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Justice and Jurisprudence and the Black Lawyer

J. Clay Smith, Jr.*

In 1841, three years before the first African American lawyer was admitted to the bar in the United States, Ralph Waldo Emerson asked:

What is a man born for but to be a Reformer, a Re-maker of what man has made; a renouncer of lies; a restorer of truth and good, imitating that great Nature which embosoms us all, and which sleeps no moment on an old past, but every hour repairs herself, yielding us every morning a new day, and with every pulsation a new life?

Emerson answered his inquiry as follows: “Let him renounce everything which is not true to him, and put all his practices back on their first thoughts, and do nothing for which he has not the whole world for his reason.”

In 1844, Macon Bolling Allen became the first black American to complete a course of study in law and the first black lawyer formally introduced to jurisprudence, at a time when black people in the nation were considered “far less esteemed than the veriest stranger and sojourner.” Allen’s study of law and his admission to the bar must have rocked the ages past, as well as the American experiment of law and equality. Although no record has been

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found listing the books or subjects that Allen’s private instructor used to teach him, Allen must have studied from classical sources to demonstrate to his white examiners that he was qualified to be admitted to the bar in the State of Maine. One can only imagine the questions that were put to Allen during his oral bar examination. Perhaps he was questioned on the premises undergirding the Declaration of Independence. Or perhaps he was questioned on the Federal Constitution, elements of the debates between the Federalist and the Antifederalist, the definition of a slave or the meaning of citizenship, and his views on the slave provisions of the Constitution. He may have been asked why he wanted to be a lawyer, or how he planned to function as a lawyer in a nation half free and half slave. Could the wrong answer to these questions have influenced the decision to grant or to deny him admission to

4 SMITH, supra note 2, at 95 (stating “[t]he Liberator [1845] . . . reported that Allen had 'received a classical education.'”).


6 If Allen were asked in 1844 about his views on slavery, it might have been difficult for him to answer, even before a liberal bar examiner. In 1844, Cassius M. Clay, a southerner, manumitted all of his slaves. In response, W.J. McKinney, the mayor of Dayton, Ohio, wrote to him to canvass Clay’s interest for the presidency. Cassius M. Clay, perhaps because of age, declined the invitation, but declared that he would cast his vote for Henry Clay, a slaveholding southerner. Clay’s lament, or perhaps his reformed liberal view on slaveholding, was that “[m]en never have and never will . . . think alike: all government is necessarily a sacrifice, to some extent, of individual will: that is the best government to each individual which fosters or allows the most of what individual believes to be conducive to his best interest.” Letter from Cassius M. Clay, to Niles’ National Register (Apr. 6, 1844), at 88.

How could Macon Bolling Allen safely answer any question which condemned slavery as opposed to his basic notions of justice and jurisprudence, when men like Cassius M. Clay, who had manumitted his slaves, continued to ask Americans to judge Henry Clay not as a slaveholder, but as a promoter of justice and jurisprudence for white Americans? Clay’s letter implicates the church in that “Mr. [Henry] Clay is a slave-holder, in a community where the whole Christian church of all denominations—the only professed teacher of morals among the people—are also slave holders. . . .” Id. Indeed, Cassius M. Clay could have gone even further in his remarks. In 1844, the Southern Baptist Convention was formed and “actually announced that the denomination was free ‘to promote slavery,’” making the subject of slavery appear moral. PAUL L. BRADY, A CERTAIN BLINDNESS: A BLACK FAMILY’S QUEST FOR THE PROMISE OF AMERICA 308-09 (1990). In fact, in 1787, “while the Constitution was being forged in Philadelphia, a [sic] small groups of black Christians in that city were pulled from their knees while praying in the segregated gallery of St. George’s Methodist Episcopal Church.” Id. at 310; see also Preamble and Articles of Association of the Free African Society, (Apr. 12, 1787) in CHARLES H. WESLEY, RICHARD ALLEN: APOSTLE OF FREEDOM 269-71 (1935) (the Free African Society was a black religious society that was formed to build its own churches).
the bar? Might Allen boldly have declared his intention to use the law to help emancipate his people from slavery, "to be a Reformer, a Re-maker of what man has made [and] a renouncer of lies . . . ?"7

What may have been difficult for Macon Bolling Allen to foresee in 1844 is clear to his legal progenies in 1994, the sesquicentennial anniversary of the black lawyer in America. In the words of Emerson, the black lawyer was determined "to see to it that the world [was] the better for [himself and his people] and to find [his] reward in the act."8

I. JUSTICE AND JURISPRUDENCE

The first known comprehensive book on jurisprudence written by blacks was the brainchild of black people. Written with the assistance of black lawyers and funded and influenced by black men and women, it was entitled, Justice and Jurisprudence: An Inquiry Concerning the Constitutional Limitations of the Thirteenth, Fourteenth, and Fifteenth Amendments.9 The book, authored by the Brotherhood of Liberty, was published in 1889, one hundred and two years after the United States Constitution was ordained, ninety-eight years after the first decision was issued by the U.S. Supreme Court,10 forty-five years after Macon Bolling Allen was admitted to the bar, and twenty-four years after John Swett Rock became the first black lawyer admitted to practice before the U.S. Supreme Court.11

The purpose of this Article is to acknowledge the entry of black lawyers into the jurisprudential matrix as jurisprudents, as well as law enforcers (litigators). A review of the legal literature by

7 Emerson, supra note 1. The pioneer black lawyer, who no doubt studied the classical commentaries of Blackstone, Kent, Wheaton, and other scholars of the day, had to be aware of the ongoing debate on the question of whether natural law, as a fundamental source of law, had "any meaning independent of the 'public acts' in which it appeared?" G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 679 (abridged ed. 1991). I believe that the only response that the pioneer black lawyer could have made to this inquiry was that a civilized nation had embodied natural right and natural law themes into the written Constitution in the same degree for both black and white people.

8 Emerson, supra note 1.


10 West v. Barnes, 2 U.S. (2 Dallas) 401 (1791).

11 See SMITH, supra note 2, at 101.
the great writers of modern times has failed to discover writings authored by or citing to black lawyers, or any writings that characterize the black lawyer as a jurisprudent. Since 1844, one is hard pressed to identify from hundreds of treatises, case books, legal histories, and law review articles on jurisprudence, any comprehensive treatment of the first principles advanced by black lawyers. It is also difficult to find any of their critical reviews of actions taken by the courts adverse to the emancipation of their people, even though black lawyers were important thinkers in the transformation of modern American constitutionalism and the common law.12

In 1841, the same year that Ralph Waldo Emerson called on man to “renounce everything which [was] not true to him,”13 and three years before Macon Bolling Allen became America’s first black lawyer, Augustus Comte found “no absolute contradiction between slavery and nature or slavery and Christianity.”14 Yet, with the discovery of America, scholar Abbé Raynal and his co-authors concluded that the discovery “had profoundly influenced the history of the world . . . . [T]he great question was whether this influence had furthered human progress or had only brought more rapid change.”15 Raynal may have been one of the authors whom the first black lawyers consulted, because “Raynal thought that slavery was contrary to nature and thus universally wrong.”16 While Raynal’s views may have helped to slow the slave trade in Europe, the slave traders in America renewed their interest in this enterprise.17 For Macon Bolling Allen and the other black lawyers

12 The Brotherhood of Liberty believed that “[t]he future solution of all race-problems in America must depend upon the learned and faithful exposition of the historical, political, constitutional, and common-law significance of the pregnant provisions and commandments of [the Thirteenth, Fourteenth and Fifteenth Amendments].” JUSTICE AND JURISPRUDENCE, supra note 9, at 437.

13 Emerson, supra note 1.


15 Id. at nn.24-25 (citing Guillaume-Thomas Raynal, Histoire philosophique et politique des établissements et du commerce des Européens dans les deux Indes (1781)).

16 Id. at 14.

17 In the eighteenth and nineteenth century, an estimated 500,000 Africans were captured from expeditions from Nantes, France. Recently disclosed documents reveal that “[i]n Nantes and elsewhere in Europe, the slave trade spawned its own economy. From 1707-1847, records show, 3,829 slaving ‘expeditions’ left from France alone . . . . One ship of slaves could yield up to three or four shiploads of coffee, sugar, indigo, cacao, cotton—produced by slave labor . . . .” Marlise Simons, Unhappily, Port Confronts its Past: Slave Trader, N.Y. TIMES, Dec. 17, 1993, at A4. “At Nantes, documents . . . convey how slave business operated . . . from what became known as ‘the triangular trade.’” (The same
soon to be admitted to the bar, the question was: Could "the great promise of America . . . be fulfilled without the abolition of slavery[?]"

In 1844, what Macon Bolling Allen saw occurring in America was the enforcement of heinous slave codes. Professor Kelly Miller of Howard University has written that the "African slave was introduced into this country as a pure animal instrumentality to perform the rougher work under dominion of his white lord and master. There was not the remotest thought of his human personality [and] his human capabilities were emphatically denied." Yet, in bondage, the African personality, unlearned in legal terms used in colonial courts, naturally conceptualized that its forced condition was wrong and fundamentally contrary to the principles of human dignity. The Abolitionists, who initiated the anti-slavery movement, understood this. The slaves, as witnessed by their ships carried European goods to Africa, exchanged them for slaves, took the slaves to the Americas and returned to Europe loaded with sugar, tobacco, coffee . . . and other tropical produce.)" Id. France banned slavery in 1817.

18 DAVIS, supra note 14, at 16.

19 See Appendix for extracts of American Slave Codes. See generally J.D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY (1837).

20 Kelly Miller, Education for Manhood, in MASTERPIECES OF NEGRO ELOQUENCE 445-446 (Alice Moore Dunbar ed., 1970). One leading early American historian states well the plight of slaves: "The negro race, from the first, was regarded with disgust, and its union with the whites forbidden under ignominious penalties." DAVIS, supra note 14, at 23 (quoting GEORGE BANCROFT, HISTORY OF THE UNITED STATES, FROM THE DISCOVERY OF THE AMERICAN CONTINENT 177 (14th ed. 1874)).


22 According to Charles H. Wesley, "the first abolition society was organized in Pennsylvania in 1775]." CHARLES H. WESLEY, RICHARD ALLEN: APOSTLE OF FREEDOM 8 (1935). In the mid 1850s, Macon Bolling Allen and Robert Morris, Sr., the nation's first and second black lawyers, may not have been totally convinced that the Abolitionists were absolutely committed to the emancipation of slaves, given the Abolitionists formalistic interpretation of the Constitution. Allen and Morris were no doubt aware of the Declaration of Sentiments of the American Anti-Slavery Society, adopted in 1833. The Declaration stated that "all . . . laws which are now in force, admitting the right of slavery, are . . . before God utterly null and void; being an audacious usurpation of the Divine prerogative . . . they ought instantly to be abrogated." Declaration of Sentiments of the American Anti-Slavery Society, Adopted at the Formation of Said Society, (proceedings of the Anti-Slavery Convention, Assembled at Philadelphia, Dec. 4-6, 1833) reprinted in RUCHAMES, supra note 21, at 81. While the Abolitionists made declarations against slavery, published
heroic acts to escape slavery,²³ declared themselves not to be instrumentalities of white masters, but equal beings. Though chained, they were always free, though their declared freedom was distilled in mind only.²⁴ The anti-slavery movement²⁵ helped confirm the original declaration of the slaves that no chains or laws could enslave their nature as free persons.²⁶

pamphlets, and preached against it, they also supported the principle solemnly advanced by slaveholders: that Congress under the Constitution, did not have power to interfere with states' rights to authorize or permit slavery. The 1839 Declaration of Sentiments "unanimously recognise[s] the sovereignty of each State, to legislate exclusively on the subject of the slavery which is tolerated within its limits [and] concede[d] that Congress under the present national compact, has no right to interfere with any of the slave States, in relation to this momentous subject." Id. at 82. The power of Congress, they declared, reached only to suppress the "domestic slave trade between the several States, and to abolish slavery in those portions of our territory which the Constitution has placed under its exclusive jurisdiction." Id.

²³ See generally JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 205-13 (1966); WILLIAM STYRON, THE CONFESSIONS OF NAT TURNER (1967).

²⁴ As I previously have written, "Afro-Americans enslaved and unrecognized as human beings rejected the contemporary view of their state of legal non-existence and chose to 'stand the storm' and 'walk together.' They buried the word 'weary.' The concept of freedom and liberty remained poised 'in essence' but the hope that freedom and liberty would vest 'in being' always remained. Hence, for the early [black] poets, the concept of freedom was not attainable on earth: Freedom existed 'over me' and the poet made it clear that the Afro-American symbolically chose the grave over slavery for it was only with their God that they could partake of freedom." J. Clay Smith, Jr., "The Social Dynamics of Afro-American Poetry: An Evaluation," presented at the Sun Gallery, Washington, D.C. (Feb. 26, 1981), at 4 (on file with author). See, e.g., Oh, Freedom, in SONGS OF ZION 102 (1981) (United Methodist Hymnal). See also Lawrence W. Levine, Slave Songs and Slave Consciousness, in AMERICAN NEGRO SLAVERY: A MODERN READER 153, 168 (Allen Weinstein & Frank Otto Gatell eds., 2d ed. 1973).

²⁵ See generally WRITINGS AND SPEECHES OF ALVAN STEWART ON SLAVERY (Luther Rawson Marsh ed., 1969). In 1835, Stewart stated, "We, even we, white-skinned Republicans, appear to be on the eve of losing our rights as white men, for having, from the deepest impulses of humanity, become the slave's organ, to explain to an unfeeling world the wrongs inflicted upon him." Id. at 53.

²⁶ The authors of JUSTICE AND JURISPRUDENCE would have been familiar with the poetry of George Moses Horton: "His first book Poems of a Slave, appeared in 1829, and other books followed until 1865." ROBERT THOMAS KERLIN, NEGRO POETS AND THEIR POEMS 25 (1923). The early black bards can be consulted to ascertain the philosophy of slaves who opposed slavery and supported liberty. Horton's poem, which follows in part, is instructive about how slaves called for liberty under their own powers of thought and imagination:

Alas! and am I born for this
To wear this slavish chain?
Deprived of all created bliss,
Through hardship, toil, and pain?
How long have I in bondage lain
And languished to be free!
Alas! and must I still complain,
Deprived of liberty?
Though slavery was an unnatural and unsatisfying condition, it flourished in the ancient world. As David Brion Davis, the author of *The Problem of Slavery in Western Culture* states, "there had been no moral influence to overcome the specious arguments of Aristotle, who had confused nature with the actual institutions of the city-state, and had provided sophisms for all future apologists for slavery."²⁷ The moral force of state supported slavery and the powerful pens of scholars like Augustus Comte, "found profound meaning in Aristotle's theory that some men are slaves by nature."²⁸ Yet, even Comte was no absolutist on the permanence of slavery. He believed that as "society progressed through monotheistic and metaphysical states," it became useless, and "reversed the course of progress . . . of a rational society."²⁹

From his earliest days, the black lawyer embraced principles of equality and particularly was aware "of the American paradox: that the land of the free was the home of the slave; that in practice, equality meant equality among propertied white men; and that constitutional liberty extended only to whites."³⁰ *Justice and Jurisprudence* was the work of the Brotherhood of Liberty, a group of black persons in Baltimore, Maryland, led by Reverend Harvey Johnson.³¹ The group was formed on June 2, 1885.³² Ironically, one purpose of this group was to fight against "restrictions . . . prohibiting blacks from becoming members of the Maryland bar."³³ In 1885, as a direct result of the agitation of the Brotherhood of Liberty, this purpose was realized when Everett J. Waring was admitted to the Maryland bar after his graduation from Howard University's law school in June, 1885.³⁴

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Come, Liberty! thou cheerful sound,
Roll through my ravished ears;
Come, let my grief in joys be drowned,
And drive away my fears.

Id. at 26.

²⁸ Id. at 20.
²⁹ Id.
³² Id. at 7.
³³ SMITH, *supra* note 2, at 143.
³⁴ Id.
purpose of the Brotherhood of Liberty, one that would be profoundly more difficult, was "to crusade against denial of liberty according to race," and to "use all legal means within [their] power to procure and maintain [their] rights as citizens of [their] common country."

Reverend Harvey Johnson and Everett J. Waring, recognizing that "the Negro was [considered] an inferior being in America," concluded that "[i]f he was to progress, there would have to be marked changes in how he and his rights were viewed by the nation and its judges." Reverend Johnson's aim was to influence critical thinking about race through the use of a book: *Justice and Jurisprudence*.

In 1886, Everett J. Waring, one year out of the Howard University School of Law, wrote an article titled, *The Judicial Function in Government*, the first scholarly article by a black lawyer in the State of Maryland. The article "expressed skepticism about the judicial power exercised in *Dred Scott v. Sandford* because such judicial power had ordained white power as superior . . . ." With black lawyers in their group, the Brotherhood of Liberty was prepared to invade the matrix of jurisprudential thought to com-

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35 Id.
38 JUSTICE AND JURISPRUDENCE, supra note 9. In the Preface, the Brotherhood of Liberty desired to offer a "[mature] reflection" on matters "involved in the much-mooted race-question." Id. at i. Rev. Harvey Johnson and Everett J. Waring knew that "[n]o other profession does the book . . . play a greater role than in . . . law . . . . Yet, so little is known about the development of American legal literature and the individuals who have contributed to its development." ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 1 (1990). This is particularly true when it comes to early black lawyers and black jurisprudents. In 1889, they, like Professor Christopher Columbus Langdell, believed that "[l]aw [was] a science, and all the available materials of that science are contained in printed books." Walter Wheeler Cook, *Law and the Modern Mind: Legal Logic*, in ESSAYS ON JURISPRUDENCE FROM COLUMBIA LAW REVIEW 380, 381 n.33 (1963) (quoting Christopher C. Langdell, Address at the Celebration of Harvard University (Nov. 5, 1887), in 3 L.Q. Rev. 123, 123-24 (1887)). JUSTICE AND JURISPRUDENCE, and the language and legal culture represented in it "originate[d] in a popular spirit [and] a common conviction of right." Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, in ESSAYS ON JURISPRUDENCE FROM COLUMBIA LAW REVIEW 281 (1963). Its original purpose was to counter the science of words and phrases in other books and writings which subjugated people of color.
39 2 AFRICAN METHODIST EPISCOPAL CHURCH REV. 437 (April 1886).
bat racist thinking and to make a "sober investigation and dissection" of the court opinions "which [had] produced or suffered the... obscuration of the great political truths of the [Thirteenth,] Fourteenth, [and Fifteenth] Amendment[s]." Members

41 JUSTICE AND JURISPRUDENCE, supra note 9, at 42. The book's authorship was simply "Brotherhood of Liberty." The book gives no reason to question the authorship of the Brotherhood of Liberty. See WILLIAM M. ALEXANDER, supra note 31, at 4 (listing life members). One scholar claims that the Brotherhood of Liberty wrote only the first 43 pages, and that John Henry Keene, a white lawyer, wrote the remaining 535. Elaine K. Freeman, supra note 37, at 55. Speculation even surrounds the authorship of the 43 pages attributed to the Brotherhood of Liberty. Freeman concludes that only Rev. Harvey Johnson wrote the first 43 pages of the book. Id.

Freeman's assumptions and conclusions are subject to question given the involvement of several black lawyers in the Brotherhood of Liberty and given the fact that a review of the book gives no indication that the Brotherhood of Liberty did not author the book. T.M. Wakeman, Justice and Jurisprudence: An Inquiry Concerning the Constitutional Limitations of the Thirteenth, Fourteenth, and Fifteenth Amendments, 15 SCIENCE 16 (Jan. 10, 1890) (book review). The reviewer notes:

That this publication should appear anonymously is a matter to be regretted. The plain avowal of a public purpose by every American citizen is his prerogative and duty. If he is a member of the bar, it is still more a duty to relieve the country from an error of the courts affecting grave public interests, by honestly... explaining the error, and indicating the remedy... We have entirely too much unhealthy private grumbling, and too many secret societies seeking to do covertly what no American need be ashamed of. We believe that the colored people back of this movement would do better to give their names...

Id. at 17.

It is likely that Everett J. Waring, one of the colored people behind this movement, played a key role in the authorship of JUSTICE AND JURISPRUDENCE. Waring was present at the first general meeting of the Brotherhood of Liberty which convened on October 19, 1885. He was a member of a special committee that reviewed actions of the Board and recommended legal actions. Other black lawyers from around the nation, such as William E. Matthews (from Washington, D.C.), and John H. Butler, an 1873 Howard University law graduate, attended the first general meeting. Butler was one of the speakers at this meeting. ALEXANDER, supra note 31, at 13. William Henry Richardson, who joined the Howard University law faculty in 1890 after JUSTICE AND JURISPRUDENCE was published, also could have worked on the manuscript. Richardson graduated from Howard University's law school in 1881 and was listed as an active participant in the Brotherhood of Liberty prior to the publication of the book. Id. at 23. Other black lawyers were aware of the formation of the Brotherhood of Liberty, including Richard T. Greener, an 1876 graduate of the University of South Carolina Law School, and Judge George Lewis Ruffin, who in 1869 was Harvard University's first black law graduate, and who, in 1885, sat on the District Court of Boston. Both Greener and Ruffin sent letters which were read during the October meeting "regretting their inability to be present." Id. at 8; see SMITH, supra note 2, at 33, 46-47, 221.

Further evidence supports the involvement of Everett J. Waring and other black lawyers in the writing of JUSTICE AND JURISPRUDENCE, because in 1886 Waring demonstrated his gift for legal scholarship in his article, The Judicial Function in Government, supra note 39, at 437. This article was written three years before JUSTICE AND JURISPRUDENCE was published. In 1886, a second Howard University law graduate, Joseph S. Davis, had
of the Brotherhood of Liberty, most of whom were born under the yoke of slavery, declared a “desire [for] a comprehensive review of the jurisprudence of those motley bodies of legists whose decisions . . . gave them ‘free and untrammeled authority to pass rules and regulations under State laws’ for the conduct of the public business [which] constitute the practical, scientific, philosophic, historical, and commercial judicature of civil rights in America.” 42 The Brotherhood of Liberty was interested in “a philosophic account of the jurisprudence of race-prejudice, and of

become a member of the Maryland bar and an active member of the Brotherhood of Liberty, while even perhaps, he was in law school or months after he received his law degree. By November of 1886, he had already begun to express his views on political themes. J.S. Davis, Lawyer Davis’ Criticism, N.Y. FREEMAN, Dec. 4, 1886, at 2; ALEXANDER, supra note 31, at 19; SMITH, supra note 2, at 144. Therefore, it is plausible that Waring, Davis, Butler, Greener, Richardson, Matthews, and Ruffin wrote and/or advised Rev. Harvey Johnson and the Brotherhood of Liberty on the preliminary concepts to be covered in the book, or the substance and meaning of the drafts of JUSTICE AND JURISPRUDENCE. This is particularly true with respect to Waring, who served for a short period as president of the Brotherhood of Liberty (1887), and Davis who in 1887, was elected to the Board. ALEXANDER, supra note 31, at 20. Judge Ruffin’s participation in this venture was of short duration. J. Gordon Street, Death of George L. Ruffin, N.Y. FREEMAN, Nov. 27, 1886, at 1.

JUSTICE AND JURISPRUDENCE was published following a request by The Brotherhood of Liberty that “Their Counsel” research and answer the question of “whether the Fourteenth Amendment is sovereign, or whether citizen-kings in America have prerogatives superior to those dictates of reason and justice which it embodies.” JUSTICE AND JURISPRUDENCE, supra note 9, at 40, 42. It (the Brotherhood) demanded “to know whether there is not to be a grandeur solution of the problem of citizenship in America than the labor-kings, the public-servants, and the labor-classes.” Id. Given The Brotherhood of Liberty’s determination to advance counterthoughts on constitutional interpretation relative to black people, it is not likely that it would have left all the fine points of this groundbreaking enterprise solely in the hands of Keene, although he apparently was a friend of the black community. SMITH, supra note 2, at 179 n.176. Everett J. Waring was “counsel for the Brotherhood since its organization.” ALEXANDER, supra note 31, at 43.

It is not conjecture; if black lawyers and black people had not inaugurated the idea or had not, written and contributed to JUSTICE AND JURISPRUDENCE, it is unlikely that such a volume would have been completed for some years to come. In this context, upon an earlier time, the following statement of Professor Duncan Kennedy has real significance: “It would be farfetched to argue that the race of these lawyers was irrelevant to their choice of subject matter, or that the black civil rights cause would have evolved in the same way had all of the lawyers involved been white.” Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 DUKE L.J. 706, 729. While there have been responses, pro and con, to Professor Kennedy’s statement, I believe that JUSTICE AND JURISPRUDENCE speaks for itself, and that the subject matter of this discourse is the product of black lawyers and black laymen, perhaps in cooperation with Keene, or vice versa. Compare Richard A. Posner, Duncan Kennedy on Affirmative Action, 1990 DUKE L.J. 1157, 1161 (con) with Jerome McCristal Culp, Jr., Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy, 1992 DUKE L.J. 1095, 1102-1103 n.20 (pro).

42 JUSTICE AND JURISPRUDENCE, supra note 9, at 42.
the history of its lineal descent from the ancestral jurisprudence of slavery."\(^\text{43}\)

II. THE CONSTITUTION AND SLAVERY

The Brotherhood of Liberty understood that the doctrine of equality was planted in America as a white theme, and that "[t]he doctrine of inequality was originally transported to, and planted upon . . . [American] soil in the form of slavery."\(^\text{44}\) There can be little doubt that the black lawyer and black lay activists, such as Frederick Douglass, believed in natural law or natural rights themes.\(^\text{45}\) Although no known black people were involved in the constitutional debates preceding the adoption of the Constitution, had there been, it is not likely that they would have supported its slave provisions.\(^\text{46}\)

Under the terms of the Constitution, the slave trade or "migration and importation" provision was conferred by Article 1, Section 9; the fugitive slave provision, by Article 4, Section 2; the insurrection provision, by Article 1, Section 8; and the three-fifths provision, by Article 1, Section 2. The slave trade provision authorized "the migration or importation of such persons as any of the

\(^{43}\) Id. Even after the great postulates of the Thirteenth, Fourteenth and Fifteenth Amendments were conferred, their confirmation was doubted by the Brotherhood of Liberty because of the continued presence "of tyranny and power" and the "spirit of dominion masquerading in America under the guise of a permanently privileged class . . . ." The "badge of servitude" seemed unwilling to die. Id. at 439-40. See generally \textsc{Mark V. Tushnet, The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest} (1981).

\(^{44}\) \textsc{Justice and Jurisprudence, supra note 9, at 464.}

\(^{45}\) Natural law and natural right themes, although different, "typically run together." \textsc{White, supra note 7, at 676.} During the Marshall Court, natural law and constitutional law appear to have been interconnected. The reasons for this may be debateable. However, scholars have reasoned that the tie was rooted in the principles of the American Revolution, which "had given a practical meaning to natural rights principles: natural law had evolved from its religious origins to a secular principle of late-eighteenth-century political theory, encompassed in the idea of the inalienable rights of man." Id. at 675. See also \textsc{William E. Nelson, The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513 (1974).}

\(^{46}\) For example, Frederick Douglass stated, "I . . . deny that the Constitution guarantees the right to hold property in man." Frederick Douglass, Speech, \textit{The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?}, in 2 \textit{The Life and Writings of Frederick Douglass: Pre-Civil War Decade, 1850-1860, supra note 3, at 468.} See also \textit{Frederick Douglass, Position of the Government Toward Slavery, in 3 The Life and Writings of Frederick Douglass: Pre-Civil War Decade, 1850-1860, supra note 3, at 104, 108} (Douglass states that "[i]n a moral and humane point of view, the conduct of our Government towards the few slaves coming within their power, would be a disgrace to savages."
States now existing shall think proper to admit, shall not be prohibited prior to the year 1808.” Although the word “slavery” was not used in the Constitution, it was understood that the words “migration and importation” meant slavery. For the majority of the Framers, the slave trade “could be justified on the principles

47 Between 1849 and 1860, Frederick Douglass switched his views on whether the Constitution represented a pro-slavery document. In 1849, the progressive Douglass believed “as I have ever . . . , that the original intent and meaning of the Constitution (the one given to it by the men who framed it, those who adopted, and the one given to it by the Supreme Court of the United States) makes it a pro-slavery instrument - such . . . [as] one . . . I cannot bring myself to vote under, or swear to support.” FREDERICK DOUGLASS, The Constitution and Slavery, in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: EARLY YEARS, 1817-1849 352-53 (Philip S. Foner ed., 1950). In a second statement in 1849, Douglass stated, “What . . . we would be understood to mean now, is simply this—that the Constitution of the United States, standing alone, and construed only in the light of its letter, without reference to the opinions of the men who framed and adopted it, or to the uniform, universal and undeviating practice of the nation under it, from the time of its adoption until now, is not a pro-slavery instrument.” Id. at 361-62. Here, Douglass, without reference to the opinions of the slaveholders who would control the states in which slavery was practiced, rejected the real subtext of the Framers. In a formalistic manner, Douglass advanced a view that the authority to enslave was beyond the power of the states to impose under the “letter” of the Constitution.

In 1860, Douglass, again using a textual analysis, argued that the nation and the courts should close its eyes to the pro-slavery debates leading to the adoption of the Constitution: “These debates form no part of the original agreement. I repeat, the paper itself, and only the paper itself, with its own plainly-written purposes, is the Constitution.” DOUGLASS, supra note 46, at 467, 469. In light of the foregoing, it is curious why Douglass ignored the Supreme Court’s treatment of the constitutional debates under the slave provisions, unless he rejected the power of the Court to interpret not only the Constitution, but the meaning of its content drawn from antecedent debates. This position, if it were a position, would have been uncharacteristic of Douglass’s usually brilliant commentaries. See, e.g., WHITE, supra note 7, at 681. In contrast, the renowned historian, John Hope Franklin, has stated, “I don’t believe we know enough about our founding fathers and how they implanted racist doctrines in our Constitution and practiced those doctrines in our early history. They established the doctrines in such a way that it would take centuries to dismantle.” Frank L. Matthews, The Genius of John Hope Franklin: America’s Truly Great Historian, 10 BLACK ISSUES IN HIGHER EDUC., No. 23, at 16.

Although Justice Thurgood Marshall, the first black Supreme Court justice, and Frederick Douglass were men from the same philosophical mold, it appears that Marshall did not fully conform with Douglass’ later view that the Constitution was color-blind. Marshall determined that the Constitution was flawed because the “Constitution did not condemn slavery; rather the Constitution was defective at the start.” Resolutions in Tribute of the Late Justice Thurgood Marshall, 114 S. Ct. CXIX, CXXVII (1993) (citing Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 HARV. L. REV. 1, 2, 5 (1987). However, both Marshall, the realist, and Douglass, the formalist, held the same view that the Constitution should be interpreted as a living document, a living fact, one capable of enlarging the fundamental themes of citizenship of the slave progeny. See Thurgood Marshall, The Constitution: A Living Document, 30 HOW. L.J. 623 (1987); FREDERICK DOUGLASS, The Constitution and Slavery, supra at 361, 363 (“The Constitution is not an abstraction. It is a living . . . fact, exerting a mighty power over the nation of which it is the bond of Union.”).
of religion, humanity and justice; for certainly to translate a set of human-beings from a bad country [Africa], to a better country [America], was fulfilling every part of these principles."  

If racial subjugation entered the text of the Constitution as a condition of forming the Union, one is inclined to wonder whether the provision facilitating the termination of slave importation by 1808 directly or indirectly incorporated a natural right exception in the Constitution. Specifically, after 1808, Africans would be excepted from the abuses of slavery and would be able to make claims for justice, be immune by law from slave-import commerce and from slavery per se.  

No case ever tested the exception advanced here. In 1808, the demand for the continuation of slavery in the South did not end. Because of "the introduction of the cotton-plant into the Southern States," the economic interest in the engine of slavery vigorously pushed on. This single act, and its "cultivation as an article of profitable commerce, increased the demand for laborers of African birth or descent, who . . . were supposed to be the best adapted, if not alone able, to bear the exposure incident to that species of cultivation."  

No doubt, the Brotherhood of Liberty was aware that not all white people favored slavery during debate of the slave provisions at the constitutional convention. For example, George Mason

48 Should One Experiment with Liberty, or Tamper with Slavery? Rawlins Lowndes and Edward Rutledge Debate in the South Carolina Legislature, in 2 THE DEBATE ON THE CONSTITUTION 19, 20 (Bernard Bailyn ed., 1993). The justification for the domestic slave commerce continued until the Civil War. Hence, the early black lawyers, admitted to the bar prior to the Civil War, were faced with a view that their African ancestry was from a "bad country" and that the slave trade which uprooted Africans from their homeland fulfilled all that was good. After adoption of the Constitution, such logic would shape the principles of religion, humanity, and justice, a logic which the black lawyer rejected. See generally SMITH, supra note 2.  

49 Arguably, God's law, rooted in natural law and referred to in "abstract principles of justice, humanity, [and] tolerance," would enter in full into American culture, no doubt to be questioned by those who believed that no justice, human recognition or racial tolerance would bind the nation without an expressed declaration and grant of power to protect blacks from positive, municipal or public law "by which was meant written law." WHITE, supra note 7, at 677.  

50 One wonders whether Africans were viewed as being outside the protection of natural law. Black people may have been told by a court or political body that to the extent they were subjugated to slavery and considered as the property of their white slaveholders, they were unable to roam the land by virtue of their racial characteristics. See infra, Appendix, for extracts of American Slave Codes.  

51 WILLIAM ALEXANDER DIER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 267 (1856).  

52 Id.
thought the allowance of the slave trade provision to be "a fatal section" in the Constitution. Mason believed that "the augmentation of slaves weaken[ed] the States; and that such a trade [was] diabolical in itself, and disgraceful to mankind." On the other hand, James Madison argued for Union over Justice because the "Southern States would not have entered into the Union of America, without the temporary permission of that trade." Madison tailored his view by reference to the Articles of Confederation which, he argued, contained no limitation on the slave trade. At least, Madison claimed, under the present Constitution, "an end may be put to [the slave trade] after 20 years," a term limit that was viewed by some with much skepticism.

III. HEAVEN-BORN JUSTICE

In 1850, just as the new Fugitive Slave Act became law, six

53 George Mason and James Madison Debate the Slave-Trade Clause, in 2 THE DEBATE ON THE CONSTITUTION, supra note 48, at 706.
54 Id.
55 During preratification debates, the question whether the great object of Government was justice or Union loomed large. However, what justice for the slave was lost during the debate on whether slaves constituted property for purposes of taxation or persons for purposes of Congressional representation. See Patrick Henry Elaborates His Main Objections, and James Madison Responds, in 2 THE DEBATE ON THE CONSTITUTION, supra note 48, at 673; THE FEDERALIST No. 54 (James Madison), in 2 THE DEBATE ON THE CONSTITUTION, supra note 48, at 196.
56 George Mason and James Madison Debate the Slave-Trade Clause, supra note 53, at 707.
57 Id.
58 David Ramsay of South Carolina was one such skeptic:

Though Congress may forbid the importation of negroes after 21 years, it does not follow that they will. On the other hand, it is probable that they will not. The more rice we make, the more business will be for their shipping: their interest will therefore coincide with our's. Besides, we have other sources of supply—the importations of the ensuing 20 years, added to the natural increase of those we already have, and the influx from our northern neighbours, who are desirous of getting rid of their slaves, will afford a sufficient number for cultivating all the lands in this state.

"Civis" [David Ramsey] to the Citizens of South Carolina, in 2 THE DEBATE ON THE CONSTITUTION, supra note 48, at 152 (emphasis added). In accordance with the constitutional provision that the importation of the slave trade end in 1808, Congress banned expeditions to Africa that could not be completed before January 1, 1808. Other provisions prohibited coastwide trade, if such trade was carried on ships of less than forty tons. John Hope Franklin reported that "there was little real reason for rejoicing" after Congress acted on the measure because "from the beginning, the law went unenforced." He further stated that the first underground railroad was not that carried on by the abolitionists to get Negro slaves to freedom but the one carried on by merchants and others to introduce more Negroes into slavery." JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 154 (3d ed. 1967).
59 See, e.g., SMITH, supra note 2, at 96, 98 (summarizing Robert Morris's legal de-
years after Macon Bolling Allen’s admission to the bar, and six
years before the Supreme Court’s *Dred Scott* decision, George
Bancroft, an American historian, released his fourteenth edition of
the *History of the United States*. David Brion Davis reported that
Bancroft found nothing peculiar about the institution of slavery
and that “unlike [Henri Alexandre] Wallon, [an important French
scholar of the time, Bancroft] found no continuing contest be-
 tween liberty and bondage in the ancient world.” Bancroft’s po-
 sition is likely to have disheartened Macon Bolling Allen and Rob-
 ert Morris, Sr., America’s second black lawyer admitted to the
Massachusetts bar in 1847. Bancroft held an even more startling
view that slavery “might be planted in other promised lands with-
out blighting their mission . . . [as] extraneous” to America’s
mission. Allen no doubt agreed with Wallon in that slavery in
America was an act of violence, contrary to the teachings of
Christ, and a “brusque departure from the normal development of
humanity.”

Members of the Brotherhood of Liberty clamored “for a liberal
and spiritual construction of [the] broad charter of freedom.” They believed that they were in the society as free persons before
this state of violence and struggle was constitutionally redefined by
“seiz[ing their] rights.”

Freedom is a natural state, and the Brotherhood of Liberty viewed “American civil rights [as] intimately associated with man’s
true nature, his real inward essence, as it stands correlated to the
physical.” They viewed the Anglo-Saxon’s march toward the ul-
timate truths in the Declaration of Independence and the Consti-
tution as events that “postulated man’s likeness to God as a fun-

dence of the slave Shadrack in Boston).

60 DAVIS, supra note 14, at 21.
61 Id. at 21-22.
62 Contemporary scholars have written on the subject of violence and law. See gener-
ally Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and
63 DAVIS, supra note 14, at 19.
64 JUSTICE AND JURISPRUDENCE, supra note 9, at 428.
65 Id.
66 Id. at 421.
67 It has been written that:

When Independence was declared at Philadelphia in 1776, America was yet a
unit in the possession of slaves, and when the Constitution of 1787 was or-
dained, the institution still existed in every one of the thirteen States save Massa-
chusetts only. True its decay had begun where it was no longer profitable, but
The Brotherhood of Liberty believed that the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the "three rolls . . . lodged in the ark of the covenant of civil liberty," was a blessing from God, an answer to the prayers of the slaves, and a sign that God had delivered them from the Union's bondage. They believed "that theological influence" passed into the text of the amendments, often called the "Negro's charter of liberty." However, they must have wondered whether jurisprudence was capable of recognizing the humanity of contemporary black people and "whether God's justice [could] be denied [to] any race which bears His image."

The Brotherhood of Liberty was certain that the ratification of the emancipatory amendments to the Constitution "testified to [America's] unflinching confidence in the celestial origin, and the final triumph upon earth, of Heaven-born Justice."

IV. BLACK PEOPLE: PRIMA FACIE CITIZENS

In *Justice and Jurisprudence*, the members of the Brotherhood of Liberty asserted a belief that after the abolition of slavery in 1865 and the ratification of the Fourteenth Amendment in 1868 that nothing should have stood in the way of black people to claim all rights, privileges and immunities vested in the Constitu-

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68 JUSTICE AND JURISPRUDENCE, supra note 9, at 422.
70 JUSTICE AND JURISPRUDENCE, supra note 9, at 363.
72 JUSTICE AND JURISPRUDENCE, supra note 9, at 499.
73 Id. at 503. Black lawyers' "search after the primal truth of Providence embodied in these [emancipatory] amendments" has been "long, obscure, continuous, laborious, and unremitting." Id. at 450. Among the first principles advanced by black jurisprudential and unceasing that it was the "will of the Supreme Being . . . that all human liberties be recognized." Id. at 452. They believed that "jurisprudence should perceive that the perpetual struggle for the establishment of the universal equality of mankind is in accordance with the decree of the Almighty," id. at 445, and that the "postulate of Providence culminated[ed] in the Fourteenth Amendment." Id. at 431.
tion. They believed that the rights and privileges of free persons of color had been decided by the U.S. Attorney General in 1862, three years prior to the abolition of slavery and six years prior to the ratification of the Fourteenth Amendment.

In 1862, Edward Bates, the U.S. Attorney General, rendered an opinion on the question whether "[f]ree men of color, if born in the United States, are citizens of the United States; and, if otherwise qualified, are competent, according to the Acts of Congress, to be masters of vessels engaged in the coasting trade." Attorney General Bates answered this question affirmatively. In 1889, this opinion was important to the Brotherhood because black citizens, then free by law, continued to face limitations on rights available to white citizens. Hence, they pointed to Attorney General Bates' opinion to demonstrate that the law interpreted by the courts limiting the civil rights of people of color after emancipation was contrary to the Constitution.

In 1889, the position of the Brotherhood of Liberty on the question of citizenship was the same as that issued by Attorney General Bates in 1862: A free person was not legally incapacitated to be a full citizen of the United States because of his color. Further, the Brotherhood of Liberty opined that with the passage of the Fourteenth Amendment, dual citizenship eliminated any national or local distinction between coloreds, mixed bloods and blacks of pure-blooded African ancestry. It believed that, under the Fourteenth Amendment and Attorney General Bates' opinion, "every person born in the country is at the moment of birth, prima facie a citizen," protected as such by the national govern-

74 The Thirteenth Amendment became part of the Constitution on December 31, 1865.
76 JUSTICE AND JURISPRUDENCE, supra note 9, at 142.
78 The Fourteenth Amendment "was designed primarily to protect the negro race in their newly acquired rights and privileges." CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 145 (1930) (footnote omitted).
79 Citizenship, 10 Op. Att'y Gen. 382, 394 (1862). General Bates's opinion did not answer the question of "[w]hether or not it is legally possible for a slave to be a citizen." Id. at 397; Frederick Douglass answered the question in 1853:

By birth, we are American citizens; by the principles of the Declaration of Independence, we are American citizens; ... by the facts of history, and the admissions of American statements, we are American citizens; by the hardships and trials endured; by the courage and fidelity displayed by our ancestors in defending the liberties and in achieving the independence of our land, we are American citizens. In proof of the justice of this primary claim, we might cite
Hence, in *Justice and Jurisprudence*, the Brotherhood of Liberty argued that no state or political group could deny to the black race any right, privilege or immunity possessed by white citizens; if they did, “the burden of proving [the] disfranchisement,” solely on the basis of “race or color, or any other accidental circumstance,” fell on those who denied rights, privileges or immunities.81

In 1889, it should have been even more reasonable to persuade judicial and public forums of the substance that Attorney General Bates’ opinion: “In every civilized country the individual is born to duties and rights, the duty of allegiance and the right to protection; and these are correlative obligations, the one the price of the other, and they constitute the all-sufficient bond of union between the individual and his country; and the country he is born in is prima facie, his country.”82

*Justice and Jurisprudence* claimed that black people possessed equal political status in the nation because as citizens they were members of the body politic.83 Yet, an existing class of whites believed that the incidental rights of citizenship passed down by blood and were secured by descent, a view naturally rejected by black lawyers. The black lawyer believed, as did Attorney General Bates, “that citizenship . . . never ‘passes by descent.’ It is as origi-
nal in the child as it is in his parents. It is always either born with him or given to him directly by law."

A first principle of the Brotherhood of Liberty was that the attributes of citizenship were considered *sine qua non* to birth. Yet, racism posed a more serious question, one that would haunt the nation for years to come: Shall the nation carve out a disqualifying exception to naturally born citizens of African descent on race alone, justified on the ground that persons of "African descent be so incompatible with the fact of citizenship that the two cannot exist together?" The end of Reconstruction partially answered that question. In the South, being black was incompatible with citizenship, and some believed that being black disqualified the colored race from all elements of justice. This disqualification is said to have been advanced by the creation of "false historical beliefs," beliefs that "presented the [Negro] as a degraded being who has no rights that need be respected."

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84 Citizenship, *supra* note 79, at 399.
85 *Id.* at 398. The white underclass, though many chose to ignore it, was at one time subjugated to upper class white people because in some southern states, though free and without land, a white man could not vote. *Id.* at 402. In 1856, major scholars, probably read by black lawyers in the New England states, acknowledged that "[n]o definition of the character of a citizen is contained in the Constitution of the United States." *Duer, supra* note 51, at 297. However, it also was determined that no general guarantee granted for privileges and immunities of citizens of the several states existed under Article IV, Section II of the Constitution. Since the states conferred citizenship only "upon the highest classes of society," not even "free negroes and mulattoes are . . . citizens as were contemplated by the Article in question, inasmuch as . . . the Constitution does not authorize any but 'white' persons to become citizens of the United States . . . ." *Id.* at 298. While no expressed presumption against free persons of color is stated in the Constitution, it was written that the Constitution created "a presumption that no State had made citizens of persons of any other color, one that "will stand until repelled by positive testimony." *Id.* (footnotes omitted).

86 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 591-601 (1988). For example, mob violence was used to run black Republicans from office. Some of them, like William H. Foote of Yazoo City, Mississippi, a black tax collector, was lynched in 1883. *Id.* at 591. Once the South was given a free hand and federal troops were withdrawn, "a South Carolina writer predicted early in 1877, they would 'go so far as they dare in restricting colored liberty . . . without actually reestablishing personal servitude.'" *Id.* at 593. See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 691-92 (reprint 1973); T. HARRY WILLIAMS ET AL., A HISTORY OF THE UNITED STATES [SINCE 1865] 120-21 (1960), for background leading to the agreement.

87 Historical Beliefs Determine Racial Attitudes, 22 NEGRO HIST. BULL. 74 (Jan. 1959). See also FREDERICK DOUGLASS, *Why is the Negro Lynched?, in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER, supra* note 3, at 491, 500-01, where Douglass talks about falsifications about the Negro that denied him justice:

You will remember that during all the first years of reconstruction, and long after the war, Negroes were slain by scores. The world was shocked by these
V. JUSTICE AND JURISPRUDENCE: POST-RECONSTRUCTION

In 1883, six years after federal troops were withdrawn from the South and seven years before the publication of Justice and Jurisprudence, Frederick Douglass described Post-Reconstruction as follows:

Peace with the old master class has been war on the Negro. As the one has risen, the other has fallen. The reaction has been sudden, marked, and violent. It has swept the Negro from all the legislative halls of the Southern States, and from those of the Congress of the United States. It has, in many cases, driven him from the ballot box and the jury box.\(^{88}\)

Several opinions of the Supreme Court between 1872-89, the period just prior to the publication of Justice and Jurisprudence, conflicted with the aspirations of the slave progeny. Acts of Congress, aimed at enlarging the social and political rights and protection of the slave progeny, were declared unconstitutional.\(^{89}\) Black murders, so that the Southern press and people found it necessary to invent, adopt and propagate almost every species of falsehood to create sympathy for themselves, and to formulate excuses for thus gratifying their brutal instincts against the Negro . . . When a black man's language is quoted, in order to belittle and degrade him, his ideas are often put in the most grotesque and unreadable English . . . .


\(^{89}\) See, e.g., POLITICAL CASES. United States v. Reese, 92 U.S. 214 (1876) (holding act of Congress making it a crime to obstruct any citizen from voting unconstitutional); JURY CASES. Strauder v. West Virginia, 100 U.S. 303 (1879) (holding state law mandating jurors be white people unconstitutional under the Fourteenth Amendment); Virginia v. Rives, 100 U.S. 313 (1879) (finding Virginia jury administration statute did not violate the Fourteenth Amendment when two blacks, indicted for murder, were, on request, denied proportional race representation on the grand jury.); Neal v. Delaware, 103 U.S. 370 (1880) (applying principles decided in both Strauder and Rives). The black defendant was spared from an order of execution by the Court because the facts demonstrated that "although its colored population exceeded twenty thousand in 1870, and 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and [the] laws of the United States." (emphasis added). See B. Frank Duke, The Negro Before the Supreme Court, 66 ALBANY L.J. 238 (1904); Bush v. Kentucky, 107 U.S. 110 (1882).
America's mood was somber.\textsuperscript{90}

For blacks, one consequence of Post-Reconstruction was the reversal of social circumstances and political fortune, which caused the Brotherhood of Liberty to particularly question cases like \textit{Hall v. DeCuir}.

Hall was one of the first Supreme Court cases reversing the forward era of Reconstruction.

In 1869, four years after the passage of the Thirteenth Amendment, and during the early days of the Post-Reconstruction era, the Louisiana legislature passed a statute prohibiting intrastate businesses or common carriers from enforcing rules or regulations that discriminated on account of race or color. Josephine DeCuir, a woman of color, sued for damages (allowed under the law) when the master and owner of the steamboat "Governor Allen" refused her accommodations on account of her race in a cabin designated for whites only. Her ticket did not contemplate traveling beyond the borders of Louisiana. DeCuir was awarded a judgement for $1,000, which was affirmed by the Supreme Court of Louisiana.\textsuperscript{92} Benson, the owner of the steamboat "Governor Allen," died, so an administratrix named Hall substituted to protect his interest. In \textit{Hall v. DeCuir}\textsuperscript{93} argued before the U.S. Supreme Court, Hall argued that the Louisiana equality law was unconstitutional because it placed an undue burden on interstate commerce.\textsuperscript{94}

\textit{(applying \textit{Strauder}).} \textbf{EQUAL PROTECTION CASES.} United States \textit{v. Harris}, 106 U.S. 629 (1882) (holding unconstitutional congressional act making it a crime for two or more persons to conspire together for the purpose of depriving persons equal protection of the laws). \textbf{EQUAL ACCOMMODATION CASES.} \textit{Civil Rights Cases}, 109 U.S. 3 (1883) (holding unconstitutional congressional act providing that every race and color were entitled to equal enjoyment of accommodations and privileges of inns, public conveyances and theaters). For another treatment of these and other cases, see \textit{DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888}, at 383-402 (1985).

\textsuperscript{90} See, e.g., \textit{FREDERICK DOUGLASS, The Civil Rights Case, in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER, supra note 3, at 392-93:} "[Black Americans] have been, as a class, grievously wounded, wounded in the house of our friends, and this wound is too deep and too painful for ordinary measured speech."); Richard T. Greener, a black lawyer, "called the court's decision 'the most startling decision . . . since [Dred Scott]."") \textit{SMITH, supra note 2, at 222 (citing \textit{The Civil Rights Act, a Negro Lawyer on the Court's Decision}, N.Y. EVENING POST, Oct. 16, 1883, at 4).}

\textsuperscript{91} \textit{Hall v. DeCuir}, 95 U.S. 485 (1877); \textbf{JUSTICE AND JURISPRUDENCE, supra note 9, at 42.}


\textsuperscript{93} 95 U.S. 485 (1877).

\textsuperscript{94} \textit{Id.} at 488.
In an opinion by Chief Justice Waite, the Louisiana equality law was held to be unconstitutional because a state statute disallowing racial discrimination on carriers passing through the state’s portals impermissibly burdened interstate commerce. *Gibbons v. Ogden*, a case thought to be remotely striking down laws enacted by southern states to advance the equality of all races, now appeared to thwart an ex-slave state from righting its wrongs. The import of the decision was severe: Unless Congress passed a law similar to the provision in the Louisiana statute, the Commerce Clause would continue to permit business and common carriers passing through a state to segregate their passengers, shielding the carriers from any liability under a state statute. Racial protection enacted by a state prohibiting common carriers from segregating was determined to be invalid on its face. Chief Justice Waite’s short four page opinion, written in 1877 and within months the end of the Post-Reconstruction era, was devastating to blacks, who viewed the Court’s action as a stamp of approval for racism by the United States under via the Commerce Clause, unless Congress affirmatively acted to disavow it.

Justice Nathan Clifford’s concurring opinion further clarified the majority opinion’s position on race. Justice Clifford (originally from Maine) determined that any carrier enrolled under the laws of the United States proved the “national character of the ship or vessel” and the need for uniform regulation of such carriers, even in matters of racial disallowance by the states. Racial equality laws protecting black people in intrastate transit was a burden on commerce because, as Justice Clifford wrote,

> If Louisiana may pass a law forbidding such steamer from having two cabins and two tables,—one for white and the other for colored person,—it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have a separate cabins and tables, and make it penal for white and colored persons to be accommodated in the same cabin or to be furnished with meals at the same table.

95 22 U.S. (9 Wheat.) 1 (1824).
96 *Hall*, 95 U.S. at 490.
97 See generally Foner, supra note 86.
98 *Hall*, 95 U.S. at 496-97.
99 See generally Senator Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court’s Nomination Battles* 191-92 (1992) (revealing that after Justice Clifford was nominated to the Court, “[s]ome questioned his legal credentials, but more focused on his views on slavery that can best be described as being somewhere between pro-slavery and fuzzy.”).
100 *Hall*, 95 U.S. at 498 (Clifford, J., concurring). Since Congress had not acted
Furthermore, Justice Clifford aggressively discouraged states from eliminating Jim Crow laws, regulations, and the general racist conduct of carriers by passing anti-race statutes. He reasoned that equality laws passed by states could deprive property owners of their right to contract and earn profits if white people choose not to patronize certain carriers with racially integrated accommodations. Justice Clifford concluded that so long as carriers provided substantial equality in the accommodations for whites and blacks, the requirements of the law would be met. Based on this reasoning, he believed that the Court would uphold such a division. Justice Clifford rejected the perceived claim that “equality [meant] identity... unless our commercial marine [underwent] an entire change.” In light of the existing precedent of *Dred Scott v. Sandford*, to which he refers, Justice Clifford was unwilling to entertain such a change.

*DeCuir* must have baffled black citizens in the South and particularly Louis André Martinet, a black lawyer in Louisana who had passed the bar a year before *DeCuir* was decided. Martinet realized that, unless Congress enacted legislation, the Commerce Clause allowed common carriers to discriminate on the basis of race, and it disallowed any state action, such as the Lousiana statute, to end racial discrimination. Yet, black citizens were told in the *Civil Rights Cases* that the remedy for unprotected private conduct could be obtained solely from “State law or State authority” under the Fourteenth Amendment. Perhaps it was this reason-

against racism, Justice Clifford determined that Congress had made it legal. “Governed by the laws of Congress, it is clear that a steamer carrying passengers may have separate cabins and dining saloons for white persons and persons of color, for the plain reason that the laws of Congress contain nothing to prohibit such an arrangement.” *Id.* at 500-01.

101 *Id.* at 501, 503.

102 *Id.* at 503.


104 SMITH, *supra* note 2, at 283.

105 *Civil Rights Cases*, 109 U.S. 3, 17, 23 (1883). Critically, in *JUSTICE AND JURISPRU- DENCE*, the Brotherhood of Liberty construed the decision to mean that “until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said Amendment, nor any proceeding under
ing by the Court in the *Civil Rights Cases* that led Justice John M. Harlan to state in his dissent that

Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.\textsuperscript{106}

VI. JUSTICE AND JURISPRUDENCE: A CLAIM FOR CIVIC LIFE

Black people received the *DeCuir* decision "with abject terror," and considered it an "attempt to perpetuate the rites of slavery."\textsuperscript{107} The fact that the law bifurcated the status of equality by giving rise to a subtext that equality meant something different for blacks than it did for whites forced the Brotherhood of Liberty to vigorously dissent from the interpretation.\textsuperscript{108} For black lawyers, a dual meaning of the word equality presented an enormous challenge during their protracted struggle to enlarge the meaning of that word to include black Americans. They asserted that such an interpretation with respect to one race could not work because the democratic state was far too complex to disallow uniform themes of equality as an "every-day correlation of the civic life of the two races."\textsuperscript{109}

The Brotherhood of Liberty opined that civic life "should be free, easy, elastic, and natural,"\textsuperscript{110} a view they asserted in *Justice and Jurisprudence*. However, substantial numbers of the white race trapped in the belief that blacks were arguing for identical equality across the board were blinded to this assertion. Hence, the word equality, when used in the context of race, led whites to see themselves as identical to the progeny of slaves—a conception which scared and angered them—and made them incapable of realizing the quest of black people to pursue a civic life.\textsuperscript{111}

\textsuperscript{106} Civil Rights, 109 U.S. at 26.
\textsuperscript{107} *JUSTICE AND JURISPRUDENCE*, supra note 9, at 193.
\textsuperscript{108} See id. at 418.
\textsuperscript{109} Id. at 418-19.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 392. The Brotherhood of Liberty said that "[n]o metaphysician engaged in
Justice and Jurisprudence was written to advance a moral theme related to blacks that had been ignored with "[t]he sudden re-arrangement"\textsuperscript{112} of American society "upon a pure principle of equality"\textsuperscript{113} after the American Revolution. This re-arrangement occurred "[b]efore the moral perfection of jurisprudence was sufficiently advanced to admit the doctrine of equality in the distribution of civil rights,"\textsuperscript{114} and thus only provided for the benefit and protection of the civic life of whites. However, the demand for equality, perhaps also asserted by immigrants,\textsuperscript{115} who were at the bottom of the social and economic ladder,

accounts for the unsympathetic and antagonistic tendencies, otherwise unintelligible, which . . . resulted in the formulation of the legal fiction, that 'Equality does not mean identity;' and the development of its natural corollary, that the substantial accommodation which satisfies the requirements of the law does not deny the right of the public servant to discriminate on account of color.\textsuperscript{116}

The fiction that "the beneficence of the principle of equality" allowed the state to distribute rights in light of "narrow social expediency" prevented equality, as a principle of law, from "run[ing] in its constitutional channel."\textsuperscript{117} Perhaps this was because the "doctrine of inequality was originally transported to, and planted upon [American] soil in the form of slavery,"\textsuperscript{118} thus rendering the virtues of civic life unattainable to the slave progeny. After emancipation, equality, as interpreted by the Supreme Court, did not lose this dual meaning. It merely widened the gap, with occasional attempts to patch it through various forms of judicial methodology.\textsuperscript{119}

\begin{itemize}
  \item the investigation of the profound philosophy of language, could ever have dreamed of a classification of ideas in which the word 'equality' is synonymous with 'identity.'
  \item Id. at 427.
  \item Id.; J. Clay Smith, Jr., In Memoriam: Professor Frank D. Reeves: Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence, 18 HOW. L.J. 1, 4-5 (1974).
  \item JUSTICE AND JURISPRUDENCE, supra note 9, at 427. In JUSTICE AND JURISPRUDENCE, the Brotherhood of Liberty concluded that there existed a "long-established order of white civil rights in America" to allow the U.S. Supreme Court to extend the "fundamental principle of all American liberty" to African Americans. Id. at 73.
  \item THOMAS G. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 287 (1968).
  \item JUSTICE AND JURISPRUDENCE, supra note 9, at 427.
  \item Id. at 451.
  \item Id. at 464.
  \item Id. at 418-19.
\end{itemize}
After 1876, the negative civil rights opinions of the U.S. Supreme Court (e.g., DeCuir) as experienced by the members of the Brotherhood of Liberty, and observed by black lawyers, influenced their belief that "judges must . . . be liable to [being] unconsciously swayed by the general current of the feelings and actions of the individuals and communities around them, who had not accommodated themselves to the reformation contemplated by the war amendments." The Brotherhood of Liberty believed that these decisions stripped blacks of self respect and "relegated [the black] race back to the status of barbarism." The thought of such retrenchment inspired and heightened the unyielding commitment of black lawyers to reverse this slippery slope of tyranny.

Like Emerson, who would renounce everything deemed untrue by a reformer, the black lawyer announced:

A rule which refuses to recognize the tie making this race an integral part of the human family, and disfigures the Fourteenth Amendment, is not a reasonable rule, for how can that be reasonable which overturns the foundation-stones of a newly-created, beautiful civil life, of . . . all the finer environments of civic relationship? The first principle, clearly articulated in Justice and Jurisprudence, was that the nation could not endure if it continued to subject black people "under the pupilage of the jurisprudents of DeCuir." Rather, they hoped for a national shift to jurisprudents who would help black citizens "to advance concurrently with the other citizens, and be made producers and contributors to the common stock of the nation." They hoped for a shift away from "cold judicial formalism Jurisprudence . . . [that] turns aside and permits the spirit of man to be brutalized by the sly public servant.

120 Id. at 192.
121 Id. at 209.
122 Id. at 350.
123 Id. at 366. Elsewhere, JUSTICE AND JURISPRUDENCE states: "It is well known to scholars that philosophy and science are inhospitable to caste-prejudice. It is an unintelligent, vagabondish vice. It has no vernacular, no speech, no mental energy, thought, or depth." Id. at 365.
124 Id. at 366.
125 Id. at 423.
VII. CONCLUSION

What was the black lawyer born for but to be a reformer? And what reformers the pioneer black lawyers were! In 1844, they entered the legal profession armed with a belief that the basis of slavery and the notions of inequality that attached to that culture were a lie. How could a black lawyer help remake a lie and reform it to accommodate the subject of the lie? Armed with the power of the law that their legal training provided, the pioneer black bar believed that it was "not in the vain, farcical garb of 'legal fiction', or in temporary expediencies, that jurisprudence [could] discover its true exposition."26 From the outset, pioneer lawyers, such as Macon Bolling Allen, Robert Morris, Sr., Everett J. Waring; and modern black lawyers, such as Charles Hamilton Houston and Thurgood Marshall;27 and lay activists, such as Reverend Harvey Johnson, would determine that "[j]urisprudence, as an institution of the state, must adapt its artificial principles to the new conditions which environ it."28

Black lawyers, the laymen and laywomen29 who were members of the Brotherhood of Liberty and the authors of Justice and Jurisprudence, hoped through their book to repair the nature of man. They sought to provide the legal system an opportunity for a new beginning, one repudiating the ancestral jurisprudence of slavery. Jurisprudence, they said, "has no natural tendency, in itself, to any form of social or political anthropomorphism."30 However, they believed that it was imperative not to allow jurisprudents to do "nothing more progressive than mark[] time,"31 or to wear blinders to "the new citizen [who continued] to wear the habiliments of the old slave."32

126 Id. at 450.
127 See Smith, supra note 40, at 503.
128 JUSTICE AND JURISPRUDENCE, supra note 9, at 450.
129 There were at least three black women who were life members of the Brotherhood of Liberty; namely, Irene Davis, Sadie T. Galamison, and Mrs. G.R. Waller. ALEXANDER, supra note 31, at 4. The membership of women in the Brotherhood of Liberty is significant, not only because of the financial support that they provided, but also because it must be presumed that they had something to say about the content of JUS-
130 JUSTICE AND JURISPRUDENCE, supra note 9, at 461.
131 Id.
132 Id. at 423.
In 1889, when *Justice and Jurisprudence* rolled off the presses at J.B. Lippincott Company, priced at three dollars,\(^{133}\) the "pagan theology"\(^{134}\) embodied in the jurisprudence of *Dred Scott*, called "the antique foot-rule,"\(^ {135}\) ominously hung over the fate of the slave progeny. In *Justice and Jurisprudence*, the Brotherhood of Liberty did not call for armed insurrection or anarchy, as others might have felt justified to do.\(^ {136}\) It called for a "new graduation" of jurisprudence capable of adjusting to modern times, "in keeping with the sociological and industrial progress which [had] naturally followed this new standard of political truth."\(^ {137}\)

The extent to which *Justice and Jurisprudence* would or has influenced the law cannot be answered with precision. It surely must have made an impact on those who read it, and inspired the lawyers who produced it to incorporate its themes in civil rights litigation. For the Brotherhood of Liberty, Justice was the end to be achieved, and Jurisprudence was the means to achieve it. This would secure the future of black Americans. The Brotherhood of Liberty consisted of former slaves who, after emancipation, continued to be treated as slaves. They hungered for the trappings of citizenship, and were determined to repudiate past ages of slave jurisprudence which classified people of color as inferior and provided little protection for their rights.

Since its publication in 1889, whatever influence *Justice and Jurisprudence* has had on American law, its origination stands as the Magna Carta of black people, and its powerful themes now grace the matrix of American law.\(^ {138}\)

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134 *Justice and Jurisprudence*, supra note 9, at 196.
135 Id. at 451.
136 In 1886, there were white anarchists "trying to persuade the black community to overthrow the government." Smith, supra note 2, at 377.
137 *Justice and Jurisprudence*, supra note 9, at 451.
Appendix

EXTRACTS FROM THE AMERICAN SLAVE CODES

(The following text is from The Anti-Slavery Bugle, Circa 1840s)

The following are mostly abridged selections from the statutes of the slave States and of the United States. They give but a faint view of the cruel oppression to which the slaves [were] subject, but a strong one enough, it is thought, to fill every honest heart with a deep abhorrence of the atrocious system. Most of the important provisions here cited, though placed under the name of only one state, prevailed in nearly all the States, with slight variations in language, and some diversity in the penalties. The extracts have been made in part from Stroud's Sketch of the Slave Laws, but chiefly from authorized editions of the Statute books referred to . . . .

The cardinal principal of slavery, that the slave is not to be ranked among sentient beings but among things—is an article of property—a chattel personal, obtains as undoubted law in all the Slave States. [In accordance with this doctrine, an act of Maryland, 1798, enumerates among articles of personal property, "slaves, working beasts, animals of any kind, stock, furniture, plate, and so forth."—lb. 23.]-Stroud's Sketch, p. 22.

The dominion of the master is as unlimited, as is that which is tolerated by the laws of any civilized country, in relation to brute animals—to quadrupeds; to use the word of the civil law.—lb. 24. Slaves cannot even contract matrimony. [A slave is not admonished for incontinence, punished for adultery, nor prosecuted for bigamy.—Attorney General of Maryland, Md. Rep. Vol. 1 561.] —ib.61.

LOUISIANA.— A slave is one who is in the power of his master, to whom he belongs. The master may sell him, dispose of his person, his industry and his labor; he can do nothing, possess nothing, nor acquire anything but what must belong to his master.—Civil Code, Art. 35.

Slaves are incapable of inheriting or transmitting property.—Civil Code, Art. 945; also Art. 175, and Code of Practice, Art. 103. Martin's Digest, act of June 7, 1806. Slaves shall always be reputed and considered real estate; shall be as such subject to be
mortgaged, according to the rules prescribed by law, and they shall be seized and sold as real estate.—Vol. 1. p. 612.

Dig. Stat. Sec. 13.—No owner of slaves shall hire his slaves to themselves, under a penalty of twenty-five dollars, for each offence.—Vol. 1. p. 102.

Sec. 15.—No slave can possess any thing in his own right or dispose of the produce of his own industry, without the consent of his master.—p. 103.

Sec. 16.—No slave can be party in a civil suit, or witness in a civil or criminal matter, against any white person, p. 103. See also Civil Code, Art. 117, p. 28.

Sec. 18.—A slave's subordination to his master is susceptible of no restriction, (except in what incites to crime,) and he owes to him and all his family, respect without bounds, and absolute obedience. p. 103.

Sec. 25.—Every slave found on horseback, without a written permission from his master, shall receive twenty-five lashes. p. 105.

Sec. 32.—Any freeholder may seize and correct any slave found absent from his usual place of work or residence, without some white person, and if the slave resist or try to escape, he may use arms, and if the slave assault [The legal meaning of assault is to offer to do personal violence.] and strike him, he may kill the slave. p. 109.

Sec. 35. It is lawful to fire upon runaway negroes who are armed, and upon those who, when pursued refuse to surrender. p. 109.

Sec. 38. No slave may buy, sell or exchange any kind of goods, or hold any boat, or bring up for his own use any horses or cattle, under a penalty of forfeiting the whole. p. 110.

Sec. 7. Slaves or free coloured persons are punished with death for wilfully burning or destroying any stack of produce or any building. p. 115.

Sec. 15. The punishment of a slave for striking a white person, shall be for the first and second offenses at the discretion of the court, [A court for the trial of slaves consists of one Justice of the Peace and three freeholders, and the Justice and one freeholder, i.e. one half the court, may convict, though the other two are for acquittal.—Martin's Dig. I. 646] but not extending to life or limb, and for the third offence death, but for grievously wounding or mutilating a white person, death for the first offence: provided, if the blow or wound is given in defense of the person or property
of his master, or the person having charge of him, he is entirely justified.

Act of Feb. 22, 1824, Sec. 2. A slave for wilfully striking his master or mistress, or the child of either, or his white overseer, so as to cause a bruise or shedding of blood, shall be punished with death. p. 125.

Act of March 6, 1819. Any person cutting or breaking any iron chain or collar used to prevent the escape of slaves, shall be fined not less than two hundred dollars nor more than one thousand dollars, and be imprisoned not more than two years nor less than six months. p. 64 of the session.

MISSISSIPPI. Chapt. 92, Sec. 110. Penalty for any slave or free colored person exercising the functions of a minister of the gospel, thirty-nine lashes; but any master may permit his slave to preach on his own premises, no slaves but his own being permitted to assemble. Digest of Stat. p. 770.

Act of June 18, 1822. Sec. 21. No negro or mulatto can be a witness in any case, except against negroes or mulattoes. p. 749, New Code, 372.

Sec. 25. Any master licensing his slave to go at large and trade as a freeman, shall forfeit fifty-dollars to the State, for the literary fund.

Penalty for teaching a slave to read, imprisonment one year. For using language having a tendency to promote discontent among free colored people, or insubordination among slaves, imprisonment at hard labor, not less than three, nor more than twenty-one years, or death at the discretion of the court. L.M. Child's Appeal p. 70.

Sec. 26. It is lawful for any person, and the duty of every sheriff, deputy-sheriff, coroner and constable to apprehend any slave going at large, or hired out by him, or herself and take him or her before a Justice of the peace, who shall impose a penalty of not less than twenty dollars, nor more than fifty dollars on the owner, who has permitted such slave to do so.

Sec. 32. Any negro or mulatto, for using abusive language, or lifting his hand in opposition to any white person (except in self-defence against a wanton assault,) shall, on proof of the offence by oath of such person, receive such punishment as a justice of the peace may order, not exceeding 39 lashes.

Sec. 41. Forbids the holding of cattle, sheep or hogs by slaves, even with consent of the master, under penalty of forfeiture, half to the county and half to the informer.
Sec. 42. Forbids a slave keeping a dog, under penalty of twenty-five stripes: and requires any master who permits it to pay a fine of five dollars, and make good all damages done by such dog.

Sec. 43. Forbids slaves cultivating cotton for their own use, and imposes a fine of fifty dollars on the master or overseer who permits it.

Revised Code. Every negro or mulatto found in the State, not able to show himself entitled to freedom, may be sold as a slave, p. 389. The owner of any plantation, on which a slave comes without written leave from his master, and not on lawful business, may inflict ten lashes for every such offence. p. 371.

ALABAMA. Aiken's Digest. Tit. Slaves, &c., sec. 31. For attempting to teach any free coloured person, or slave, to spell, read or write; a fine of not less than two hundred and fifty dollars not more than five hundred dollars! p. 397.

Sec. 35 and 36. Any free coloured person found with slaves in a kitchen, outhouse or negro quarter, without a written permission from the master or overseer of said slaves, and any slave found without such permission, with a free negro on his premises, shall receive fifteen lashes for the first offence, and thirty-nine for each subsequent offence; to be inflicted by master, overseer or member of any patrol company. p. 397.

Toulmin's Digest. No slave can be emancipated but by a special act of the Legislature. p. 623. Act. Jan. 1st, 1823. Authorizes an agent to be appointed by the Governor of the State, to sell for the benefit of the State all persons of colour brought into the United States, and within the jurisdiction of Alabama, contrary to the laws of Congress prohibiting the slave trade. p. 643.

GEORGIA. Prince Digest. Act Dec. 19, 1818. Penalty for any free person of colour (except regularly articled seamen) coming into the state, a fine of one hundred dollars, and on failure of payment to be sold as a slave. p. 465.

Penalty for permitting a slave to labour or do business for himself, except on his master's premises, thirty dollars per week p. 457.

No slave can be a party to any suit against a white man, except on claim of his freedom, and every coloured person is presumed to be a slave, unless he can prove himself free. p. 446.

Act Dec. 13, 1792. Forbids the assembling of negroes under pretence of divine worship, contrary to the act regulating patrols, p. 342. This act provides that any justice of the peace may dispense any assembly of slaves which may endanger the peace; and
every slave found at such meeting shall receive, without trial, 25 stripes! p. 447.

Any person who sees more than seven men slaves without any white person, in a high road, may whip each slave twenty lashes. p. 454.

Any slave who harbors a runaway, may suffer punishment to any extent, not affecting life or limb. p. 452.

SOUTH CAROLINA. Brevard’s Digest. Slaves shall be deemed sold, taken, reputed, and adjudged in law to be chattels personal in the hands of their owners, and possessors, and their executors administrators, and assigns, to all intents, constructions and purposes whatever. vol. ii., p. 229.

Act of 1740, in the preamble, states that “many owners of slaves and others that have the management of them do confine them so closely to hard labour that they have not sufficient time for natural rest,” and enacts that no slave shall be compelled to labor more than fifteen hours in the twenty-four, from March 25th to September 25, or fourteen in the twenty-four for the rest of the year. Penalty, from £5 to 20. Vol. ii. p. 243.

[Yet in several of the slave states, the time of work for criminals whose punishment is hard labour, is eight hours a day, for three months, nine hours for two months, and ten for the rest of the year.]

A slave endeavoring to entice another slave to runaway, if provision be prepared for the purpose of aiding or abetting such endeavor, shall suffer death. p. 233 and 244.

Penalty for cruelly scalding or burning a slave, cutting out his tongue, putting out his eye, or depriving him of any limb, a fine of £100. For beating with a horse whip, cow-skin, switch or small stick, or putting irons on, or imprisoning a slave, no penalty or prohibition. p. 241.

Any person who, not having lawful authority to do so, shall beat a slave, so as to disable him from working, shall pay fifteen shillings a day, to the owner, for the slave’s lost time, and the charge of his cure. p. 231 and 232.

A slave claiming his freedom may sue for it by some friend who will act as guardian, but if the action be judged groundless, said guardian shall pay double costs of suit, and such damages to the owner as the court may decide. p. 260.

Any assembly of slaves or free coloured persons in a secret or confined place, for mental instruction, (even if white persons are present,) is an unlawful meeting, and magistrates must disperse it,
breaking doors if necessary, and may inflict twenty lashes upon each slave or colored person present. p. 254 and 5.

Meetings for religious worship, before sunrise, or after 9 o’clock P.M., unless a majority are white persons, are forbidden: and magistrates are required to disperse them. p. 261.

A slave who lets loose any boat from the place where the owner has fastened it, for the first offence shall receive 39 lashes, and for the second shall have one ear cut off. p. 228.

James’s Digest. Penalty for killing a slave, on sudden heat or passion, or by undue correction, a fine of $500 and imprisonment not over 6 months. p. 392.

NORTH CAROLINA.— Haywood’s Manual. Act of 1798, Sec. 3 Enacts, that the killing a slave shall be punished like that of a free man; except in the case of a slave out-lawed, [A slave may be out-lawed when he runs away, conceals himself, and, to sustain life, kills a hog, or any animal of the cattle kind, Haywood’s Manual, p. 521.] or a slave offering to resist his master, or a slave dying under moderate correction. p. 530.

Act of 1799. Any slave set free, except for meritorious services, to be adjudged of by the county court, may be seized by any free holder, committed to jail, and sold to the highest bidder. [In South Carolina, any person may seize such freed man and keep him as his property.] p. 525.

Patrols are not liable to the master for punishing his slave, unless their conduct clearly shows malice against the master. Hawk’s Reps., vol. i. p. 418.

TENNESSEE.— Stat. Law, chap. 57, sec. 1. Penalty on master for hiring to any slave his own time, a fine of not less than one dollar nor more than two dollars a day, half to the informer. p. 679.

Chap. 2. sec. 102. No slave can be emancipated but on condition of immediately removing from the state, and the person emancipating shall give bond, in a sum equal to the slave’s value, to have him removed. p. 279.

Laws of 1813. Chap. 35. In the trial of slaves, the sheriff chooses the Court, which must consist of three Justices and twelve slave holders to serve as jurors.

ARKANSAS.— Rev. Stat., Sec. 4. Requires the patrol to visit all places suspected of unlawful assemblages of slaves; and sec. 5, provides that any slave found at such assembly, or strolling about without a pass, shall receive any number of lashes, at the discretion of the patrol, not exceeding twenty. p. 604.
MISSOURI.—Laws, I. Any master may commit to jail, there to remain, at his pleasure, any slave who refuses to obey him or his overseer. p. 309.

Whether a slave claiming freedom, may even commence a suit for it, may depend on the decision of a single judge. Stoud's Sketch, p. 78, note which refers to Missouri laws L, 404.

KENTUCKY.—Dig. of Stat., act Feb. 8, 1798, Sec. 5. No colored person may keep or carry gun, powder, shot, club or other weapon, on penalty of thirty-nine lashes, and forfeiting the weapon, which any person is authorized to take.

VIRGINIA.—Rev. Code. Any emancipated slave remaining in the state more than a year, may be sold by the overseer of the poor, for the benefit of the literary fund! Vol. I. p. 436.

Any slave or free colored person found at any school for teaching reading or writing, by day or night, may be whipped at the discretion of a Justice, not exceeding twenty lashes. p. 424.

Suppl. Rev. Code. Any white person assembling with slaves, for the purpose of teaching them to read or write, shall be fined, not less than 10 dollars, nor more than 100 dollars; or with free colored persons, shall be fined not less than 10 dollars, no more than 100 dollars; or with free colored persons, shall be fined not more than 50 dollars, and imprisoned not more than two months. p. 245.

By the revised code, seventy-one offenses are punished with Death when committed by slaves, and by nothing more than imprisonment when by the whites. Stroud's Sketch, p. 107.

Rev. Code. In the trial of slaves, the court consists of five justices without juries, even in capital cases. I. p. 420.

MARYLAND.—Stat. Law, Sec. 8. Any slave for rambling in the night or riding horses by day without leave, or running away, may be punished by whipping, cropping or branding in the cheek, or otherwise, not rendering him unfit for labour. p. 237.

Any slave convicted of petty treason, murder, or wilful burning of dwelling houses, may be sentenced to have the right hand cut off, to be hanged in the usual manner, the head severed from the body, the body divided into quarters, and the head and quarters set up in the most public place in the country where such fact was committed!! p. 190.

Act 1717, chap. 13, Sec. 5. Provides that any free coloured person marrying a slave, becomes a slave for life, except mulattoes born of white women.

DELAWARE.—Laws. More than six men slaves, meeting together, not belonging to one master, unless on lawful business of
their owners, may be whipped to the extent of 21 lashes each. p. 104.

UNITED STATES.—Constitution. The chief pro-slavery provisions of the Constitution . . . are: 1st. slave States are represented in Congress for three-fifths of their slaves; [By the operation of this provision, twelve slave holding states, whose white population only equals that of New York and Ohio, send to Congress 24 senators and 102 representatives, while these two states only send 4 senators and 59 representatives]; 2nd. that requiring the giving up of any run away slaves to their masters; 3rd. a provision pledging the physical force of the whole country to suppress insurrections, i.e., attempts to gain freedom by such means as the framers of the instrument themselves used.

Act of Feb. 12, 1793. Provides that any master or his agent may seize any person whom he claims as a “fugitive from service,” and take him before a judge of U.S. court, or magistrate of the city or county where he is taken, and the magistrate, on proof, in support of the claim, to his satisfaction, must give the claimant a certificate authorizing the removal of such fugitive to the state he fled from. [Thus it may be seen that a man may be doomed to slavery by an authority not considered sufficient to settle a claim of twenty dollars.]

DISTRICT OF COLUMBIA.—The act of Congress incorporating Washington city, gives the corporation power to prescribe the terms and conditions on which free negroes and mulattoes may reside in the city. City Laws, 6 and 11. By this authority, the city in 1827 enacted that any free coloured person coming there to reside, should give the Mayor satisfactory evidence of his freedom, and enter into bond with two free hold sureties, in the sum of five hundred dollars, for his good conduct, to be renewed each year for three years; or failing to do so, must leave the city, or be committed to the work house, for not more than one year, and if he still refuse to go, may be again committed for the same period, and so on. Ib. 198.

Coloured persons residing in the city, who cannot prove their title to freedom, shall be imprisoned as absconding slaves. Ib. 198.

Coloured persons found without free papers may be arrested as runaway slaves, and after two month’s notice, if no claimant appears, must be advertised ten days, and sold to pay their jail fees. [The prisons of the district, built with the money of the nation, are used as store houses of the slave-holders’ human merchandise. “From the statement of a keeper of a jail in Washing-
ton, it appears that in five years, upwards of 450 coloured persons were committed to the national prison in that city, for safe keeping; i.e., until they could be disposed of in the course of the slave trade, besides nearly 300 who had been taken up as runaways." Miner's speech in H. Rep. in 1829.] Stroud, 85, note.

The city of Washington grants a license, to trade in slaves, for profit, as agent or otherwise, for four hundred dollars. City Laws, p. 249.

Reader, you uphold these laws while you do nothing for their repeal. You can do much. You can take and read the anti-slavery journals. They will give you an impartial history of the cause, and arguments with which to convert its enemies. You can countenance and aid those who are laboring for its promotion. You can petition against slavery; can refuse to vote for slave holders or pro-slavery men, constitutions and compacts; can abstain from products of slave labour; and can use your social influence to spread right principles and awaken a right feeling. Be as earnest for freedom as its foes are for slavery, and you can diffuse an anti-slavery sentiment through your whole neighborhood, and merit "the blessing of them that are ready to perish."