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Recommended Citation

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The Case for the Repeal of the Fifteenth Amendment in the *Yale Law Journal*

Alfred L. Brophy¹

Abstract

In June 1903, in the depths of the Jim Crow system, the *Yale Law Journal* published an article by famed New York corporate lawyer John R. Dos Passos (whose son, with the same name, later became a famous modernist novelist and socialist). The article, entitled “The Negro Question,” argued that many African American citizens in southern state were not yet ready for voting rights. The article defended the restriction of rights in southern states since the end of Reconstruction among African-Americans.

Dos Passos’ article has received virtually no attention in recent years. It is important evidence of the intellectual credibility of ideas of segregation and second-class citizenship at the turn of the twentieth century. It reveals the breadth of the entrenched opposition to the ideas of racial equality. And it invites further examination of how law reviews in the early twentieth century supported Jim Crow segregation.

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1903 was one of the darkest years of the Jim Crow system of segregation that blanketed the United States between the end of Reconstruction and the modern Civil Rights movement. Two years earlier, in 1901, Alabama's notorious state constitutional convention had disfranchised African American voters. It did this by allowing those who had fought in the Civil War or whose ancestors fought in the American Revolution (or a few other wars) and people who understood the duties and obligations of citizens of a Republic to register.² Then, those who were registered by 1903 were entitled to continue to vote, while others were subject to strenuous tests.³ The Supreme Court that in 1903 confirmed the disfranchisement.⁴ Justice Holmes, writing for the majority, said that equity would not support putting an African American man's name on the voter roles because putting his name on the rolls would do no good. "Unless we are prepared to supervise the voting in that state by officers of the court, it seems as though all the plaintiff could get from equity would be an empty form"⁵

Alabama's restrictions on voters built on Mississippi's disfranchisement in the 1890s. The Supreme Court said Mississippi's efforts at disfranchisement were acceptable because, even though the consequences fell hardest on African Americans that the literacy test was applied to all men, white and black, equally. This built on disfranchisement in Mississippi a few years earlier, which had also been permitted by the U.S. Supreme Court.⁶ In fact, throughout the south in the 1890s and first decade of the 1900s, voting restrictions were key parts of solidifying the Jim Crow system.⁷ Meanwhile, in New Haven, the *Yale Law Journal* offered another defense of disfranchisement of African American voters.⁸ It was by a New York lawyer, John R. Dos Passos.

Amidst the discussion of changing the name of Calhoun College at Yale, there was a significant focus on the ideas of conservatism on that campus in the 1930s. But what did not receive so much attention were the ideas about Jim Crow segregation that appeared in the *Yale Law Journal*. Yale history professor Allen Johnson published an article in the *Yale Law Journal*

² *Giles v. Harris*, 189 U.S. 475, 483 (1903).

³ *Id.* at 483-84.

⁴ *Id.* See also *Giles v. Teasley*, 193 U.S. 146 (1904) (refusing relief because independent state grounds for refusing to register African Americans in Alabama).

⁵ *Giles*, 189 U.S. at 488. See also ALEXANDER M. BICKEL & BENNO C. SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT*, 1910-21 908-27 (1984) (discussing *Giles* and its context).

⁶ See *Williams v. Mississippi*, 170 U.S. 213, 225 (1898) (The Court and statues of Mississippi "do not on their face discriminate between the races and it has not been shown that their actual administration was evil, only that evil was possible under them..."). *Id.* at 222 ("The operation of the Constitution and laws is not limited by their language or effects to one race. They reach weak and viscous white men as well as weak and viscous black men.").

⁷ MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* (1972).

⁸ John R. Dos Passos, *The Negro Question*, 12 *YALE L.J.* 467 (1903).

in 1921 that supported the southern interpretation of the fugitive slave act of 1850.⁹ That article has influenced generations of writing on the Act, as it argued that the Act was constitutional and thus made the southern case look more legitimate. When Johnson had legitimized a pro-Confederate version of history, John R. Dos Passos' article in 1903 in the *Yale Law Journal* advocates limiting the voting rights of African Americans in the southern states.

While Dos Passos' article has received little attention,¹⁰ it serves as important evidence of contempt that leading Northerners, including lawyers, held about African American rights in the early years of the twentieth century. It reveals the retreat from ideas of racial equality that were once widespread. It correlates with the growth of Jim Crow in particular the disfranchisement that swept southern states and found acceptance among the Supreme Court.

1. The Case for Disfranchisement

For Dos Passos, the "Negro question" is about the voting rights of African Americans in the seventh. The origins of the title harkens back to Thomas Carlyle's debate with John Stuart Mill, which Carlyle called the "N—r Question," when he discussed the emancipation in the West Indies.¹¹ It also recalls the 1890 book by George Washington Cable, *The Negro Question*, which deals with the distinction between social and civil equality.¹² *The Negro Question* was reprinted in 1903, as the great questions of voting rights became even more salient. All aimed at explaining the problems that people of African descent posed for white supremacy. This was, after all, the era where many spoke of the "white man's burden"—the supposed burden that

⁹ Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161 (1921). See also Alfred L. Brophy, *Jim Crow in the Yale Law Journal*, 49 CONNECTICUT LAW REVIEW ONLINE 1-16 (2017).

¹⁰ Among the few citations are CAROL A. HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM 246 nn. 71-73 (2005); James Campbell, *African Americans in Freedom*, in A COMPANION TO AMERICAN LEGAL HISTORY 171, 173 (Sally Hadden & Alfred Brophy, 2013); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 65, 87 (2008); Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage during Reconstruction* 82 N.C. L. Rev. 1525, 1581 (2004); Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. Rev. 1551, 1573 (2014); Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOWARD L.J. 1, 16 (2006). At the time the *American Law Register* remarked on Dos Passos' article that "the author, who, we may believe with sincerity, claims to be a friend of the negro, states at large the argument against negro suffrage. He proposes that the question be left to the states, and the fifteenth amendment be repealed with section two of the fourteenth amendment." *Notes on Recent Leading Articles in Legal Publications*, 51 AM. L. REG. 587, 587 (1903).

¹¹ Thomas Carlyle, *Occasional Discourse on the Negro Question*, 40 FRASER'S MAGAZINE FOR TOWN AND COUNTRY 670-679 (1849); John Stuart Mill, *The Negro Question*, 41 FRASER'S MAGAZINE FOR TOWN AND COUNTRY 25-31 (1850).

¹² GEORGE WASHINGTON CABLE, *THE NEGRO QUESTION* (1890).

white people assigned themselves to “care” for non-white races.¹³ And it was a contemporary with W.E.B. DuBois’ statement that “the problem of the twentieth century is the color line.”¹⁴ Later the “negro question” had a different meaning.¹⁵

The article is oddly organized. It begins with improbable argument about the difficulty of legislating equality – laws have to reflect culture; they can’t elevate people. “Of course, as history has always demonstrated the effect of a contest between positive law on the one side and actual conditions or customs on the other, was that the constitutional amendments were disregarded in overwritten.”¹⁶ This argument, a traditionally conservative argument against the use of law for social change – and in fact one that argued that social change was impossible through law.¹⁷

The key factual assumption was that many African Americans were not ready for voting. Dos Passos’ arrived at this conclusion by first observing the benefits of slavery. At 475

It is often remarked that there seems to have been a providence in the institution of slavery as it existed in this country. The original condition of the blacks in their native regions was that of the most appalling hope was barbarism. Slaves themselves at home, and willing instruments in transferring slavery to more civilized countries, they were yet aiding in the evolution of their race, otherwise condemned to perpetual savagery. With all its evils, their condition here was preferable to that which they had left behind them, and it was not possible, all restrictive laws and sentiments to the contrary

¹³ Rudyard Kipling, *The White Man's Burden: The United States and the Philippine Islands* (1899), reprinted in CHRISTOPHER HITCHENS, *BLOOD, CLASS, AND EMPIRE: THE ENDURING ANGLO-AMERICAN RELATIONSHIP* 63–64 (2004). *But see* EDMUND DENE MOREL, *THE BLACK MAN'S BURDEN* (1920).

¹⁴ See W. E. Burghardt Du Bois, *The Freedmen's Bureau*, 87 *THE ATLANTIC* 354 (1901). He made that statement in the introduction to *THE SOULS OF BLACK FOLK* 5 (1903) and it appears twice in the chapter on *The Freedmen's Bureau*, *id.* at 16, 37. That statement was later taken – silently, without reference to DuBois -- by Lothrop Stoddard in book criticizing the Haitian Revolution. T. LOTHROP STODDARD, *THE FRENCH REVOLUTION IN SAN DOMINGO* vii (1914) (stating that the “conflict of color” “bids fair to be the fundamental problem of the twentieth century”). This prefaced a debate in 1929 between DuBois and Stoddard over scientific racism and whether people of African descent were less intelligent than white people. See DAVID LEVERING LEWIS, *W. E. B. DU BOIS, 1919-1963: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY* 235-36 (2001); Carol M. Taylor, *W.E.B. DuBois's Challenge to Scientific Racism*, 11 *J. BLACK STUDIES* 449-460 (1981).

¹⁵ BARBARA FOLEY, *RADICAL REPRESENTATIONS: POLITICS AND FORM IN U.S PROLETARIAN FICTION, 1929 ...* 194-96 (1993) (discussing 1930s treatment of “negro question” by communist authors, including the younger Dos Passos).

¹⁶ Dos Passos, *supra* note 8, at 470.

¹⁷ Maybe use Carlyle on History essay (1830) – but this is really the issue that law can’t change culture, that law derives from strength only to the extent that it is resting on culture. This is an argument against change – and one that we hear a lot about in the pre-Civil War era. Also, maybe some in the post-war era (of historical scholarship). See David Rabban.

notwithstanding, that they should not take some degree of the benefits of the association with the superior race. They received the inestimable boom of the Christian religion; they became, to say the very least, humanized. But they were at the epoch of the Civil War far, very far, from even approximating to the requirements of the citizenship out of which they could be made an intelligent, and by virtue of its function, and in the degree to which the numbers extended, a dominating democracy, whether pure or representative.

Dos Passos believed – in keeping with many other white southerners – that universal suffrage for African American men was a mistake and that the constitutional amendments supporting universal suffrage should be repealed. He wanted to allow southern states to set the voting requirements for African American voters. For he saw the extension of voting rights to formerly enslaved men and their descendants as a mistake.

To take millions of ignorant people from a state of slavery and ignorance, which condition existed for generations, and by a stroke of a pen to clothe them the highest rights of citizenship, was a fundamental, pernicious and far-reaching error—a mistake which became absolutely cruel when it placed these voters in control in domination of their rights, liberty and property of the large class of cultivated and trained citizens. Of course it is easier to see the truth now than when our visions were clouded by the passion and prejudice which necessarily resulted from a gigantic Civil War; and I need to cast no undue reflection on those who participated in the acts which we are now compelled to review. They were in that were consumed with passion; we're in the frigid zone of reason.¹⁸

Here Dos Passos drew on a common trope, which divided reason from passion. Unsurprisingly for a lawyer, reason was what he respected and passion led humans astray. The distinction between reason and passion – sometimes also referred less dramatically to as the distinction between reason and sentiment – was a common theme in legal literature.

The best friends of the Negro now see that the chasm between enfranchisement and political suffrage was too wide to be spanned without the aid of educational probation and training, and the Negro find themselves as brawling, in a hopeless confusion, at the bottom of the chasm into which they have fallen--victims of a short-sighted, reckless and thoughtless policy of political elevation.¹⁹

The problem with African American voting was that they voted as a bloc – and that they voted in ways not in keeping with the Dos Passos' values.

The history of the last thirty-six years illustrates very forcibly the futility and powerlessness of laws intended to operate against natural conditions. Once extricated from the meshes of military rule, which the Federal laws had woven around them, the whites in the southern states engaged in an endeavor to prevent the blacks from voting, *as a mass*. This was accomplished by not counting their votes; by enacting election laws so

¹⁸ Dos Passos, *supra* note 8, at 475.

¹⁹ Dos Passos, *supra* note 8, at 468.

intricate and obscure as to deter them from voting, or by discriminating against them in the polls; or by constitutional provisions, which were on their face applicable to all citizens, but were aimed at and intended to operate especially against the blacks.²⁰

The nature of the problem, really, was that African Americans were gaining political power. Race prejudice was high – very high in 1903 when Dos Passos was writing – but it had not yet acquired the appearance of “science” that we saw in the 1910s and 1920s. This article shows how the ideas of empire and eugenics were linked to voting rights. This is an early version of the white supremacy of the 1910s and 1920s of which Lothrop Stoddard’s *Rising Tide of Color* is best-known.²¹

Though Dos Passos does not cite historians, or really many other sources for the failure of African American voting that he believes so self-evident, his argument is in keeping with historians who interpreted the story of Reconstruction as a problem with corrupt freed people. [cite the early 20th century work on Reconstruction – William Dunning’s work and that of other scholars who depicted freed people as corrupt and criminals] The article precedes by only a few years Thomas Dixon’s *The Clansman*, which was later made into the movie *Birth of a Nation*. Already in popular and elite culture there was a well-established trope that African American voting was a mistake. Dos Passos’ contempt for many African Americans correlates with the attitudes held by many. For instance, in 1898 Yale Law student Joseph Edwin Proffit published a essay on “Lynching: Its Causes and Cures,” and remarked that “the ballot was placed in hands era he was ready to receive it.”²²

²⁰ *Id.* at 470. See also *id.* at 477 (“the basis of opposition has been the two Negro suffrage on block. The Negro is, bypassing one solid vote, as it were, for the wrong candidate, are enabled, if not prevented, to dominated control the whites and their vast property interests—therefore choose, private and political—and their very lives. A massive ignorant voters can rule the villages, towns, cities and states of the south, without regard to the true, best and ultimate interests of the whole people. The objection to the solid Negro vote of the south is no different than substance to objections which might be, and often have been, raised in our large cities against government bypass of the ignorant voters, who, led by inflammatory and demographic appeals, unites themselves into a solid voting bloc and, taking possession of municipal governments, introduced politics in opposition to the true interests of the community. The criticism of the whites of the south to the solid black vote is applicable to any condition where congested massive ignorant or corrupt voters cast their ballots for a man or a set of men in this dominate the community. Suppose a predominating mass of the ninth and non-English-speaking Italians for poles, were, as soon as landed, precipitately transformed into citizenship by suspension of the naturalization laws, and allowed to vote in New York City without the necessity of five years’ probation, and, acting together as one man, should be able to rule the municipality, what a crime would go forth from the mouths of the minority citizens—the persons interested in the property and welfare of the city?”).

²¹ See Alfred L. Brophy and Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C. L. Rev. 1871, 1882-84 (2016) (discussing literature in the 1910s and 1920s on eugenics and white supremacy).

²² Joseph Edwin Proffit, *Lynching: Its Causes and Cures*, 7 YALE L. J. 264, 264 (1898).

And voting did matter – DuBois had already put the world on notice that the oppressed people were not going to stand oppression any longer than they absolutely needed to in *The Souls of Black Folk*.

What that meant, when de-coded, was really the end of white supremacy.²³ But even as he was saying that the fifteenth amendment was a mistake and a disaster – and as he acknowledged this was about white supremacy, Dos Passos tried to frame the issue as one of qualifications to vote, rather than white supremacy. Thus, he spoke of the pivot point of democracy as informed voters. And his suggestion was that African Americans in the southern states might regain the vote at some point. Or, as Dos Passos phrased it, “the suggestion is temporarily to deprive them of suffrage, to put them upon information, to quarantine them, until such time as they demonstrated ability to intelligently and honestly cast a vote.”²⁴ He claimed that even the “best friends of the Negro, of which I profess to be one, are forced to admit, and nearly 40 years after the war, that negro suffrage in the south was a monumental error.”²⁵ Yet he followed this up by trying to redirect from the issue of race to voting qualifications. “This question cannot be regarded, at all, as one of race prejudice. It is one surely of what constitutes the necessary qualifications for suffrage.”²⁶

Dos Passos’ case for disfranchisement of African American men built on the disfranchisement of women, young people, and voters in the District of Columbia.²⁷ And then, given the examples of disfranchisement, he had the audacity to claim that the denial of voting rights to African American men was still consistent with their citizenship rights. “I accordingly maintain that,” Dos Passos wrote, “exclusion of the Negro from political suffrage, while he retains citizenship, does not relegate him to an inferior state in the community, nor disentitle him to the full protection of the laws guaranteed by either Federal or state constitutions. If deprived of suffrage you would still leave him with citizenship and placing with many classes of whites which are also excluded.”²⁸ This was a perverse use of an equal treatment argument – some

²³ Dos Passos, *supra* note 8, at 477 (“a combination of the Negro voters of the south would mean the domination in control of the whites, and of all their property rights.”). *See also id.* at 476 (“in the south, or portions of it—geographical portions—there are hundred blacks to one white.”).

²⁴ *Id.* at 472.

²⁵ *Id.* at 476.

²⁶ *Id.*

²⁷ *Id.* at 473 (“the regulation of suffrage is necessarily arbitrary, even in a purely democratic governments—which this is not. A moment’s reflection will demonstrate the statement. The age of the voter has always been fixed and 21 years. Why? Because the wisdom of Law-makers has concurred in holding that the age of 21 years is the point in an individual’s life we can be safely assumed that he’s competent to exercise the most important for raw data that citizenship—to vote.”).

²⁸ *Id.* at 474.

others are deprived of voting rights, so there is no problem with yet more being deprived of voting rights.

He even recognized that the U.S. Supreme Court allowed laws they violated the spirit of the 15th amendment, even if they were neutral on their face.²⁹ All of this built to a crescendo that seems so surprising to twenty-first century readers, of a recommendation of constitutional reform to return power to the southern states to allow them to set voting qualifications. Dos Passos' solution to the "Negro question" was to repeal section two of the 14th amendment and the 15th amendments. He recognized that this was radical and that it was moving backwards, or as he phrased it a "retrograde movement in our constitutional history."³⁰ His grim conclusion was that "we must retrace their steps and undo organic legislation which was hastily enacted after they were bellying; to take back to that which was given."³¹

2. Who was John R. Dos Passos?

Who was this lawyer who so boldly advocated what he acknowledged was a step backwards in voting rights through the full repeal of one constitutional amendment and the partial repeal of another? John R. Dos Passos, the son of Portuguese immigrants, was born in 1844 in New York.³² He went to school at Yale and Yale Law School and built a fabulously successful career as a corporate lawyer. He is best remembered for his work on railroad reorganization and the formation of trusts in the early twentieth century.³³ He also wrote on corporate law (the subtitle of one book was "the growth and rights of aggregated capital")³⁴ and the legal profession.³⁵ His work on the legal profession suggests just how conservative the ideal of the legal profession could be. In addition to "The Negro Question," he published in 1903 the book *The Anglo Saxon Century and the Unification of the English-Speaking People*.³⁶ It presented some of the ideas of racial supremacy – such as the control of the world by the United Kingdom, the United States, Russia, Germany and France.³⁷ He wanted to ensure that English-speakers consolidated their power so that they could continue to be dominant. Thus it presents ideas of Anglo Saxon supremacy that appeared in more detailed form a few years later in works like Madison Grant's

²⁹ *Id.* at 479.

³⁰ *Id.* at 472.

³¹ *Id.* at 472.

³² VIRGINIA SPENCER CARR, DOS PASSOS: A LIFE (2004); Melvin Landsberg, *John R. Dos Passos: His Influence on the Novelist's Early Political Development*, AM. Q. 473-85 (1964). Given the author's name, "The Negro Question" is occasionally mistakenly attributed to the novelist. GAYLE ROGERS, INCOMPARABLE EMPIRES: MODERNISM AND THE TRANSLATION OF SPANISH AND AMERICAN ... 257 n.11 (2016).

³³ *Obituary for John R. Dos Passos*, NEW YORK TIMES, JANUARY 28, 1917.

³⁴ JOHN R. DOS PASSOS, A TREATISE ON THE LAW OF STOCK-BROKERS AND STOCK-EXCHANGES (1905); JOHN R. DOS PASSOS, COMMERCIAL TRUSTS: THE GROWTH AND RIGHTS OF AGGREGATED CAPITAL (1899).

³⁵ JOHN R. DOS PASSOS, THE AMERICAN LAWYER AS HE WAS AND AS HE CAN BE (1907).

³⁶ JOHN R. DOS PASSOS, THE ANGLO SAXON CENTURY AND THE UNIFICATION OF THE ENGLISH-SPEAKING PEOPLE (1903).

³⁷ *Id.* at 9.

*The Passing of the Great Race*³⁸ and Lothrop Stoddard's *The Rising Tide of Color Against White Supremacy*.³⁹ And Dos Passos was writing at a time when the continued white supremacy was more possible than even fifteen years later when Stoddard was writing.⁴⁰ In 1911 he also opposed direct election of Senators.⁴¹ In sum, John R. Dos Passos was a deeply conservative figure – a man who worked to create massive corporations, who thought black men – like women of all races --should not be guaranteed the right to vote, and who did not want to make United States senators more accountable to their constituents, and who believed that lawyers ought to protect against radical ideas.

All the while, as he was supporting that constellation of ideas, he had a much more famous son, John R. Dos Passos, Jr., who became a modernist novelist. The younger Dos Passos was a non-marital child who was not acknowledged until his father's wife had passed away – when the child was a teenager. Perhaps the father's conservatism had something to do with the son's early radical ideas—and his later more conservative ideas as well. The father died in 1917, just as his son was finishing the first of his novels in the USA trilogy.

3. What Did Others Say about Voting Rights and African American Citizenship?

Dos Passos' remarks about African American voting are surprising to modern readers, yet they are in keeping with what was appearing in public debate, certainly among white southerners. They are the forerunners of a lot of other white supremacy literature. Four years before Dos Passos' article was published, Amasa Eaton, a Providence, Rhode Island lawyer, writing in the *Harvard Law Review*, made similar references to the foolishness of the fifteenth amendment that conferred votes on the “mass of ignorant blacks” in southern states.⁴² Eaton, though he criticized the 15th amendment, was too optimistic in his prediction about the protection the amendment provided to African American voters. He believed the 15th amendment would strike down Louisiana's restrictions on African American voters.⁴³ In that he was wrong. Both

³⁸ Brophy & Troutman, *supra* note 22, at 1882. .

³⁹ *Id.* at 1882-83.

⁴⁰ Dos Passos, *supra* note 37, at 9 (predicting that China will not be a factor in international relations); *id.* (“The Russian and Spanish races will furnish two absorbing problems of this century to Europe and the United States.”). One might, for instance, contrast Lothrop Stoddard's *Rising Tide of Color* published in 1920 with John Lawson Stoddard's travel books, published in the 1890s and first years of the 1900s – and so are contemporaneous with Dos Passos' “Negro Question.” The latter are replete with ridicule of non-western countries and people.

⁴¹ John R. Dos Passos, *Some Observations on the Proposition to Elect United States Senators by the People*, 23 GREEN BAG 229 (1911).

⁴² Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279 (1899) (arguing that Louisiana's suffrage restriction was a fraud on African American votes and the 15th amendment prohibiting restriction).

⁴³ Eaton, *supra* note 25, at 293 (“However mistaken the adoption of the 15th amendment and however desirable it made the to exclude the vote of the ignorance other Negroes, when the question is carried to the Supreme Court of the United States, ... This constitution of Louisiana will be declared unconstitutional, if the court look at the true intent, real meaning, and actual operation thereof, by taking into consideration these declarations and explanations by the man

Eaton and Dos Passos disliked the fifteenth amendment – and yet they also agreed that the amendment should protect African American male voters from the kinds of disfranchisement schemes that Mississippi and later Alabama implemented.

Like Eaton, who thought that Mississippi's restrictions on African American voting were unconstitutional – even as he supported African American disfranchisement⁴⁴ -- Dos Passos thought that the evasion of the fifteenth amendment was improper. He felt that such evasions led to a disrespect for the law and he urged, in its place, an outright repeal. Dos Passos wrote that

The purpose of the Constitution of the Southern States ... was to thwart the amendments and to deprive a large majority of the blacks of the power to vote. The people of the United States solemnly intended one thing, the courts, looking in your words in the surface of things, and it cleared another. Such a condition is not calculated to inspire a profound respect for our unit laws. So this tree in fallacious pretense are invoked to overcome express constitutional mandates. It seems to me it is the wise and necessary to get rid of this unhappy spectacle, which tends to weaken the confidence of the people in the strength and integrity of constitutional law, and to return to old and perfectly natural conditions I again unqualifiedly placing this question of suffrage with the respective states, where it belongs. It is for them to decide who shall vote, and the general government shall have no voice in the matter.⁴⁵

Dos Passos, thus, even though he believed universal African American male suffrage was wrong, still believed that the Supreme Court and southern states were wrong in trying to evade the Fifteenth Amendment. The fifteenth amendment was not repealed explicitly, as Dos Passos suggested. Yet, a dozen years after Dos Passos' article, Baltimore lawyer Arthur Machen argued in the pages of the *Harvard Law Review* that the 15th amendment was void.⁴⁶ William C.

who made it?"). The manner in which the 13th, 14th, and 15th amendments to the constitution of the United States were carried through may be reprehensible, and the wisdom of the last two amendments may admit of question. Nevertheless they are the law of the land, and, until altered in accordance with provisions of the constitution, they must be obeyed.

⁴⁴ *Id.* at 283 ("this city of patriots not only in the northern states but also throughout the whole union, has been rows in contemplating the unexpected bad results that have followed from conferring the suffrage upon the mass of ignorant blacks throughout the south. Let us freely admit that a great mistake was made in us conferring the suffrage upon them, but let us not lend ourselves to another in perhaps is still more serious mistake by correcting is the error by some ultra constitutional method. We may rest assured that in the long run the cause of constitutional liberty is best maintained by correcting errors only by the methods pointed out in the constitution.").

⁴⁵ Dos Passos, *supra* note 8, at 479-80.

⁴⁶ Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910) ("Now, could a constitutional amendment without the consent of the government's South Carolina, or of those persons who constituted that state, and necks to their body politic the large black majority in their midst and give those blacks--who South Carolina had never recognizes for citizens--the power to outvote the whites in the election of members of the state legislature and dusty indirectly in the choice of two United States senators? Would not such a constitutional

Coleman, a Baltimore lawyer then only a year out of Harvard Law School, published an extensive response in the *Columbia Law Review*⁴⁷ that year to Machen.

Booker T. Washington's "Atlanta Exposition" speech supported the deprivation of voting rights. While he never mentioned voting, Washington said that they freed people being "ignorant and inexperienced," preferred "a seat in Congress or the state legislature" more than real estate or industrial skill. Washington was implicitly giving up suffrage rights, as he said African Americans should be content to give them up as they focused on industry. Dos Passos' "solution" was to take voting rights. Nevertheless, elsewhere, outside of southern state legislatures, outside of the southern courts, outside of the United States Supreme Court, and outside of the circles of elite law reviews,⁴⁸ some people had different ideas about the voting rights of African Americans. The most prominent defender of voting rights was perhaps W.E.B. DuBois' *Souls of Black Folks*. The "negro problem" as a duty of education and vocational opportunity that the entire nation had to shoulder.⁴⁹ Must oppose those who would take away rights. Very different from Dos Passos who blamed, as happened so frequently in the United States at the turn of the twentieth century, African Americans for the problems with American society.

amendment deprive the people whom alone the original constitution of the United States and the laws of South Carolina recognized as constituting that state--would it not deprive them of their "equal suffrage," or indeed of any suffrage in all, in the senate?").

⁴⁷ William C. Coleman, *The Fifteenth Amendment*, 10 COLUM. L. REV. 416-50 (1910).

⁴⁸ J. Newton Baker, *Segregation of White and Colored Passengers on Interstate-Trains*, 19 YALE L. J. 445 (1910) (arguing for federal legislation supporting racial segregation in inter-state commerce, or, barring that, segregation by the carriers themselves, and noting that "it would be regarded with favor not only by the white, but also by the colored race"); Theodore P. Ion in Michigan Law Review in 1906—thought US Constitutional law supported segregation of Japanese children in public schools in San Francisco. Cf. *Police Power: Schools for White and Colored Persons*, 16 YALE L.J. 45, 45-46 (1906) (expressing skepticism of wisdom of segregation legislation).

⁴⁹ DuBois, *supra* note 14, at 51.