TURNING BACK THE CLOCK:

California Constitutionalists, Hearthstone Originalism, and Brown v. Board

FELICIA KORNBLUH*

In 1953, when they were asked by the Supreme Court to reargue *Brown v. Board of Education*, the attorneys of the NAACP Legal Defense and Educational Fund turned to the writings of a blind professor from the Speech Department at UC Berkeley and a deaf librarian from Los Angeles.[1]

* Felicia Kornbluh, Ph.D., is director of the Women's and Gender Studies Program, and associate professor of history, at the University of Vermont. This article is drawn from ongoing research into the lives and work of Jacobus tenBroek and Howard Jay Graham and the transformation of equal protection in the decade after World War II. Kornbluh is the author of *The Battle for Welfare Rights* (U. of Penn., 2007), and many articles, and is writing a book tentatively entitled *Constant Craving: Economic Justice in American Politics, 1945 to the Present*. She is one of sixteen members of the Vermont Commission on Women and the editor for North America of the book series, "The Global History of Social Movements" from Palgrave–MacMillan Publishers. Kornbluh acknowledges the excellent comments of Reuel Schiller and Sarah Gordon, and the audience at the 2011 and 2012 meetings of the American Society for Legal History, as well as colleagues who heard early versions of some of this material at the Center for the Study of Law and Society, Boalt Hall, UC Berkeley, and the Political Science Department, Brooklyn College, City University of New York.

[1] I refer to Graham as "deaf" rather than "Deaf" to indicate his physical impairment as well as his lack of participation in a cultural or linguistic community of other hearing-impaired people. Graham did not communicate in American Sign Language and did not attend any schools that catered to deaf students.

Thurgood Marshall and his team utilized the work of historians such as John Hope Franklin and C. Vann Woodward. However, to answer the critical question of the original meaning of the Fourteenth Amendment — the key question the Court had put to them in its request for re-argument — they built most directly upon the scholarship of Jacobus tenBroek and Howard Jay Graham.[2] These two scholar-activists had been collaborating since the middle 1940s, when both were in Berkeley, on research about the origins of the Reconstruction Amendments. They were the first to argue that the ultimate source of the language in Section One of the Fourteenth Amendment was the antebellum movement for the abolition of slavery. Therefore, they claimed, segregated education violated the Fourteenth Amendment's proscription against states' depriving citizens of "equal protection of the laws."

TenBroek was a scholar, teacher, and advocate who began his career on the far banks of the mainstream but eventually earned a national reputation. He co-authored a now-classic essay in 1949 that predicted and promoted the central role of the Equal Protection Clause in postwar movements for social change. He argued presciently that the Equal Protection Clause was being revivified in the postwar years. TenBroek and his collaborator were responsible for the Venn diagrams that illustrate forms of discrimination under the Equal Protection Clause that are constitutionally prohibited because they are "under-" or "over-inclusive." More ambitious, if less influential, was their argument for a doctrine of "substantive equal protection" that would acknowledge the need for affirmative government action to realize equality.[3] In 1940, tenBroek founded and began to lead the National Federation of the Blind (NFB), the first national group in U.S. history dedicated to blind people's advocacy on their own behalf. The NFB became the most effective organization by and for disabled people and public assistance recipients between World War II and the coalescence of mass

[2] Richard Kluger writes that "[t]he two experts probably most deeply versed in the subject [of the Fourteenth Amendment] shared a pair of traits," that they were Californians and disabled. Kluger, *Simple Justice: The History of Brown v. Board of Education, the Epochal Supreme Court Decision that Outlawed Segregation, and of Black America's Century-Long Struggle For Equality Under Law* (New York: Vintage, 1975), 625.

[3] Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37:3 (September, 1949): 341–381. Graham also argued for substantive equal protection.

movements for disability and welfare rights in the 1960s and 1970s. In a relatively short but productive career, tenBroek wrote field-defining essays on disability rights, income-based discrimination, and the right to travel, and was lead author of the first book-length critique of the Supreme Court and Roosevelt Administration *vis-à-vis* Japanese internment.[4] He chaired the State Social Welfare Board under Governor Edmond ("Pat") Brown, and taught in the Speech and Political Science Departments at Berkeley for almost thirty years.[5] His (zealous) former students included California Supreme Court Justice Joseph Grodin and activist lawyer Michael Tigar, and his colleagues and friends included Chief Justice Roger Traynor.[6]

---

[4] Jacobus tenBroek, *The Constitution and the Right of Free Movement* (pamphlet, National Travelers' Aid Association, 1955); tenBroek, "California's Dual System of Family Law: Its Origins, Development, and Present Status," Part I, *Stanford Law Review* 16 (March, 1964): 257–357, Part II, *Stanford Law Review* 17 (July, 1964): 900–981; and Part III, *Stanford Law Review* 17 (April, 1965): 614–682; tenBroek, "The Right to Live In the World: The Disabled in the Law of Torts," *California Law Review* 54:2 (May, 1966): 841–919; tenBroek, Edward Barnhart, and Floyd Matson, *Prejudice, War, and the Constitution* (Berkeley and Los Angeles: University of California Press, 1954). On public assistance and disability, see also, tenBroek and Matson, *Hope Deferred: Public Welfare and the Blind* (University of California Press, 1959), and see discussions in Felicia Kornbluh, *The Battle for Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), 30; Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993), 20–21, 36; and Matson, *Blind Justice: Jacobus tenBroek and the Vision of Equality* (Washington, D.C.: Library of Congress/Friends of Libraries for the Blind, 2005), 129–148 (on Japanese American project), 171–179 (on theorizing poverty and social welfare).

[5] Adrienne Asch, "Jacobus Tenbroek [sic], Uc [sic] Berkeley's Pioneer in Civil Rights Theory and Action," remarks at the symposium, *Intersections of Civil Rights and Social Movements; Putting Disability in its Place*, held at UC Berkeley, November 3, 2000 and made available via the Regional Oral History Office, Bancroft Library (Bancroft), Berkeley, CA, 2004, http://content.cdlib.org/view?docId=hb5r29n7w0;NAAN=13030&doc.view=frames&chunk.id=div00019&toc.id=0&brand=calisphere [accessed November 26, 2012]; Unsigned tenBroek obituary, *San Francisco Chronicle*, March 28, 1968, and other materials, special issue of *The Braille Monitor*, voice of the National Federation of the Blind, Inkprint edition, Berkeley, July, 1968 devoted to memorializing Jacobus tenBroek, Bancroft. See also Matson, *Blind Justice*, 195, 210.

[6] Joseph Grodin, personal communication with the author, January 30, 2012; Michael Tigar, "Jacobus ten Broek. In Memoriam," *California Law Review* 56:3 (May, 1968): 573–574; Jacobus tenBroek to Howard Jay Graham, July 22, 1947; Antislavery Origins of the Fourteenth Amendment, 1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind,

TenBroek's collaborator for a decade was Howard Jay Graham.[7] Graham never held a position in a university. Nonetheless, he served as an in-house constitutional historian for the NAACP during the summer of 1953 and a consultant in the fall of 1953, and wrote a substantial portion of the final brief to the Court in *Brown*. In the second volume of his biography of Thurgood Marshall, Mark Tushnet demonstrates that Graham's contribution to the NAACP's effort to prepare for the re-argument of *Brown* was more consequential than C. Vann Woodward's.[8] In a reversal of the traditional understanding of physically disabled adults as the "vulnerable," Judge Robert Carter, in an interview with *Brown v. Board* chronicler Richard Kluger, remembered Graham as one upon whom able-bodied attorneys leaned: Without Howard Jay Graham as an advisor on constitutional history during the preparation of their brief for the reargument of *Brown*, Carter recalled, "'we would have felt very vulnerable.'"[9] Graham laid the groundwork for his NAACP work with influential essays he published between the late 1930s and early 1950s. These undercut the post–Civil War doctrine of corporate personhood; attacked what he called the "conspiracy

Jernigan Institute, Baltimore, MD: "Had a chat with Traynor the other night . . . was provoked by his tie-up of you and Stephen Field to tell an interesting story about the latter. When he was Dean of the Law School, Sproul's administrative ass't called him up one day to ask about hanging a picture of Field in Boalt. Traynor replied immediately that he 'wouldn't hang a picture of that old son-of-a-bitch in a farmer's back house.' He then hung up the phone and began to think about the difference between Roger J. Traynor, Professor, talking to a law student in the basement of Boalt Hall and Roger J. Traynor, Dean, talking to the University administration. Five minutes later he called up the President's office to say that he would be delighted to hang a picture of Mr. Justice Field. He characterized Field as one of the worst judges ever to occupy the supreme bench, intellectually crooked, a man who gave the best reasons for the worst decisions. He said I could repeat the story to you but obviously wouldn't want it spread any further."

7 In addition to my own work, Matson explores their collaboration in *Blind Justice*, 119–127.

8 Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York and Oxford: Oxford University Press, 1994), 197, describes three research papers that "became the center of the NAACP brief," by Howard Jay Graham, John Hope Franklin and constitutional historian Alfred Kelly of Wayne State, and attorney William Coleman (and collaborators).

9 Richard Carter, quoted in Kluger, *Simple Justice*, 625. Feminist legal theorist Martha Fineman has made the idea of vulnerability the center of her approach to gender, disability, and difference. See Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, 20:1 (2008): 1–23.