May.[339] The presence of an integrated federal grand jury in May emboldened this agitation. On Tuesday, May 7, a Black man named Ben Scott repeatedly refused to exit a segregated street car and was arrested; once ejected, he reportedly shouted, "By G-d . . . Judge Underwood is in town now, and he'll see who is to rule here."[340] His confidence was not misplaced: To the horror of many white Virginians, the grand jury spent several days debating whether to indict the conductor for violations of the Civil Rights Act of 1866.[341] The next day, one of the Black grand jurors, shoemaker Cornelius Harris, delivered an incendiary speech in favor of land confiscation to a large crowd at the African Church, to loud applause from the Black and white audience.[342] And the day

337 *See Great Meeting at the Theatre*, RICHMOND DISPATCH, Apr. 16, 1867 ("Several questions were put about equality. What about the colored man in the jury-box, said one."); *see also Celebration at the Anniversary of Lincoln's Death*, RICHMOND DISPATCH, Apr. 16, 1867 (noting speech of white abolitionist to a large Black crowd including, "*Freedom* is the watchword of the nineteenth century—that freedom which puts every man on an equality before the law, not only in the jury-box, at the ballot-box, in the legislative halls, freedom to the schools, &c.").

338 *See* NICOLETTI, *supra* note 7, at 272–74; *see also* ALRUTHEUS AMBUSH TAYLOR, THE NEGRO IN THE RECONSTRUCTION OF VIRGINIA 214 (1926) ("Cook and Oliver were considered intelligent men with conservative inclinations. Yet their appointment to jury service was deplored by the whites.").

339 *See Negro Disturbances*, RICHMOND TIMES, May 13, 1867 ("Within a few days past this city has had alarming evidences of the rapidly maturing fruits of the incendiarism which has been so industriously and insidiously inculcated upon the minds of our negro population . . . ."); *see also Lawlessness of Negroes at Richmond*, N.Y. TIMES, May 10, 1867 ("The crowd of negroes [yesterday] at the time numbered fully two thousand. Three policemen were severely injured during the riot."); *see also Addresses by Mr. Greeley and Judge Underwood to the Negroes in Richmond*, N.Y. TIMES, May 13, 1867 (describing pleas from Underwood and Greeley at Black church to refrain from further rioting).

340 *See Attempt on the Part of a Negro to Ride in the Ladies' Street Car*, RICHMOND TIMES, May 8, 1867; *see also A Negro Man Attempts to Ride in One of the Ladies' Cars*, RICHMOND DISPATCH, May 8, 1867; *Another Street Car Difficulty*, STAUNTON SPECTATOR, May 14, 1867. *The New York Herald* reported that the street-car rider was, in fact, a juror before Judge Underwood, but local papers identified him as Ben Scott, who was not empaneled that term. *See The Street Car Question in Richmond*, N.Y. HERALD, May 8, 1867.

341 *Trial of Jefferson Davis*, RICHMOND DISPATCH, May 11, 1867 ("The grand jury of the United States Court have had under consideration for some days the question of indicting the conductor of the street car who recently ejected a negro from one of the cars."); *News in Brief*, BALT. SUN, May 14, 1867 (noting grand jury's decision not to indict after consulting with military governor John Schofield).

342 *See Grand Ratification Meeting Last Night at the First African Church*, RICHMOND TIMES, May 8, 1867 ("Cornelius Harris, a colored citizen of Richmond, and a grand juror of the Circuit Court of the United States now in session in this city, next spoke. He made an

after that, when the beating of a young Black man by two white firemen triggered more riots across Richmond, one of the Black petit jurors, Joseph Cox, was arrested. (Cox appears in Fig. 5 standing in the back row, second from the right.) White authorities were later forced to admit they confused Cox for a different man, while the two white firemen were eventually charged for their role in triggering the tumult.[343] Black jury service was a harbinger and handmaiden of lawlessness, or of a new democratic horizon, depending on one's perspective.

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The May 1867 grand jury and petit jury venire returned unrelated indictments and sat for other trials, but ultimately they played no direct role in Jefferson Davis's prosecution.[344] The trial was postponed, and a new set of jurors for the November 1867 term were summoned.[345] This time, six Black grand jurors were empaneled, and a large petit jury venire that included twenty-seven Black prospective jurors was called for the anticipated trial of Jefferson Davis.[346] As before, the scene of Black and white jurors together holding the Bible while taking their oath garnered national attention.[347]

The hurriedly prepared Norfolk indictment suffered from a host of shortcomings, so prosecutors and the new grand jury began work on a new charging instrument in November 1867.[348] Top Confederate leaders, including Robert E. Lee, were subpoenaed and compelled to provide

incoherent, rambling argument in favor of confiscation, which was of course received with delight."); *see also Ratification Meeting of the Radical Party*, RICHMOND DISPATCH, May 8, 1867 ("Harris, colored, was next received amid loud cheers . . . .").

343 *See Circuit Court of the United States*, RICHMOND DISPATCH, May 10, 1867 (listing Cox as petit juror); *see also The Riot of the 9th Instant*, RICHMOND DISPATCH, May 25, 1867; *The Riot Case Concluded*, RICHMOND DISPATCH, May 29, 1867; *The Ninth of May Riot*, RICHMOND TIMES, May 29, 1867, at 3.

344 The only concrete sense in which this integrated May 1867 grand jury took part in Davis's case was that its white foreman, John Minor Botts, signed as a surety for Davis's pretrial release. *Letter from John Minor Botts*, N.Y. TIMES, May 21, 1867 (offering reasons in a letter sent "from the Grand Jury Room").

345 NICOLETTI, *supra* note 7, at 266; *see also The Davis Case*, RICHMOND DISPATCH, Nov. 27, 1867, at 2; *Trial of Jefferson Davis*, RICHMOND DISPATCH, Nov. 26, 1867, at 3; Letter from William M. Evarts, U.S. Att'y, to Henry Stanbery, U.S. Att'y Gen. (Nov. 2, 1867) (on file with author) (explaining that the trial will be postponed in part because of scheduling conflicts with Chief Justice Salmon Chase).

346 The *Dispatch* initially reported that the grand jury consisted of seventeen white and seven Black grand jurors, but the juror list suggests a composition of eighteen and six. *Trial of Jefferson Davis*, RICHMOND DISPATCH, Nov. 26, 1867. Other press accounts reflect an eighteen to six breakdown in the grand jury. *See, e.g.*, *Jeff. Davis Trial*, EVENING TEL. (Phila.), Nov. 26, 1867.

347 *Jeff. Davis Trial*, EVENING TEL. (Phila.), Nov. 26, 1867.

348 NICOLETTI, *supra* note 7, at 266–67.

evidence against Davis before the new grand jurors. This later, racially integrated, grand jury returned a detailed fifty-page indictment charging Davis with more than a dozen federal crimes, some of which were punishable by death.[349] Davis met with Lee just after his Richmond grand jury testimony, and decades later, Davis noted Lee's complaints that the "big black negro" seated "immediately before him" had been sound asleep throughout his appearance.[350] The anecdote almost certainly sheds more light on the bigotry of Lee and Davis than the actual conduct of the grand jurors, but it is fascinating that even with the passage of many years, the indignity of a white leader appearing before Black jurors held such salience as a symbol of Reconstruction-era misrule.

In the spring of 1868, Davis's lawyers once again geared up for what they thought might be an imminent trial, and again the prospect of Black jurors loomed large in their planning. On April 24, Davis's lawyers exchanged a list of the new petit jury venire, with the pool divided into those marked with a "C" (for colored) and "W" (for white); interestingly, attorney Robert Ould identified several of the Black jurors as "conservative" (and hence potentially defense-friendly).[351] But race was the only thing that mattered for O'Conor. His view by 1868 was straightforward:

> "Postponement should not be an object. Seeking favor of the prosecutor in any shape should not be an object. But watching closely their mode of summoning jurors and saving, as far as possible, by any fair means, the jury box from pollution should be the object and the only object."[352]

The country's newspapers speculated that Davis would mount legal challenges to the composition of the new petit jury venires—and perhaps even resign in protest if Black jurors were permitted to try Davis[353]—but ultimately they never had to. Again and again, Davis's trial was postponed: All parties, including Chief Justice Chase, had their own reasons for wanting the prosecution to disappear.[354]

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349 *Id.*

350 Jefferson Davis, *Robert E. Lee*, 150 N. AMER. REV. 55, 65–66 (1890).

351 Letter from Robert Ould to Thomas F. Bayard (Apr. 24, 1868) (on file with the Library of Congress, Thomas F. Bayard Papers, General Correspondence, 1780–1899, Box 14) ("I do not know any except from Richmond. I have marked √ opposite to such as are known to be conservative, with a cross as to such as are well known to be decidedly such.").

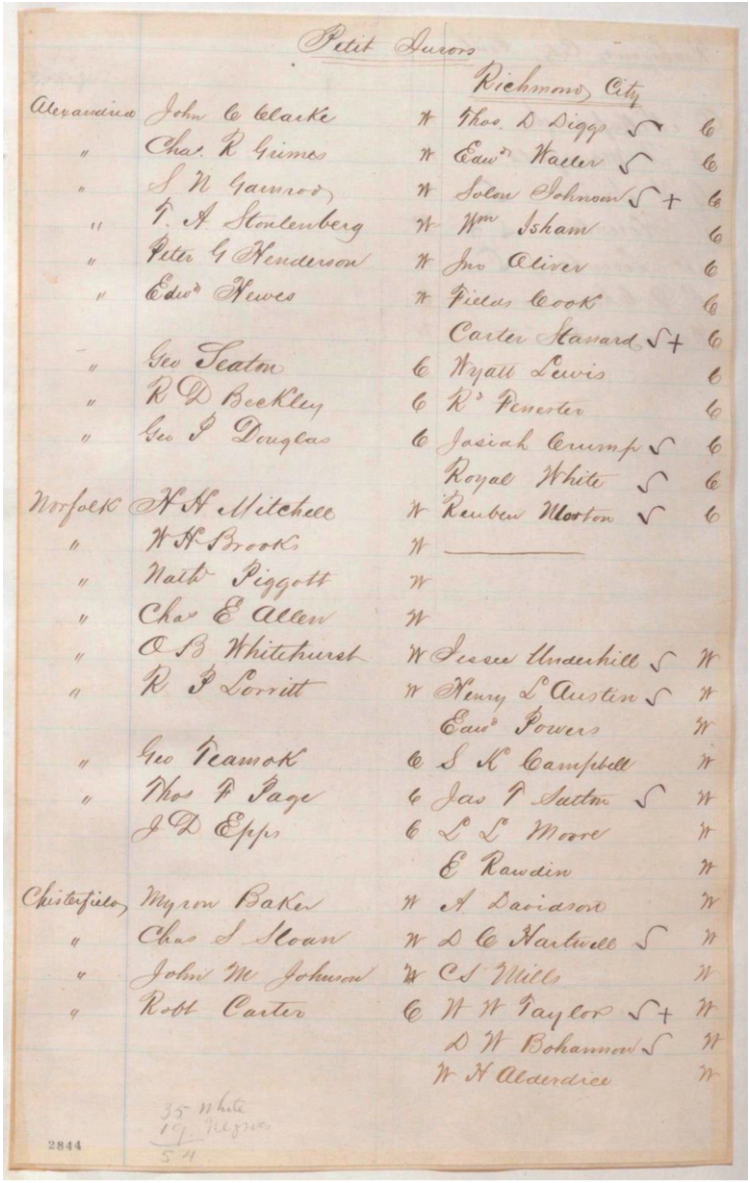
352 Letter from Charles O'Conor to Thomas F. Bayard (Apr. 14, 1868) (on file with the Library of Congress, Thomas F. Bayard Papers, General Correspondence, 1780–1899, Box 14).

353 *See, e.g.*, *The Jeff Davis Trial*, BOS. EVENING TRANSCRIPT, Nov. 22, 1867; *The Trial of Jeff Davis-What His Counsel Will Do*, N.Y. HERALD, Nov. 22, 1867; *Jefferson Davis*, PHILA. INQUIRER, Nov. 25, 1867.

354 *See* NICOLETTI, *supra* note 7, at 6–8, 18–19 (noting that federal prosecutors were worried about how a Davis acquittal may "undercut the results of the war" and how Chief Justice Chase was "reluctant to entrust Davis's fate to a jury").

Finally, on December 25, 1868, President Johnson issued a universal "pardon and amnesty" for those who had rebelled against the United States.[355] Davis's great fear—that a petit jury of white and Black jurors might hold his life in his hands—would not come to pass.

FIGURE 6. List of prospective petit jurors for May 1868 term of Circuit Court in Richmond, annotated by Robert Ould (Library of Congress)



355 *Id.* at 299.

Conclusion

Few, if any, Supreme Court opinions are more reviled than Chief Justice Taney's 1857 opinion in *Dred Scott v. Sandford*.[356] His conclusion that neither Scott nor any member of "[t]he unhappy black race" could ever be a "citizen of the United States"—a member of "the political body who, according to republican institutions, form the sovereignty"—is now enshrined as anticanon.[357] In the short term, *Dred Scott* accelerated the war that would shatter its central holding in just a few years' time; in the long term, we have come to recognize that Taney reached a "morally insufferable" conclusion that "abided constitutional evil."[358]

But undergirding Taney's legal conclusion were a series of crude and misleading historical claims that still exercise a hold on our collective historical understanding, including when it comes to thinking about the American jury. Scott could not be a citizen in 1857, Taney concluded, because in 1787 and in subsequent decades, "negroes of the African race," "whether they had become free or not, were [not] then acknowledged as a part of the people . . . ."[359] Black people were "excluded from civilized Governments" at the Founding, so it followed that they were not entitled to "any of the personal rights so carefully provided for the citizen."[360] A survey of legislation confirmed that over the subsequent seventy years those of African descent remained outside the American polity; Scott could not be a "citizen" because nowhere "did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights."[361]

There are uncomfortable echoes of Taney's historical account in how legal scholars treat the American jury prior to Reconstruction. The original source for most, if not all, of the mistaken claims that Black jury service was nonexistent before 1860 appears to be Leon Litwack's groundbreaking *North of Slavery*, which presented a withering and unrelenting account of northern white racism from the Revolution to the Civil War.[362] But as historian Van Gosse provocatively suggests (critiquing both Litwack and scholarship he helped inspire): "We have all been Taneyites, in effect, reading the *Dred Scott* decision back into the prior seventy years as an affirmation of what was always-already

356 60 U.S. 393 (1857).

357 Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 411 (2011); *Dred Scott*, 60 U.S. at 404, 407, 410.

358 Greene, *supra* note 357, at 411.

359 *Dred Scott*, 60 U.S. at 403, 407.

360 *Id.* at 410, 411.

361 *Id.* at 416.

362 *See supra* note 7 and accompanying sources.

there. Rather than letting facts speak, scholars have insisted a priori that black citizenship barely, rarely, or never existed."[363] Of course, white supremacy's violence shaped every aspect of the lives of free people of color, in both the South and the North, in the decades before the Civil War. It shaped the jury. But more recent, probing studies of antebellum Black communities and Black civil rights activism have offered "a far more nuanced—and ambitious—picture of African American life than one might have imagined from reading Litwack."[364] More searching histories of the jury, too, are overdue.

For Jefferson Davis and his legal team, the prospect of being tried before Black jurors in the former capital of the Confederacy was "almost impossible to conceive."[365] No doubt they were sincere in their disbelief: Like Taney, their worldview denied that Black citizens were, or ever had been, "a part of the people."[366] But the very existence of people like Hanson T. Hughes, Francis Clough, John Berry, Abner Francis—and countless others who spent decades fighting to get these men seated as jurors—undermines that narrative. Though we have largely forgotten them, their vision of the jury, and of citizenship, was ascendant on the eve of the Fourteenth Amendment's ratification.

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363 Gosse, *supra* note 18, at 9.

364 *See* Masur, *supra* note 19, at 368; *accord* Wilentz, *supra* note 143 ("These writings do not deny the harsh" racist realities that Litwack and others forced historians to confront. . . . But building on older studies of northern free Black communities and Black abolitionists, some historians have recovered a rich history of pre-war Black resistance to northern racism absent in earlier, bleaker accounts.").

365 Letter from Robert Ould to W.W. Corcoran (Oct. 25, 1867) (on file with the Library of Congress, W.W. Corcoran Papers, General Correspondence, Box 16).

366 But Davis was not so far removed—either in time or distance—from earlier instances of Black juror service. When Davis was a boy in Mississippi, his parents entrusted a family friend named Thomas Hinds to escort him to boarding school in Kentucky. Jefferson Davis, *Autobiographical Sketch*, *in* 1 The Papers of Jefferson Davis: 1808–1840, lxx (Haskell M. Monroe, Jr. & James T. McIntosh eds., 1971). Hinds was one of the thirteen prominent white men of Natchez who joined Andrew Barland's petition in 1824. *See* Petition of Andrew Barland, *supra* note 36. Davis was also friendly with members of the Eiler family, who previously enslaved Andrew and his mother. *See* Letter from Jacob Thompson and Jefferson Davis to James L. Edwards (Jan. 20, 1846), *in* 2 The Papers of Jefferson Davis: June 1841–July 1846 416–18 (James T. McIntosh ed., 1974).