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Essay

Jim Crow in the *Yale Law Journal*

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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 from 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 the practice 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 aimed at defending the proslavery south than has previously been recognized.*

Jim Crow in the *Yale Law Journal*

ALFRED L. BROPHY*

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 local authorities where the lynching took place.[1] During the debates, supporters of the Act referenced the Tulsa disaster.[2] However, the sentiment that those lynched deserved their fate carried the day. The Dyer Anti-Lynching bill never made it out of Congress. In genteel New Haven—far from Tulsa and from Washington—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*.[3]

The Fugitive Slave Act[4] was the centerpiece of a series of acts

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[1] *See Recent Statutes—The Federal Anti-Lynching Law*, 38 COLUM. L. REV. 199, 199–200 (1938) (discussing the scope of the bill).

[2] *See* 62 CONG. REC. 792 (daily ed. January 4, 1922) ("We have a membership of more than 500 . . . and the white people have promised to run us out and treat us like they did those Negroes in Tulsa, Okla."); 62 CONG. REC. 1428 (daily ed. January 19, 1922) (statement of Sen. Rankin) ("The relations between the white people and the Negroes in the South are about as pleasant as could be expected under the circumstances . . . these agitators have begun to invade that country and scatter their propaganda, as will appear from what took place in Arkansas two years ago and in Tulsa, Okla., last year.").

[3] *See generally* Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161 (1921).

[4] Fugitive Slave Act of 1850, ch. 60, sec. 7, 9 STAT. 462 (1850) (repealed 1864); *see also Fugitive Slave Law of 1850*, OHIO HISTORY CENTRAL, http://www.ohiohistorycentral.org/w/Fugitive_Slave_Law_of_1850

known collectively as the Compromise of 1850,[5] and was 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.[6] They also had jurisdiction to issue certificates of removal for fugitive slaves.[7] The Commissioners took testimony from the slave-owner in person and from affidavits; the alleged slaves were not permitted to testify.[8] Then, the Commissioners were to issue the certificates of removal once they established the identity of the person claimed to be a slave. There was no jury trial and no defenses were permitted.[9] 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 (ten dollars) if they ordered the slave returned than if they found the alleged fugitive was not the person claimed by the slave-owner (five dollars).[10] The Act mandated that state officers cooperate in the return of fugitive slaves.[11] Those who interfered with the return of fugitives were subject to a $1000 fine and six months imprisonment.[12] The Act was,

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[http://perma.cc/6EEK-UJNY] (last visited Nov. 7, 2016) (noting that the Fugitive Slave Law was part of the Compromise of 1850 and noting that "[t]his law required the United States government to actively assist slave owners in recapturing their fugitive slaves.").

[5] *See Primary Documents in American History: Compromise of 1850*, LIB. OF CONG., https://www.loc.gov/rr/program/bib/ourdocs/Compromise1850.html [http://perma.cc/25LH-V6CJ] (last visited Nov. 7, 2016) (noting that the Compromise of 1850 consisted of five laws pertaining to the issue of slavery).

[6] 9 STAT. 462.

[7] *See* Earl Matz, *Fugitive Slave Laws*, ENCYCLOPEDIA VA., http://www.encyclopediavirginia.org/Fugitive_Slave_Laws [http://perma.cc/8R4P-AYWS] (last visited Nov. 6, 2016) ("[T]he Fugitive Slave Act of 1850 provided for the appointment of a greatly expanded number of federal officials empowered to act as commissioners for the purpose of issuing certificates of removal. . . .").

[8] *The Fugitive Slave Law*, DIGITAL HISTORY, http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3276 [http://perma.cc/R4LY-CZE8] (last visited Nov. 7, 2016).

[9] *Id.*

[10] 9 STAT. 462.

[11] *See id.* (criminalizing and providing a one thousand dollar fine for marshals and deputy marshals who refused to "to serve such warrant, or other process, when tendered, or to use all proper means diligently to execute the same").

[12] *Id.*

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."[13] 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 a woman and her child escape slave catchers.[14] Ralph Waldo Emerson's 1851 address on the Fugitive Slave Act critiqued the law across a broad spectrum, particularly the obligation to behave inconsistently with one's own moral conscience.[15] And there were a series of high profile cases that brought home the conflict between individual sentiment toward slaves and the obligations under the law.[16] Perhaps the most controversial of these was the 1854 removal of Anthony Burns from Boston back to slavery in Virginia.[17] The removal ended up costing Commissioner Edward Loring his faculty appointment at Harvard Law School because of public outrage that he had participated in Burns' return.[18] As Thoreau grimly asked shortly afterwards, "[d]oes any one think that justice or God awaits Mr.

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[13] 4 HENRY DAVID THOREAU, *Slavery in Massachusetts*, *in* THE WRITINGS OF HENRY DAVID THOREAU: CAPE COD AND MISCELLANIES 388, 388 (1906).

[14] *See generally* HARRIET BEECHER STOWE, UNCLE TOM'S CABIN 123–34 (1852) (Lib. Am. ed. 1983) ("Chapter IX, In which it appears that a Senator is but a Man").

[15] 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).

[16] *See, e.g.*, ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1998) (discussing the rendition of Anthony Burns back to his "owner" and Burns' subsequent torture in a jail in Richmond).

[17] *See id.* at xii ("[I]f one looks away from the national context and examines the Burns case, which set Boston on its ear in the spring of 1854 and made slavery at last unpopular there, what one sees is nothing less than a pocket revolution, operating most dramatically in the context of state politics, yet resonating largely and nationally . . . .").

[18] *Id.* at 121.

Loring's decision?"[19]

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.[20] But in the period from 1865, when the Civil War ended, to the 1920s, when Johnson was writing, 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 homefront, constitutional interpretation settled only some 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?[21] Did the South have legitimate constitutional complaints regarding their treatment by the North?[22] On that new front, the southern side was

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[19] THOREAU, *supra* note 13, at 389.

[20] *Compare* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 209, 231–32 (1978) (arguing that Justice Taney's decision in *Dred Scott* was political, rather than an exercise of the concept of self-restraint), *with* MARK GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 85–86 (2006) (discussing how *Dred* Scott was constitutionally permissible because the Constitution was constructed to support racist principles), *and* AUSTIN ALLEN, ORIGINS OF THE *DRED SCOTT* CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857 227–28 (2006) (presenting contrasting views of the constitutionality of the Missouri Compromise and Chief Justice Taney's decision). Anthony Sebok returned to the constitutionality of the Fugitive Slave Act as a way of understanding the latitude judges had to interpret the Constitution. *See* Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1835–36 (1991). A number of scholars, often inspired by Robert Cover's *Justice Accused: Anti-Slavery and the Judicial Process* (1975), have asked similar questions. *See, e.g.*, James Schmitt, *The Anti-Slavery Judge Reconsidered*, 29 L. & HIST. REV. 797 (2011).

[21] *See, e.g.*, AVERY O. CRAVEN, THE COMING OF THE CIVIL WAR 149 (1942) (describing the reliance of pre-Civil War anti-slavery societies upon no more than the word of "fellow fanatic[s]").

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

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.[23]

Those who were 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.[24] The blame fell on abolitionist fanatics and, to a lesser extent, proslavery zealots, and the enslaved were depicted as burdens borne by the Nation.[25] This allowed Americans to repair the rifts and move forward, a goal sought in particular by the southerners who needed to reenter the union and rebuild their devastated states. Throughout the process of repair, it was more convenient and popular to blame someone other than the affluent white southern men who led their section into rebellion and their homeland into ruinous war.[26]

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.[27] For instance, Joshua Lawrence Chamberlain,

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1866).

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

[24] 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).

[25] Even though there was talk of reconciliation and some moments of reunification, often through subordination of African Americans, veterans from both North and South continued to harbor animosity throughout 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).

[26] W. FITZHUGH BRUNDAGE, THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY 119–20, 122 (2008).

[27] *See, e.g.*, PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 63–67, 81 (1999) (discussing the Supreme Court's Official History, especially regarding the

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 and emphasized the bravery of Confederate soldiers, therefore de-emphasizing their role in defending a nation founded on slavery.[28] Chamberlain's defense of southern soldiers was referenced in the concurrence of a 2005 Tennessee Court of Appeals opinion prohibiting Vanderbilt University from renaming a Confederate Memorial Hall on its campus.[29] The concurrence used Chamberlain's defense to argue that Confederate soldiers fought honorably.[30]

The rewriting of history was particularly popular among academic historians. One of the great growth areas in recent American history scholarship explores the ways that the North and South arrived at 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 in both the North and the South.[31] A particular emphasis of the scholarship on reconciliation is how the process of selective memory of the eras of slavery, Civil War, and Reconstruction worked in the academy.[32] In fact, early twentieth century academics were frequent contributors to the theories of white supremacy in areas from the history of slavery to eugenics.[33]

Slaughterhouse Cases, and how it narrowed Fourteenth Amendment protections for African Americans).

[28] *See* JOSHUA LAWRENCE CHAMBERLAIN, THE PASSING OF THE ARMIES 21–22 (1915) (discussing the bravery of soldiers returning to the battle after being injured); *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).

[29] United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 102 (Tenn. Ct. App. 2005).

[30] *Id.* at 122–24 (quoting CHAMBERLAIN, *supra* note 28, at 260–65).

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

[32] *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.

[33] PETER NOVICK, THAT NOBLE DREAM: OBJECTIVITY AND THE HISTORICAL

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*.[34] Some years later, University of Chicago Professor Avery Craven portrayed the Civil War as the result of abolitionist fanatics and pro-slavery zealots, an interpretation keeping with the theory that the act was constitutional.[35] Columbia University history professor William A. Dunning depicted Yankees and blacks dominating the South during Reconstruction in his writing on the topic.[36] Historians' interpretations were joined by popular works, like Thomas Dixon's 1905 novel, *The Clansman*, which portrayed Reconstruction as an era of unmitigated corruption and the breakdown of the rule of law.[37]

Johnson's article, then, was a piece of a larger tapestry of writing on the reconciliation between North and South, and he used the interpretation of the constitutionality of the Fugitive Slave Act to aid that process. He began by observing the state of reconciliation but also argued 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

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PROFESSION 72–80 (1988); BLIGHT, *supra* note 31.

[34] ULRICH BONNELL PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION RÉGIME 514 (1918).

[35] CRAVEN, *supra* note 21, at 428–30, 433.

[36] *See, e.g.*, WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877 11 (1907) (talk of "aimless but happy" freed people), *id.* at 114 (talk of "disasters of negro political supremacy"); *id.* at 122 (talk of salvation of white society through secret societies, like the Ku Klux Klan); *id.* at 213–14 (depicting calls by African Americans for "social equality" as impetus to violence in white and black communities).

[37] *See generally* THOMAS DIXON, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (1905).

> Congress in the heat of the controversy, none has been so persistently misrepresented as the Fugitive Slave Act of 1850.[38]

At the time Johnson was writing, one of the most prominent historians of the Civil War era was James Ford Rhodes,[39] whose multi-volume *History of the United States from the Compromise of 1850* promoted reconciliation by portraying the war as an "irrepressible conflict."[40] There was a sense that unresolvable conflicts between North and South—over slavery, economy, and society—helped to absolve slaveholding Southerners (and everyone else, too) of moral culpability for the war.[41] There was, so the argument goes, nothing that could be done to resolve the conflict.[42] Indeed, Rhodes, an Ohio businessman whose manufacturing interests tilted him towards reconciliation with the South,[43] offered reconciliation through criticism of both slavery and slave owners.[44] That is, Rhodes assigned substantial blame to both the North and South in the coming of war.[45] This led Johnson to write in his first paragraph that Rhodes was "usually fair-minded."[46] Yet, even Rhodes

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[38] Johnson, *supra* note 3, at 161.

[39] *See* BLIGHT, *supra* note 31, at 357 (discussing Rhodes' writing on the Civil War).

[40] JAMES FORD RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 1–2 (photo. reprint 1904) (1892).

[41] *See id.* at 3 ("The compromise measures of 1850 were a compromise with slavery and the last of those settlements that well-meaning and patriotic men from both sides of Mason and Dixon's line were wont to devise when the slavery question made unwelcome intrusion.").

[42] *See id.* at 2 ("While we now clearly see that the conflict between the two opposing principles causing the struggle . . . was destined to result in the overthrow of one or the other, yet it was not until the eleven years preceding the appeal to arms that the question of negro slavery engrossed the whole attention of the country. . . . It was less than three years before the secession of South Carolina that [William] Seward described our condition as 'an irrepressible conflict,' and Lincoln likened it to a house divided against itself that could not stand.").

[43] BLIGHT, *supra* note 31, at 357.

[44] *Id.* at 357.

[45] *See id.* (arguing that Rhodes viewed slavery as an "unrighteous cause," but that it was "more a curse imposed from without than a crime committed by the South").

[46] Johnson, *supra* note 3, at 161. Still, Rhodes also had a nationalist

thought the Fugitive Slave Act was "one of the most assailable laws ever passed by the Congress of the United Sates."[47]

Johnson, thus, set out to correct what he thought was Rhodes' misapprehension.[48] He focused on testing the Act's constitutionality, "without reference to the wisdom or expediency of its enactment."[49] This was an attempt to isolate issues that could not be isolated—questions about the Act's expediency and its wisdom are critical to understanding the Act and its place in the road to Civil War. 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 of secession—without success.[50] That was because the questions were not susceptible to constitutional resolution.[51] The constitutionality of much congressional action was in an ambiguous area. Constitutionality was worked out by discussion and action in Congress.

Yet, this 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*.[52] He took on the charges of the many respected constitutional authorities—including Massachusetts Senator Charles Sumner.[53] He dealt with the arguments that the Act was

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interpretation that criticized the South for secession alongside his low opinion of the enslaved. SMITH, *supra* note 23, at 113–15.

[47] Johnson, *supra* note 3, at 161 (quoting RHODES, *supra* note 40 at 185).

[48] *See id.* ("Mr. Rhodes . . . understands neither the Act of 1850 nor the earlier measure to which it was supplementary.").

[49] *Id.*

[50] *See, e.g.*, MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 167–99 (1998) (discussing controversies over the legality of secession).

[51] *See* GRABER, *supra* note 20, at 2–3 (arguing that some of the issues leading to the Civil War could not be settled by the Constitution because of the "bisectional" North-South hurdle to Constitutional compromise).

[52] *See* 62 U.S. 506, 526 (185918591858) ("[T]he act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States . . . .").

[53] Johnson, *supra* note 3, at 172–73 (responding to Senator Sumner's questions about denial of trial by jury that the federal commissioners established by the Act were not Article 3 officers, and that their pay increased when they

unconstitutional because it deprived the fugitives from testifying in their own defense;[54] because it denied the alleged fugitive a jury trial by turning over responsibility for rendition to a magistrate (rather than a federal judge);[55] and because the commissioners were paid a higher fee when they ordered a fugitive returned rather than set free.[56]

The argument that Johnson thought least troublesome was the differential payments that magistrates received. When slaves were ordered to be returned, the magistrates received $10; they received only $5 if a slave was not to be returned.[57] The differential was purportedly to cover the extra paperwork involved if they ordered rendition.[58] 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 humor."[59] However, shortly after Johnson's article, the Supreme Court found similar differentials unconstitutional in *Tumey v. Ohio*.[60] 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.[61] Johnson responded to the criticism that the commissioners were not Article III judges with more recent cases on administrative law for the proposition that judicial issues could be delegated to a magistrate,

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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).

[54] Johnson, *supra* note 3, at 178 ("The denial . . . of the right to testify in his own behalf applies to the fugitive from justice as well as to the fugitive from labor.").

[55] *See id.* at 173 ("[M]any officers have quasi-judicial duties without holding their offices by judicial tenure . . . .").

[56] *See id.* at 172 (refuting the notion that commissioners would be impartial because they received more money for an order the return of the fugitive slave).

[57] *Id.*

[58] *Id.* at 172–73.

[59] *Id.*

[60] 273 U.S. 510, 531 (1927) (finding a violation of due process where a judge received twelve dollars for a guilty verdict and nothing for a not guilty verdict).

[61] *Id.* at 532, 534.

rather than be heard by a federal judge.[62] So Johnson ended up with a strange juxtaposition of twentieth century administrative law precedents, like the Interstate Commerce Commission, with the Fugitive Slave Act of 1850.

A more difficult question, in Johnson's mind, related to whether suspension of habeas corpus for the supposed fugitive was constitutional.[63] 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.[64] Johnson spent the most time, though, on the questions about whether the Fugitive Slave Act of 1850 deprived alleged fugitives of their right to jury trial and due process.[65] 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.[66] Though modern research has disclosed that a few hundred enslaved people in Missouri did challenge their owners in court over the forty years before the Civil War,[67] 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 officers 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

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[62] *See* Johnson, *supra* note 3, at 173, 181–82 (outlining the increasing authority of administrative agencies and citing Prentis v. Atl. Coast Line Co., 211 U.S. 210 (1908) (authority of Postmaster General) and Lewis v. Frick, 233 U.S. 291 (1914) (power of Department of Labor) as examples of the more modern approach).

[63] *Id.* at 173–74 (noting the seriousness of the allegation that the Fugitive Slave Act of 1850 denied the writ of habeas corpus to captured fugitives).

[64] *Id.* at 173–74.

[65] *Id.* at 174–79 (explaining the argument that the procedures in the Fugitive Slave Act were extradition hearings that did not have to comport with the Fifth and Seventh Amendments to the Constitution).

[66] *Id.* at 181 (citing MO. REV. STAT. § 69 (1856) (An Act to Enable Persons Held in Slavery to Sue For Their Freedom)).

[67] *See, e.g.*, LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT xi, 3 (2014) (reporting that her research discovered 239 litigants in about 300 petitions filed from 1814 to 1860 in St. Louis).

of law and are conclusive."[68]

Johnson had long been interested in the constitutionality of the Act and the Southern side of the argument. His 1912 book, *Readings in American Constitutional History, 1776–1876*, included three documents on the rendition of fugitive slaves: an excerpt from the 1842 opinion in *Prigg v. Pennsylvania*,[69] an 1849 report from the Virginia legislature about the problems with Northern liberty laws, which made it difficult to recapture fugitives,[70] and finally, United States Attorney General John Crittenden's opinion on the constitutionality of the Act.[71] All three documents were decidedly against the (mostly Northern) abolitionist movement. The book presents a pro-Southern interpretation in other ways as well. For instance, the chapter on Lincoln's leadership during the Civil War was called "Presidential Dictatorship."[72] In addition, Johnson's section on secession referred to Democrat statements about the inability of the President to act to preserve the Union[73] and then the Southern declarations of secession[74] without any of the Republican responses.

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.[75]

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[68] Johnson, *supra* note 3, at 181.

[69] ALLEN JOHNSON, READINGS IN AMERICAN CONSTITUTIONAL HISTORY, 1776–1876, 416–21 (1912).

[70] *Id.* at 421–23.

[71] *Id.* at 423–25.

[72] *Id.* at 474–81 (recounting the debate over the executive branch's power to suspend the writ of habeas corpus in the context of Lincoln's decision to do so immediately following the fall of Fort Sumter).

[73] *Id.* at 454–59 (presenting the argument by Attorney General Black and President Buchanan that the Constitution has no procedure for secession and cannot forcibly keep a state in the Union).

[74] *Id.* at 459–63 (presenting South Carolina's explanation of its reasons for secession and Jefferson Davis' account of the unsuccessful attempt to negotiate the orderly withdrawal from the Union).

[75] *See* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES

Johnson was part of a pro-southern interpretation of the Constitution, which blamed abolitionists for their fanaticism and pled the case of conservative constitutional interpretation.[76] The article affected how people viewed the Act. Hamilton Holman's *Prologue to Conflict*, still the leading work on the Compromise of 1850, quotes Johnson to the effect that the Act was constitutional in every way.[77] 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.[78] Nevertheless, Campbell did not challenge Johnson's conclusions about the Act's constitutionality.[79]

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*.[80] 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[81] – 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.[82] Johnson's *Readings* harkens back to a time when the Constitution was thought of in broad terms, as a set of ideas

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HISTORY 498 (1922) (criticizing the abolitionists' refusal to accept the Court's decisions on slavery).

[76] *See* R. Blakeslee Gilpin, *A War Not for Abolition*, N.Y. TIMES OPINIONATOR (Oct. 11, 2011, 6:34 PM), http://opinionator.blogs.nytimes.com/2011/10/11/a-war-not-for-abolition/?_r=0 [http://perma.cc/M9T7-G7AV] (noting that in the 1860s, the *New York Herald* criticized the abolitionists for their "abuse against the constitution" and for "sow[ing] the seeds of insurrection.").

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

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

[79] *Id.* at 41.

[80] JOHNSON, *supra* note 69.

[81] *Id.* at 1–9 (reprinting the Connecticut charter of 1662 and the Maryland charter of 1632); *see id.* at 337–38 (reprinting Daniel Webster's 1830 reply to Hayne of South Carolina, which discusses whether the State retains the right to revolt in order to resist the laws of Congress).

[82] *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7–8 (2004) (arguing that the Constitution was originally seen as a "people's charter," meant to be interpreted by the general public and not solely by the judiciary).

about the Union given life by interpreters in Congress, in state legislatures, in newspapers, and in taverns at cross roads throughout the United States.[83] 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 who broadly construed the meaning of the Constitution, and he construed it in light of subsequent developments of the administrative state.[84]

Johnson also wrote a popular work on historical methods, *The Historian and Historical Evidence*, which acknowledged that historical analysis was dependent on and influenced by the politics and beliefs of the historian.[85] As Johnson wrote, "Whether or no[t] he is conscious of it, every historian writes with a predilection for one mode of interpretation or another."[86] It is not possible, he admitted, to "tell 'just how it was' or 'how it came to be.'"[87] Instead, historians must know how to measure and weight evidence, for testimony about the past is notoriously dependent on the perspective of the narrator.[88] What he provided in the *Yale Law Journal* turned out to be exactly that kind of history, dependent 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 been.

In 1926, Johnson left Yale to become editor of the *Dictionary of American Biography*.[89] Johnson was criticized by a leading southern historian regarding the *Dictionary*'s entry for Jefferson Davis. Dunbar Rowland, head of Mississippi's department of archives and history

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[83] *See id.* at 109 (stating that in the 1790s, the number of citizens involved in politics grew tremendously. The citizens reportedly "mounted petition campaigns and called conventions; they paraded in the streets, planted liberty poles, and burned effigies; they held feasts and delivered public toasts.").

[84] For instance, Johnson noted that immigration boards, set up through the Department of Labor, had control over people of Chinese descent born in the United States who were seeking to re-enter the United States. Johnson, *supra* note 3, at 182. Such boards determined constitutional rights without trial by jury. *Id.*

[85] *See* ALLEN JOHNSON, THE HISTORIAN AND HISTORICAL EVIDENCE 172–73 (1926) (arguing that methods of historical analysis change based on factors such as politics, social conditions, and new scientific discoveries).

[86] *Id.* at 172.

[87] *Id.* at *Preface*.

[88] *Id.*

[89] ALLEN JOHNSON, DICTIONARY OF AMERICAN BIOGRAPHY (1936).

and the general historian of the Sons of Confederate Veterans, protested that the entry should not have been assigned to Nathaniel W. Stephenson.[90] That Rowland saw the need for a pamphlet criticizing Johnson's supposed Northern partisanship, while this essay criticizes him for his supposed Southern partisanship, suggests how polarized attitudes towards the Civil War have been in United States history.

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.[91] 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.[92] Much was in play in 1921; even in New Haven, where,

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[90] DUNBAR ROWLAND, THE "DICTIONARY OF AMERICAN BIOGRAPHY": A PARTISAN, SECTIONAL, POLITICAL PUBLICATION – A PROTEST (1931).

[91] *See, e.g.*, *The Tulsa Riots*, 22 THE CRISIS: A RECORD OF THE DARKER RACES, July 1921, at 114, 116 (noting that black people had faced extreme oppression in Tulsa and that warnings had been distributed telling them to "leave Oklahoma before June 1, or suffer the consequences."). One might also look to works on race appearing in law journals at the time. Two years earlier, the *University of Pennsylvania Law Review* studied the origins of federal civil rights legislation. *See* Benjamin M. Kline, *The Origin of the Rule Against Unjust Discrimination*, 66 U. PA. L. REV. 123 (1919) (acknowledging the "rule against unjust discrimination" and analyzing its origins in England and in America). Conversely, one author argued in the *Virginia Law Review* about the importance of segregation. *See* Nelson Phillips, *The Integrity of American Life and American Law*, 7 VA. L. REV. 577 (1921). Four years later, the *Virginia Law Review* published an article supporting eugenics, written by the lawyer who argued *Buck v. Bell*. *See* Aubrey E. Strode, *Sterilization of Defectives*, 11 VA. L. REV. 296, 296 (1925) (arguing that since the State has the power to take into custody individuals who are criminals, "insane, epileptic, and feebleminded" and, by segregation, prevent them from procreating, the State should also have the power to sterilize those same individuals). 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, emphasizing the role that black people had in the reconstruction of democracy. *See* W. E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1935).

[92] *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

the same month that Johnson's article appeared, Yale University Press published Benjamin Cardozo's *Nature of the Judicial Process*, where Cardozo discussed the weighing of precedent, logical consistency, custom, social welfare, and justice and morals when making a judicial decision.[93] 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 taking up the ultimately futile task of defending the status quo.

Supreme Court's equal protection jurisprudence).

[93] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).