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A Confederate History in the Yale Law Journal

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Abstract

This essay revisits Yale history professor Allen Johnson's article "The Constitutionality of the Fugitive Slave Acts," which appeared in the *Yale Law Journal* in December 1921. Johnson wrote about a law that had been nullified by the Civil War and the Thirteenth Amendment nearly 70 years before. His article was part of the scholarly reconsideration of the origins of Civil War designed to reconcile North and South. Northerners, especially Northern scholars, blamed the Civil War on fanatics on both sides and in some ways exculpated Southerners for their role in the War.

While scholars of memory have explored the rewriting of history in the early twentieth century, no one has noticed how it stretched outside of history books and into the pages of the distinguished *Yale Law Journal*. The efforts to re-write constitutional history and to defend the south's case for one of the most reviled acts in American history reached into territory and to scholars we had not previously known. This essay thus implicates a wider stretch of legal and historical writing than we had known in the efforts to defend the proslavery south.

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The year 1921 witnessed the tragic Tulsa race riot in which a white mob destroyed the black section of Tulsa, leaving thousands homeless and dozens dead. Shortly thereafter, Congress debated a bill to make lynching a federal crime and provide a private remedy against the local authorities where the lynching took place. During the debates supporters of the Act referenced the Tulsa disaster.[1] However, the sentiment that those lynched deserved their fate carried the day. The Dyer Anti-Lynching bill never made it out of Congress. Far from Tulsa and from Washington, in genteel New Haven, the Jim Crow system manifested itself in a more subtle way: with the publication of Professor Allen Johnson's article proclaiming "The Constitutionality of the Fugitive Slave Acts" in the December 1921 *Yale Law Journal*.[2]

The Fugitive Slave Act was the center piece of a series of acts known collectively as the Compromise of 1850, which were designed to assuage Southern concerns over the federal government's commitment to slavery. The Act established Federal Commissioners who had the authority to require private citizens to pursue fugitives. They also had jurisdiction to issue certificates of removal for fugitive slaves. The Commissioners took testimony from the slave-owner in person and from affidavits; the alleged slaves were not permitted to testify. Then, the Commissioners were to issue the certificates of removal once they established the identify of the slave as the person claimed to be a slave. There was no jury trial and no defenses were permitted. Thus, the Commissioners' function was limited to determining the identity of the person being returned, not whether the person actually *was* a fugitive. Commissioners received more compensation ($10) if they ordered the slave returned than if they found the alleged fugitive was not the person claimed by the slave-owner ($5). The Act preempted the Personal Liberty Laws of several Northern states, which prohibited state officers from cooperating in the return of fugitive slaves. Those who interfered with the return of fugitives were subject to a $1000 fine and six months imprisonment.[3] It was, thus, a limitation of the rights of accused fugitives and the impressment of private citizens.

The Fugitive Slave Act led Henry David Thoreau to proclaim on July 4, 1854, that "there are perhaps a million slaves in Massachusetts."[4] The Act was a focal point of anger from abolitionists who were outraged that they were required to return fugitives to slavery. Harriet Beecher Stowe's *Uncle Tom's Cabin* made the act a central point of the story and in one scene an Ohio politician who had supported the act actually violated the law when he helped Eliza and her child Harry escape slave catchers.[5] Ralph Waldo Emerson's 1851 address on the Fugitive Slave

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[1] Dyer Bill, 62 CONGRESSIONAL RECORD 792-94, 1292-93, 1429 (January 19, 1922); *The Federal Anti-Lynching Law*, 38 COLUM. L. REV. 199-207 (1938) (questioning constitutionality of federal anti-lynching legislation).

[2] Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE LAW JOURNAL 161 (1921).

[3] 9 STAT. AT LARGE 462 (September 18, 1850).

[4] Henry David Thoreau, *Slavery in Massachusetts*, in 10 WRITINGS OF HENRY DAVID THOREAU 171, 171 (1906).

[5] HARRIET BEECHER STOWE, UNCLE TOM'S CABIN 98-115 (1852) (Lib. Am. ed. 1983) (chapter 9, "In which it appears that Senator is but a Man").

Act critiqued the law across a broad spectrum, particularly the obligation to behave inconsistently with one's own moral conscience.[6] And there were a series of high profile cases brought home the conflict between individual humanity to slaves and the obligations of the law. Perhaps the most controversial of these was the 1854 rendition of Anthony Burns from Boston back to slavery in Virginia.[7] That ended up costing Commissioner Edward Loring his faculty appointment at Harvard Law School because of anger that he had participated in Burns' return.[8] As Thoreau grimly asked shortly afterwards, "Does any one think that justice or God awaits Mr. Loring's decision?"[9]

It is completely understandable why the Act was controversial in the 1850s. Why, however, would someone write about the constitutionality of the Fugitive Slave Act of 1850, which was long since repealed by the Civil War and the Thirteenth Amendment? Sometimes legal historians go back and look at the arguments over the constitutionality of past events as a way of understanding the ideas of that earlier era.[10] But in the period from 1865, when the Civil War ended, to the 1920s when Johnson was writing, the interpretation of the pre-Civil War era's controversy over slavery and constitutional law was critical to politics. For the soldiers who fought in that war and those who served on the home front settled only some of the questions, such as whether a group of states could secede from the United States. For decades afterward, historians and politicians debated the causes of the war and who was to blame, as part of bringing the nation back together. Was the war the result, as many in the south and north said at the time, of abolitionist fanatics? Did the South have legitimate constitutional complaints with their treatment by the North?[11] On that new front, the southern side was moderately successful. The aptly named "moonlight and magnolia" school – for moonlight falling on sweet-smelling magnolias creates a beauty rarely rivaled – held sway from history textbooks to movies until at least the 1920s.[12]

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[6] Ralph Waldo Emerson, *Address to the Citizens of Concord on the Fugitive Slave Law*, in 11 MISCELLANIES: COMPLETE WORKS OF RALPH WALDO EMERSON 179 (1906).

[7] ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1992).

[8] *Id.* at 121.

[9] Thoreau, *supra* note 4, at 172.

[10] Compare DON E. FEHRENBACHER, THE DRED SCOTT CASE IN LAW AND POLITICS (1978) with MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006) and AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837-1857 (2006) (presenting contrasting views of the constitutionality of the Missouri Compromise and Chief Justice Taney's decision). And recently Anthony Sebok has returned to the constitutionality of the Fugitive Slave Act as a way of understanding the latitude judges had to interpret the Constitution. *See Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835 (1991).

[11] ALBERT TAYLOR BLEDSOE, IS DAVIS A TRAITOR, OR, WAS SECESSION A CONSTITUTIONAL RIGHT PREVIOUS TO THE LATE WAR OF 1861? (Baltimore, N.P. 1866).

[12] JOHN DAVID SMITH, AN OLD CREED FOR THE NEW SOUTH: PROSLAVERY IDEOLOGY AND HISTORIOGRAPHY, 1865-1918 (1985).

People tired of the war sought to assign blame. They assigned it, as happens so often in the aftermath of conflict, to those most vulnerable, in this case enslaved people and their abolitionist allies.[13] The blame fell on abolitionist fanatics and to a lesser extent proslavery zealots and the enslaved were depicted as burdens borne by the Nation.[14] This allowed Americans to repair their rifts and move forward–a goal sought in particular by the southerners who needed to reenter the union and rebuild their devastated states. In the process of repair, it was most convenient to blame someone other than the affluent white southern men who led their section into rebellion and their homeland into ruinous war.[15]

Americans engaged in the selective memory of our nation's past and thus re-wrote history in many settings, from monument dedications and memorial day observances, to court opinions. In cases interpreting the Reconstruction era amendments, particularly the fourteenth amendment, courts often took a narrow view of the purpose of the Civil War and thus construed narrowly the rights of African Americans.[16] For instance, Joshua Lawrence Chamberlain, the United States colonel who led the defense of Little Roundtop during the battle of Gettysburg, wrote about the war in the early twentieth century he emphasized the bravery of Confederate soldiers and thus de-emphasized their role in defending a nation founded on slavery.[17] There is a very long tail to Chamberlain's defense of southern soldiers. For it was quoted by a concurring opinion in 2005 in the Tennessee Court of Appeals that prohibited Vanderbilt University from renaming "Confederate Memorial Hall" on its campus. The concurrence used Chamberlain's defense to argue that Confederate soldiers fought honorably.[18]

Rewriting of history was particularly popular among academic historians. One of the great growth areas in American history in recent years has been scholarship about the ways that

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[13] Ralph Ellison, *Going to the Territory*, in COLLECTED ESSAYS OF RALPH ELLISON 591, 594-95 (John F. Callahan ed. 1995) (discussing the clean and ordered myths of history and the chaos of what actually happened and noting the selective memory in the wake of Civil War).

[14] Even though there was talk of reconciliation and some moments of reunification, often through subordination of African Americans, veterans North and South continued to harbor animosity through the end of their lives. *See* CAROLINE E. JANNEY, REMEMBERING THE CIVIL WAR: REUNION AND THE LIMITS OF RECONCILIATION (2013) (focusing on continued bitterness among veterans and their immediate families even as others in the Nation spoke of reunification).

[15] FITZHUGH BRUNDAGE, THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY (2008).

[16] *See, e.g.*, PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 61-95 (1999) (discussing "Supreme Court's Official History," especially in the *Slaughterhouse Cases*, and how that narrowed protections of Fourteenth Amendment for African Americans).

[17] *See* JOSHUA LAWRENCE CHAMBERLAIN, THE PASSING OF THE ARMIES (1915). *See also South Fought for the Constitution*, 21 CONFEDERATE VETERAN 211 (1913) (quoting speech by United States General, and later Ohio governor, Charles H. Grosvenor about the propriety of the Confederacy's constitutional claim).

[18] United Daughters of the Confederacy v. Vanderbilt University, 174 S.W.3d 98, 122-24 (Tenn. Ct. App. 2005) (quoting Chamberlain, *supra* note 17, at 260-62).

the North and South came to reconciliation in the aftermath of the Civil War. Yale history professor David Blight's 2001 book *Race and Reunion* portrays in detail how the compromise emerged both North and South.[19] A particular emphasis of this scholarship on reconciliation is how the process of selective memory of the eras of slavery, Civil War, and Reconstruction worked in the academy.[20] In fact, early twentieth century academics were frequent contributors to the theories of white supremacy in areas from the history of slavery to eugenics.[21]

Historians like University of Michigan (later Yale University) Professor U.B. Phillips portrayed slavery as not all that bad in his 1918 magnum opus, *American Negro Slavery*.[22] Some years later, University of Chicago Professor Avery O. Craven portrayed the Civil War as the result of abolitionist fanatics and proslavery zealots, an interpretation in keeping with the point that the Act was constitutional.[23] Columbia University History Professor William A. Dunning depicted Yankees and blacks ravaging the South during Reconstruction.[24] Historians' interpretations were joined by popular works, like Thomas Dixon's novel 1905 *The Clansman*, which portrayed Reconstruction as an era of unmitigated corruption and the breakdown of the rule of law.[25]

Johnson's article, then, was a piece of a larger tapestry of writing on the reconciliation between North and South and he self-consciously used the interpretation of the constitutionality of the Fugitive Slave Act to aid that process. He began with an observation about the state of reconciliation but also that the 1850 Act was still misperceived and thus hindered reconciliation:

> Time has done much to assuage the passions aroused by the controversy over slavery in the United States. Patient investigation North and South is taking the place of heated denunciation and defense; many misapprehensions have been cleared away; yet some unfortunate errors persist even in the writings of candid historians. Of the measures passed by Congress in the heat of the controversy, none has been so persistently

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[19] *See* DAVID BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001).

[20] *See, e.g.,* GAINES FOSTER, GHOSTS OF THE CONFEDERACY (1987) (portraying views of early twentieth century Southern history professors); David Blight, *If You Don't Tell it Like It Was, It Can Never Be as It Ought to Be*, in SLAVERY AND PUBLIC HISTORY: THE TOUGH STUFF OF AMERICAN MEMORY 19-33 (James Oliver Horton & Lois E. Horton eds., 2006); James Oliver Horton, *Slavery in American History: An Uncomfortable National Dialogue*, in *id.* at 35-55.

[21] PETER NOVICK, THAT NOBLE DREAM: OBJECTIVITY AND THE HISTORICAL PROFESSION 72-80 (1988); BLIGHT, *supra* note 19.

[22] ULRICH BONNELL PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION RÉGIME (1918).

[23] AVERY O. CRAVEN, THE COMING OF THE CIVIL WAR (1942).

[24] WILLIAM A. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC, 1865-1877 (1907).

[25] THOMAS DIXON, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (1905).

misrepresented as the Fugitive Slave Acts of 1850.[26]

At the time Johnson was writing, the most popular historian of the Civil War era was James Ford Rhodes, whose multi-volume *History of the United States from the Compromise of 1850* (1893-1906) promoted reconciliation by portraying the war as an "irrepressible conflict." The sense that unresolvable conflicts between North and South – over slavery, economy, and society – helped in some ways to absolve slaveholding Southerners (and everyone else, too) of moral culpability for the war. There was, so the argument goes, nothing that could be done to resolve the conflict. Indeed, Rhodes, an Ohio businessman whose manufacturing interests titled him towards reconciliation with the South, offered reconciliation through criticism of both slavery and slave owners.[27] That is, Rhodes assigned substantial blame to the North in the coming of war. This led Johnson to write in his first paragraph that Rhodes was "usually fair minded."[28] Yet, *even* Rhodes thought the Fugitive Slave Act "one of the most assailable laws ever passed by the Congress of the United Sates."[29]

Johnson, thus, set out to correct what he thought was Rhodes' misapprehension. Johnson focused on testing the Act's constitutionality, "without reference to the wisdom or expediency of its enactment."[30] That was an attempt to isolate issues that could not be isolated, for questions about the act's expediency and its wisdom are critical to understanding the Act and its place in the road to Civil War. And it suggests that there was some kind of neutral and objective conclusion regarding the Act's constitutionality, which placed it beyond cavil. Many had already tried to settle the constitutional questions related to the war – such as the lawfulness or not of secession – without success. That was because the questions were not susceptible of resolution in terms of their constitutionality.[31] The constitutionality of much congressional action was in an ambiguous area. Constitutionality was worked out by discussion and action in Congress.

Yet, it was a controversial version of history, to say the least. Johnson attempted to settle in the pages of an academic journal what could not be settled before the war, try as the Supreme Court did in *Ableman v. Booth*.[32] He took on the charges of the many respected constitutional authorities – including Massachusetts Senator Charles Sumner.[33] He dealt in turn with the

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[26] Johnson, *supra* note 2, at 161.

[27] BLIGHT, *supra* note 19, at 357.

[28] Johnson, *supra* note 2, at 161. Still, Rhodes also had a nationalist interpretation that criticized the South for secession alongside his low opinion of the enslaved. SMITH, *supra* note , at 113-15.

[29] 1 JAMES FORD RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 185-86 (1893), quoted in Johnson, *supra* note 2, at 161.

[30] Johnson, *supra* note 2, at 161.

[31] Mark Graber, for instance, reminds us in *Dred Scott and the Problem of Constitutional Evil*, *supra* note 10, that some issues simply had not been settled by the Constitution.

[32] 62 U.S. 506 (1859).

[33] Johnson, *supra* note 2, at 173-74 (responding to Senator Sumner's questions about denial of trial by jury, that judges were not article 3 officers, and that their pay increased when

arguments that the Act was unconstitutional because it deprived the prevented fugitives from testifying in their own defense; it denied the alleged fugitive of a jury trial, because it turned over responsibility for rendition to a magistrate (rather than a federal judge),[34] because the "judges" did not have life tenure, and because the commissioners were it paid magistrates a higher fee when they ordered a fugitive returned rather than set free.[35]

The argument that Johnson thought least troublesome was the differential payments that magistrates received. When slaves were ordered returned, the magistrates received $10; they received only $5 if a slave were not to be returned. (The differential was purportedly to cover the extra paperwork involved if they ordered rendition.) Johnson ridiculed the idea that such a differential might make a magistrate more likely to order the return of the alleged fugitive. "To assume that the framers of the Act of 1850 purposed effectively to secure the rendition of fugitive slaves by a paltry bribe of five dollars convicts Sumner and his followers of a want of common sense."[36] However, shortly after Johnson's article, the Supreme Court found such differentials unconstitutional in *Tumey v. Ohio*.[37] In that case, the Court struck down an Ohio statute providing a greater payment to magistrates who found defendants guilty of violating prohibition than if they found the defendant not guilty. Johnson responded to the criticism that the commissioners were not article III judges with recent cases on administrative law for the proposition that judicial issues could be delegated to a magistrate, rather than be heard by a federal judge.[38] So Johnson ended up with a strange juxtaposition of twentieth century administrative law precedents, like the Interstate Commerce Commission, with the Fugitive Slave Act.

A more difficult – in Johnson's mind – question related to whether suspension of *habeas corpus* for the supposed fugitive was constitutional.[39] Here he has a nonsensical answer, which seems to reduce to Congress does not suspend habeas corpus when it limits the courts where it can be asserted.[40] Johnson spent the most time, though, on the questions whether the Act deprived alleged fugitives their right to jury trial and due process.[41] Johnson thought that the jury trial was not necessary and that his inspection of the statutes of border states – such as Missouri – led him to believe that the rights of alleged slaves to challenge their owners' rights to hold them in slavery were protected.[42] Though modern research has disclosed that a few

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they found the accused was a fugitive). *See also* DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF CIVIL WAR 195-96 (1960) (noting how difficult it is to judge Sumner's arguments while locating them in the beliefs of anti-slavery advocates and noting that they were rejected by judges).

[34] Johnson, *supra* note 2, at 171.

[35] *Id.* at 172.

[36] *Id.*

[37] 273 U.S. 510 (1927).

[38] Johnson, *supra* note 2, at 173, 181-82.

[39] *Id.* at 173,

[40] *Id.* at 173-74.

[41] *Id.* at 174-79.

[42] *Id.* at 181 (citing Act "to enable persons held in slavery to sue for their freedom,"

hundred enslaved people in Missouri did challenge their owners in court over the forty years before Civil War,[43] Johnson presented no evidence that the courts were routinely open to slaves. Yet Johnson thought the federal commissioners rendering fugitives back to their owners were analogous to the acts of an administrative agency. Administrative agencies, Johnson wrote, "frequently exercise powers which are judicial in their nature and reach conclusions which affect property rights; yet these determinations are now held to constitute 'due process of law' and are conclusive."[44]

Johnson had long been interested in the constitutionality of the Act and the Southern side of the argument. His 1912 book on the *Readings in the Constitutional History of the United States, 1776-1876* included three documents on the rendition of fugitive slaves – an excerpt from the 1842 opinion in *Prigg v. Pennsylvania*,[45] an 1849 report from the Virginia legislature about the problems with Northern liberty laws, which made it difficult to recapture fugitives,[46] and finally United States Attorney General John Crittenden's opinion on the constitutionality of the Act.[47] All three documents were decidedly against the anti-slavery side. In fact, that set of readings presented a pro-Southern interpretation in other ways. For instance, the chapter on Lincoln's leadership during the Civil War was called "Presidential Dictatorship."[48] Johnson's section on secession referred to Democrat statements about the inability of the president to act to preserve the Union[49] and then the southern declarations of secession, without any of the Republican responses.[50]

Johnson's conclusion that the Fugitive Slave Act of 1850 was constitutional took up the side of the South and helped to deflate Rhodes' defense of the North and abolitionists. It was the capstone to the pro-Southern interpretation of the antebellum era. Johnson's interpretation was adopted by other historians who sought reconciliation as well. For instance, Charles Warren's famous 1922 book *The Supreme Court in American Life* extends Johnson's attack on the abolitionists and his support for the Fugitive Slave Act.[51] Johnson's was part of a pro-southern interpretation of the Constitution, which blamed abolitionists for their fanaticism and pled the case of conservative constitutional interpretation. The article affected how people viewed the Act. Hamilton Holman's *Prologue to Conflict,* still the leading work on the Compromise of

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MISSOURI REVISES STATUTES ch. 29 (1856)).

[43] *See, e.g.*, LEA VANDERVELDE, REDEMPTION SONGS: SUEING FOR FREEDOM BEFORE DRED SCOTT (2014).

[44] Johnson, *supra* note 2, at 181.

[45] ALLEN JOHNSON, READINGS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1776-1876 416-21 (1912).

[46] *Id.* at 421-23.

[47] *Id.* at 423-25.

[48] *Id.* at 474-81.

[49] *Id.* at 454-59.

[50] *Id.* at 459-63.

[51] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 498 (1922) (citing Johnson, *supra* note 2).

1850, quotes Johnson to the effect that the Act was constitutional in every way.[52] Stanley Campbell's 1970 book *The Slave Catchers*, which is less sympathetic to the Act than Holman, was a little more skeptical in its reliance on Johnson. Nevertheless, Campbell did not challenge Johnson's conclusion about the Act's constitutionality.[53]

Who was Allen Johnson (1870-1931)? He was a history professor at Yale and author of, among other works, *Readings in American Constitutional History, 1776-1876*.[54] Given that the *Readings* began even before 1776 – the book includes several colonial charters from the seventeenth century and works on the ideas of Revolution[55] – Johnson obviously had a broad definition of "Constitutional." That is further evidence of Larry Kramer's theory in *The People Themselves* that our nation has a richer sense of constitutionalism than just Supreme Court doctrine.[56] Johnson's *Readings* harkens back to a time when the Constitution was thought of in broad terms, as a set of ideas about the Union given life by interpreters in Congress, in state legislatures, in newspapers, and in taverns at cross roads throughout the United States. It was not just a set of words of "the Constitution" as interpreted by the Supreme Court. This makes particularly odd, in some ways, his argument that the Fugitive Slave Act of 1850 was constitutional. However, Johnson set himself up as an interpreter of the meaning of the Constitution broadly construed and he construed it in light of subsequent develops of the administrative state.[57]

Johnson also wrote a popular work on historical methods, *The Historian and Historical Evidence,* which acknowledged that historical analysis was dependent and influenced by the politics and beliefs of the historian. "Whether or not he is conscious of it, every historian writes with a predilection for one mode of interpretation or another," Johnson wrote.[58] It is not possible, he admitted, to tell "just how it was" or "how it came to be." Instead, historians must know "how to measure and weigh" evidence, for testimony about the past is notoriously dependent on the perspective of the narrator.[59] What he provided in the *Yale Law Journal* turned out to be exactly that kind of history, dependant on questions of contemporary debates for its questions about the past. It was a work of advocacy disguised as history, as so much history has

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[52] HAMILTON HOLMAN, PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850 172 (1964).

[53] STANLEY CAMPBELL, THE SLAVE CATCHERS: THE ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860 41 (1970).

[54] JOHNSON, *supra* note 2.

[55] *Id.* at 1-6 (reprinting Connecticut charter of 1662); *id.* 6-9 (reprinting Maryland charter of 1632).

[56] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[57] For instance, Johnson noted that immigration boards set up through the Department of Labor's oversight of immigration had control over people of Chinese descent who were born in the United States seeking to re-enter the United States. Such boards determined constitutional rights "without trial by jury." Johnson, *supra* note 2, at 182.

[58] ALLEN JOHNSON, THE HISTORIAN AND HISTORICAL EVIDENCE 172 (1926).

[59] Preface, in *id.* unnumbered page.

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One should contrast Johnson's *Yale Law Journal* article with articles appearing in another important periodical, W.E.B. DuBois' *The Crisis*. In 1921, when the *Yale Law Journal* was rehabilitating Southern constitutional theory–and grafting it onto post-Civil War developments in the administrative state–*The Crisis* ran a series of articles on the gross inequality in criminal prosecutions of blacks and whites.[60] It is possible that in the pages of *The Crisis* may be found the origins of the equal protection doctrine that triumphed in the civil rights era.[61] Much was in play in 1921; even in New Haven where, the same month that Johnson's article appeared, Yale University Press published Benjamin Cardozo's *Nature of the Judicial Process*.[62] Ideas of racial equality were on the march against those that justified white supremacy. And as happens so often in American history, ideas expressed by people at the intellectual edges of society were remaking our nation, even as those at the center of power were seeking the ultimately futile task of defending the status quo.

[60] *See, e.g.*, *The Tulsa Riots*, 22 THE CRISIS 114-16 (July 1921). One might also look to works on race appearing in other law journals at the time. Two years earlier, the *University of Pennsylvania Law Review* studied the origins of federal civil rights legislation. *See Origins of the Rule Against Unjust Discrimination*, 66 U. PENN. L. REV. 123 (1919). Conversely, one author argued in the *Virginia Law Review* about the importance of segregation. *See* Nelson Phillips, *Integrity of American Life and Law*, 7 VA. L. REV. 577-93 (1921). Four years later the *Virginia Law Review* published an article supporting eugenics by the lawyer who argued *Buck v. Bell*. *See* Aubrey E. Strode, *Sterilization of Defectives*, 11 VA. L. REV. 296 (1925). At that point, black intellectuals were struggling to point out how those kinds of scholarly interpretations had contorted history. DuBois put together his thoughts in 1935 in *Black Reconstruction*.

[61] *See* Alfred L. Brophy, *The Great Constitutional Dream Book*, 2 ENCYCLOPEDIA OF THE SUPREME COURT 360-63 (David Tanenhaus ed., 2008) (discussing African American intellectuals' ideas and their relationship to the Supreme Court's equal protection jurisprudence).

[62] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).