TURNING BACK THE CLOCK:

California Constitutionalists, Hearthstone Originalism, and Brown v. Board

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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]

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[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]

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[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.

theory" of a pro-capitalist, anti-civil rights Constitution posited by Charles and Mary Beard; and claimed that passionate citizens outside of the courts fashioned an "extra-judicial" version of substantive due process in the middle nineteenth century.[10] Graham defended the New Deal while renovating the historical reputations of abolitionists and Radical Republicans, and attempted to fashion an interpretation of the constitutional text that made it useful to social-change efforts in post–World War II America.[11]

TenBroek and Graham were virtually alone in researching the legislative and grassroots origins of the Fourteenth Amendment in the years between 1944 and 1950.[12] Early in their collaboration, they concluded that the legislative history of the Amendment could support diverse interpretations of its meaning — including interpretations that troubled their effort to further the cause of African-American civil rights in the middle twentieth century.[13] In response to this difficulty, tenBroek and Graham emphasized the significance of the constitutional thought of the

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[10] Howard Jay Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," Part I, *Yale Law Journal* 47:3 (January, 1938): 371–403; Part II, *Yale Law Journal* 48:2 (December, 1938): 171–194; Editorial Note prior to reprint of the "conspiracy theory" articles, *Everyman's Constitution* (Madison: State Historical Society of Wisconsin, 1968), 23–27; "Four Letters of Mr. Justice Field," *Yale Law Journal* 47:7 (May, 1938): 1100–1108; "Justice Field and the Fourteenth Amendment," *Yale Law Journal* 52:4 (September, 1943): 851–889; and "Procedure to Substance: Extra-Judicial Rise of Due Process, 1830–1860," *California Law Review* 40:4 (Winter, 1952–1953): 483–500. Only a week after publication of his first "conspiracy theory" essay, Justice Black cited it in his dissent in the case *Connecticut General Life Insurance Co. v. Johnson* [303 U.S. 77, 87] (1938), as support for his questioning of the idea of the corporate person that enjoyed the protections of Section One of the Fourteenth Amendment. Graham begins his book with reference to the constitutional rights of "*artificial* persons." See *Everyman's Constitution*, 3.

[11] For the New Deal context of his early publishing, see Graham, *Everyman's Constitution*, 25.

[12] Within the historical profession, they were working against the still-dominant Dunning school, on the right, and the Beardian or Progressive school, on the left. However, in their appreciation of the historical significance of the abolitionist movement, they followed on the heels of Dwight Lowell Dumond's *Antislavery Origins of the Civil War in the United States* (Ann Arbor: University of Michigan Press, 1939; reprint, with foreword by Arthur Schlesinger, Jr., 1959).

[13] For their frustration with what they found disappointing or "embarrassing" views of the Republicans who helped pass the Thirteenth and Fourteenth Amendments, see Howard Jay Graham to tenBroek, October 1 1945; October 28, 1945; and n.d. [filed in-between letters dated October 28 and November 25]; Antislavery Origins of the Fourteenth Amendment,

movement for the abolition of slavery from the early nineteenth century forward, and de-emphasized some of the ideas of the Republicans who formed the Congressional majority after the Civil War.[14] They argued that the abolitionists were the true authors of the Reconstruction Amendments, and that abolitionist oratory and journalism gave precise meanings to the sometimes-opaque phrases particularly of Section One of the Fourteenth Amendment.[15] They extrapolated from this research to articulate a socio-legal, "legal-history-from-below," approach to constitutional history.[16] They concluded that what Graham termed the "hearthstone opinions" of activists outside the courts and legislatures and what tenBroek called the work of "dogmatic, even fanatical, reformers" created some of the most significant changes in constitutional meaning in U.S. history.[17] In their

1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind, Jernigan Institute, Baltimore, MD.

[14] Dumond, rev. ed., 1959, 67–82, preceded tenBroek and Graham in offering an interpretation of anti-slavery and pro-slavery constitutional thought. (NAACP and U.S. Government Briefs for the Reargument included a few additional citations on anti-slavery thought and more generally on Reconstruction.)

[15] I see here something of a California or Berkeley socio-legal constitutional tradition — a tradition that, like the work of Willard Hurst and the Wisconsin School, was Realist in its inspiration. TenBroek and Graham were less interested than was Hurst in turning away from appellate case law and toward the interpenetration of law into daily lives, and more interested in exploring the historical roots of elite legal change. Interestingly, Hurst and Graham reviewed one another's work positively. See Willard Hurst, Review, "Truth and Fiction about the Fourteenth Amendment" by Louis B. Boudin; "The 'Conspiracy Theory' of the Fourteenth Amendment" by Howard Jay Graham; "Equality and the Law" by Louis A. Warsoff, *Harvard Law Review*, 52:5 (March, 1939): 851–860; Hurst, Review of *Everyman's Constitution*, *Journal of American History* 56:1 (June, 1969): 146–148; and Graham, Review of *Law and the Conditions of Freedom in the Nineteenth-Century United States* by James W. Hurst and *The Law of the Commonwealth and Chief Justice Shaw* by Leonard W. Levy, *California Law Review*, 45:5 (December, 1957): 792–796. Graham also reviewed John Phillip Reid's book, *Chief Justice: The Judicial World of Charles Doe, Journal of American History* 54:2 (September, 1967): 426–427.

[16] William Forbath, Hendrik Hartog, and Martha Minow, "Forward: Legal History from Below," *Wisconsin Law Review* (July/August, 1985) 759–766; for a debate and a refinement, see Felicia Kornbluh and Karen Tani, "Below, Above, Amidst: The Legal History of Poverty," *A Companion to American Legal History*, ed. Alfred Brophy and Sally E. Hadden (Blackwell Publishing, 2013), 329–348.

[17] Howard Jay Graham, SCHOOL SEGREGATION CASES — APPENDIX TO APPELLANTS' BRIEFS: "The purpose and Meaning of Sections One and Five of the Fourteenth Amendment: The Historical Evidence Re-examined," NAACP papers, Group

understanding of legal history, what activists such as the abolitionists called illegal and unconstitutional became so; after years of bitter struggle and warfare, the legal and constitutional agenda of these "fanatical" reformers was written into the Constitution.

The NAACP brief for the reargument of Brown echoed tenBroek's and Graham's scholarship, and had Howard Jay Graham as a primary author. The brief made an historical, originalist, and socio-legal argument about the Fourteenth Amendment that has only rarely been revisited. I think that it deserves reconsideration in light of years of second-guessing — from the left as well as the right — of the so-called "living constitutionalism" of the May, 1954, opinion in *Brown* and its reliance upon data from the "doll studies" of Kenneth and Mamie Clark, among other sources. Graham's and tenBroek's appreciation of the role of abolitionist activists in the making of constitutional meaning, combined with their particular originalist historical method, deserves consideration as well in the general context of the renaissance of originalist jurisprudence in the past thirty

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II, Box B 143, Folder titled "Schools – Kansas – Topeka – Brown v. Board of Education (and other cases) – 2nd Reargument – Legal papers – 1954," LOC. Graham wrote, p. 1: "The modern elaboration of due process and equal protection is familiar to everyone. Yet the really decisive shifts in these fields occurred before the Civil War. The synthesis was made, moreover, not by lawyers or judges, but by laymen, and only recently has the significance of this fact begun to be fully appreciated." Also see Graham's essay, "Extra-Judicial Rise of Due Process," which emphasized the activist origins of a theory of substantive due process decades before the late nineteenth century, and the essay he produced closest to his experience working for the NAACP, "The Fourteenth Amendment and School Segregation," *Buffalo Law Review* 3:1 (Winter, 1953): 1–24, which included his appreciation of "hearthstone," or grassroots, constitutional interpretation. See also Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley and Los Angeles: University of California Press, 1951), 94–95: "The three much-discussed clauses of section I of the Fourteenth Amendment were the product of and perhaps took their meaning, application, and significance from a popular and primarily lay movement, which was moral, ethical, religious, revivalist rather than legal in character. The movement was comprised of people who knew little and cared less about the erudition and ancient usages of the law, who came to the reading of the Constitution as dogmatic, even fanatical reformers . . . It was as a culmination of this movement and usage that the clauses of section I of the Fourteenth Amendment were made a part of the Constitution; and their accepted meaning was the meaning which these reformers gave to them on the hustings, in revival meetings, in pamphlets, and in the thousand other outlets to their ardor."

years.[18] Interestingly, Randy Barnett, the leading libertarian originalist legal scholar, recently rediscovered tenBroek's and Graham's scholarship on Section One of the Fourteenth Amendment. However, Barnett reiterated some of the constitutional arguments of leading abolitionists *vis-à-vis* the eighteenth-century Constitution without proceeding, as tenBroek and Graham did, to consider the ways in which nineteenth-century radical politics transformed constitutional meanings and gave the Reconstruction Amendments their liberatory edge.[19]

The originalism of the two disabled, California-based, scholars differed in important ways from Randy Barnett's and from that of present-day conservatives such as Antonin Scalia.[20] It differs as well from the "framework

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[18] The *stunde null* of modern constitutional originalism may be Alexander Bickel's 1955 essay on the use of historical evidence in *Brown*, based upon the research he conducted for Justice Frankfurter in the months after the Court posed its questions for reargument to the parties. Alexander Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69:1 (November, 1955): 1–65.

See also, among other reflections, Erwin Chemerinsky's recent thoughts on the SCOTUS Blog on the significance of Bickel's work in the development of originalism. Chemerinsky argues that the problem derived from Bickel's scholarship, of the legitimacy of "counter-majoritarian" appellate court action, and the answer that originalism appears to provide to this supposed difficulty, are both dead ends for legal thought. Erwin Chemerinsky, "It's Alexander Bickel's Fault," Online Alexander Bickel Symposium, SCOTUS Blog, August 16, 2012 [accessed October 22, 2012]: "Modern constitutional theory began with Alexander Bickel's *The Least Dangerous Branch* and its declaration . . . that there is a 'counter-majoritarian difficulty' in having an unelected judiciary with the power to invalidate the acts of popularly elected officials. The focus of constitutional theory ever since has been on trying to solve the counter-majoritarian difficulty identified by Bickel and on reconciling judicial review with democracy. Unfortunately, this is a misguided and impossible quest, but one that has had profound consequences for constitutional law ever since."

[19] Randy Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," Georgetown Public Law Research Paper No. 10-06, February, 2010, later published in *Journal of Legal Analysis,* 3 (2011). Barnett has been credited as the author of the constitutional challenge to the Affordable Care Act; despite the Court's choice to uphold the law, Justice Roberts's finding that its mandate exceeded what it was permissible under the Commerce Clause may have owed a debt to Barnett. See Sheryl Gay Stolberg and Charlie Savage, "Vindication for Challenger of Health Care Law," *New York Times*, March 26, 2012 [accessed at http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html October 29, 2012].

[20] Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004); Antonin Scalia, *A Matter of Interpretation: Federal*

originalism" that the liberal constitutional theorist Jack Balkin has offered as an alternative to the jurisprudence of the Warren Court. However, like Balkin's provocative effort to blend late-twentieth- and twenty-first-century rights jurisprudence with originalism, the constitutional theory of tenBroek, Graham, and the NAACP's reargument in *Brown* was an attempt to claim that the true meaning of the Constitution was an equalitarian one. I do not offer the originalism of the *Brown* reargument as an alternative for today.[21] However, I think that studying the fate of that particular brand of "living originalism" (to borrow Balkin's phrase) can help us understand the legal world before *Brown*, and to comprehend some of the reasons why and ways how the Warren Court came to craft its approach to jurisprudence.[22]

The history of tenBroek's and Graham's role in *Brown v. Board* points toward different understandings of the roots of modern constitutional change than the standard ones. In a parallel to their interpretation of the nineteenth century, tenBroek's and Graham's work and lives indicate that twentieth-century constitutionalism, too, came from unlikely and largely unauthorized sources. Beyond their own biographies as West Coast intellectuals whose bodily experiences powerfully shaped their careers, tenBroek's and Graham's scholarship was also informed by the national and local contexts in which it was formed. For these two students at Berkeley in the 1930s, New Deal constitutional politics were obviously influential. TenBroek's early study of what he called "extrinsic [that is, historical] aids" to constitutional construction, and Graham's impassioned critique of the Beards, were complementary efforts to tear down the edifice of (pro-corporate, anti-labor, and anti-civil rights) post-*Lochner* jurisprudence — a body of jurisprudence that, both scholars would have argued, betrayed the Reconstruction Constitution.[23] For both men, the turn toward historical data as a resource in constitutional interpretation was a Realist intellectual

Courts and the Law, ed. Amy Gutmann, and with responses by Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin (Princeton: Princeton University Press, 1997).

21 But see Jamal Greene, "Fourteenth Amendment Originalism," *Maryland Law Review* 71 (2012): 978–1014.

22 Jack Balkin, *Living Originalism* (Cambridge: Harvard/Belknap Press, 2011).

23 Jacobus tenBroek, "Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* 26:3 (March, 1938): 287–308; tenBroek, "Use by the United States Supreme Court of Extrinsic Aids

move comparable to Willard Hurst's turn toward history as a window upon the role of law in American life. Graham and tenBroek both paid close attention to African-American civil rights campaigns, but for tenBroek, at least, the campaigns of Japanese and Japanese-American advocates in California were at least as influential as African-American ones.[24] This is evident in the range of cases he and co-author Joseph Tussman cited in their essay on equal protection, on which tenBroek was working at the same time that he was collaborating with Graham, and in the cases and other materials tenBroek taught his students in the Berkeley Speech Department (which he turned into a pre-law department) in the late 1940s and 1950s.[25] TenBroek, and perhaps Graham as well, were also shaped as intellectuals who appreciated the role of outsider groups in creating legal change by the disability rights movements of the 1930s and 1940s, including the statewide and national groups tenBroek co-founded, the California Council of the Blind and the National Federation of the Blind.[26]

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in Constitutional Construction," *California Law Review* 26:4 (May, 1938): 437–454; and Graham, "Conspiracy Theory," Part I and Part II.

[24] For general background on the multiple but distinct threads of civil rights activism in postwar California, see Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978* (New York and Oxford: Oxford University Press, 2010).

[25] Tussman and tenBroek, "Equal Protection of the Laws." In an early edition of the course book for Speech 1A and 1B, which served as the introductory courses in law at Berkeley during tenBroek's years in the Speech Department, tenBroek and Richard Wilson included the Supreme Court opinions in *Missouri ex rel. Gaines v. Canada* and *Smith v. Allwright*, but few other cases regarding African-American civil rights. The book also included materials from the internment cases, from *Yamashita v. Styer* (prosecution of the Japanese commander in the Philippines), and *Duncan v. Kahanamoku* (challenge to martial law in Hawaii). Jacobus tenBroek and Richard Wilson, *Materials for Speech 1A-1B, University of California Syllabus Series — Syllabus RX — Materials for Spech 1-A and 1-B* (Berkeley and Los Angeles: University of California Press, September, 1947), Bancroft. Note that the course book must have been amended after September, 1947, since the *Gaines* case was not decided by the Supreme Court until 1948.

[26] For discussions, see Kornbluh, "Disability, Antiprofessionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s," *Journal of American History* 97:4 (March, 2011): 1023–1047. We may find the roots of their approach to constitutional history as well in the internationalist and social democratic "human rights" politics of the era after the war; the efforts of women to defend their rights to work within and outside of the courts; the legal improvisations of the rising homophile movement of the 1940s; and in the belated revulsion within U.S. public

A LEGAL DILEMMA

Graham and tenBroek had begun to collaborate actively in the early 1940s. This was shortly after tenBroek had completed two years at Harvard Law School and another two at the University of Chicago Law School, earning one doctorate in law at Berkeley and beginning another at Harvard, and attempting to obtain a full-time teaching position. He had also during these years founded the National Federation of the Blind (in 1940, at the age of twenty-nine). Finally, in 1942, he received an offer of a full-time position in the Department of Speech at his alma mater. He began teaching in the fall of 1943.[27] Graham had by this time spent twelve fruitful but perhaps also frustrating years in Berkeley, had completed an M.A. in political science and training in librarianship. Despite his widely acknowledged expertise, Graham held neither a Ph.D. nor a law degree.[28] He started his career at the Los Angeles County Law Library in 1939. He had faced the predictable barriers both to education and to a scholarly career on account of his disability and on account of, first, the Depression and then wartime declines in university enrollments.[29]

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opinion at the treatment of European Jewry by the Nazis and the assertion of Jewish civil rights after World War II.

[27] TenBroek spent two years on a one-year fellowship at Harvard Law School and two in a one-year position at the University of Chicago Law School. On his final settlement with Berkeley, see Letter from Jacobus tenBroek, Chicago, Illinois, to Charles Aikin, Berkeley, CA, March 3, 1942; Letter from Gerald Marsh, Berkeley, CA, to Jacobus tenBroek, March 20, 1942; tenBroek to Marsh, April 13, 1942; and tenBroek to Aikin, April 30, 1942, all quoted in Lou Ann Blake, "Jacobus tenBroek: Letters to Berkeley," *Braille Monitor* 51:3 (March, 2008), no page, http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0803/bm080312.htm [accessed January 11, 2012]. For tenBroek's efforts to find a job generally, see Blake, "Jacobus tenBroek: Letters to Berkeley."

[28] In his foreword to Graham's book, Brandeis University constitutional historian Leonard Levy called Graham "surely the greatest authority on the history of the [Fourteenth] amendment," its "Maitland," and perhaps the greatest living authority on the history of the Constitution in the United States. Levy, "Foreword," to Graham, *Everyman's Constitution*, vii.

[29] Graham, *Everyman's Constitution*, xiii: Graham acknowledges his gratitude to the Berkeley School of Librarianship, "for further professional preparation, often under mutual difficulties — bridged in this instance, as always, by my wife Mary's faithful assistance." For sensitivity to the role of the war in constraining academic careers, I rely upon assorted letters excerpted in Blake, "Jacobus tenBroek: Letters to Berkeley."

The two scholars co-wrote a series of reviews of state constitutional law for the *American Political Science Review* (in 1943–44, 1944–45, and 1945–46).[30] They started work on the project they initially called "The American Judiciary and the American Dilemma" in the early fall of 1945, a year after publication of Myrdal's *An American Dilemma*.[31] By 1946, they were writing to one another several times a week, sharing citations, interpretations of data, and drafts of writing. Their correspondence was particularly rich since Graham was a self-described "lip-reader," and there was at this point in history no assistive technology that would allow him to speak on the telephone.[32] TenBroek was blind and could not read the letters Graham sent. However, his wife, Hazel tenBroek, who was sighted, worked nearly full time reading aloud to him.[33]

As they attempted to contribute to the cause of equality by means of constitutional history, tenBroek and Graham researched the immediate, post–Civil War, political context that produced the Reconstruction Amendments, and most particularly the Fourteenth Amendment. In service of this end, they took the relatively innovative strategy of largely bypassing

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30 "State Constitutional Law in 1943–44," *American Political Science Review* 38 (August, 1944): 670–692; "State Constitutional Law in 1944–45," *American Political Science Review* 39 (August, 1945): 685–719; and "State Constitutional Law in 1945–46," *American Political Science Review* 40 (August, 1946): 703–728.

31 Graham had great respect for Myrdal's study. In the editorial notes following republication of his original *Yale Law Journal* piece on the "conspiracy theory," Graham writes: "Not merely the law review literature, but even the Journal of Negro History reflects the national paucity of constitutional research and discussion at this period [late 1930s]. Such was the price and impact of the 1877–1897 constitutional and sectional 'settlement.' All honor therefore to the work of the NAACP, and to the Carnegie Corporation . . . for launching, in 1937, the foundation study which culminated in An American Dilemma." *Everyman's Constitution*, 67, fn. 11.

32 Graham, in *Everyman's Constitution*, "Preface," xii, describes himself as "a librarian and lipreader — a member of both groups that understand best how corporate and sociological modern research and communication are."

33 Occasionally Graham would acknowledge that the person who was actually reading his letters was Hazel tenBroek, but generally he would not. Howard Jay Graham to Jacobus ("Chick") tenBroek, October 28, 1945; 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, Jernigan Institute, Baltimore, MD: "Hazel, Never mind this I've repeated the important parts of it elsewhere . . . ."

judicial interpretations of the Amendments and focusing instead on congressional materials.[34] Their initial assumption appears to have been that the intentions of the congressional authors of the Fourteenth Amendment, and of the members of Congress who approved it, were broadly equalitarian; by reading their words, one could develop a convincing case to the effect that Jim Crow segregation was inconsistent with their intentions and that appellate jurisprudence on this and similar questions had been incorrect for half a century and needed to be thrown over.

TenBroek and Graham discovered fairly quickly that parsing the "original intent" of the "framers" of the Fourteenth Amendment was an extremely complex matter. As they gathered information about the congressional sponsors of the Reconstruction-era rethinking of the Constitution, they found that not everything these legislators said or did was consistent with their own twentieth-century civil rights politics. The collaborators began to overcome their impasse at the very end of 1945 or beginning of 1946, when they switched their emphasis (and widened the distance between their method and conventional forms of argumentation in constitutional law) from post–Civil War congressional debate to the roots of the Reconstruction Amendments in the ideology of the movement for the abolition of slavery. As tenBroek wrote later, with a degree of understatement that sounds almost ironic, "the discovery of the antislavery origins of the Civil War amendments dissipates much of the confusion resulting from the congressional and ratification debates."[35]

To a degree that may seem contradictory to a contemporary reader, tenBroek and Graham's approach to the Constitution was simultaneously originalist, historicist, and non-elite. It was originalist in that it centered on the quest for the true meaning of the document; it was historicist in that it sought that meaning in the rich documentation of the past; and it was non-elite, in that it encompassed not only the interpretations of existing constitutional texts by radical activists but also made them, as the sources of the ideas that found their way into Section One of the Fourteenth Amendment, the primary authors of constitutional change in U.S.

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34 See tenBroek, "Extrinsic Aids" essays.

35 tenBroek, *Antislavery Origins*, 4.

history.[36] Graham, writing in 1953, found the relationship between abolitionism and the Reconstruction Amendments to be "perhaps the classic example of moral and ethical revision of the law and of creative popular jurisprudence and constitution making — at least in the nineteenth century. 'Hearthstone opinions' in this process," he continued, "obviously were far more vital and determinative than judicial opinions. Constitutional Law here was growing at the base rather than at the top."[37]

PROVOKING THE ARGUMENT FROM HISTORY

The NAACP argued *Brown v. Board* before the Supreme Court for the first time in December, 1952.[38] Thurgood Marshall and the other attorneys submitted to the Court a thirteen-page-long brief accompanied by an appendix signed by leading researchers, including social psychologists Kenneth and Mamie Clark, Robert Merton of the Columbia Sociology Department, psychologist Gordon Allport, and the psychiatrist, Dr. Viola Bernard. The NAACP brief included a quotation from the Kansas court whose decision it appealed, a portion of which the Warren Court ultimately included in its own opinion. The quotation concerned the negative effects of segregation upon "colored children."[39] "'Segregation,'" the brief quoted, "'has a tendency to retard the educational and mental development of negro children and . . . instills in [the African-American child] a feeling of inferiority resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society.'"[40] In passages that did not ultimately find their way into the Supreme Court opinion,

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[36] For such an approach to legal meaning-making, see Forbath, Hartog, and Minow, "Legal History from Below."

[37] Graham, *Everyman's Constitution*, chapter 6 (originally *Buffalo Law Review*, 1953), 284–85.

[38] I rely for background upon Tushnet, *Making Civil Rights Law*, 196–231, and Kluger, *Simple Justice*, 582–699.

[39] Brief for Appellants, in the Supreme Court of the United States, October Term, 1952, No. 8 – Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmuel, et al., Appellants, vs. Board of Education of Topeka, Shawnee County, Kansas, et al., Appeal from the United States District Court for the District of Kansas, NAACP papers, Series II, Box B138, Folder 10: "Schools – Kansas – Topeka – Brown v. Board of Education – Legal papers – 1951–1953," Library of Congress (LOC), Washington, D.C., 8.

[40] Ibid., 9.

the scholars argued that *white* children in a segregated society were likely to develop characteristics that intellectuals of the Frankfurt School had identified with the Authoritarian Personality, hating "the weak while they obsequiously and unquestioningly conform to the demands of the strong." The social and medical scientists argued that African-American children attending segregated schools "tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist."[41]

In response to these arguments regarding the "intangible" effects of segregation, the Supreme Court deadlocked.[42] Justice Douglas, writing in 1954, remembered that after the initial oral argument in *Brown*, there were four in favor of striking down segregation statutes, three in favor of upholding the *Plessy* doctrine, and Frankfurter and Jackson in-between, eager to avoid facing "the question if it was possible to avoid it."[43] The stalemate was settled by a consensus decision to request reargument. Despite his partial endorsement, in an informal memorandum, of the idea that constitutional meanings change with the times, Frankfurter helped settle the stalemate by drafting questions for the reargument that centered on research into the original meanings of the Reconstruction Amendments.[44]

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41 Ibid., 5.

42 I have come to understand the importance of the "intangible" from Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1986). However, the idea of intangibles shifted from the higher education cases discussed by Tushnet, which treated matters such as a law school's reputation and the intellectual value of dialogue with other talented students as the relevant "intangibles," to the psychological and sociological intangibles that came to the foreground in the consideration of elementary- and secondary-school segregation.

43 William O. Douglas, "Memorandum for the File in re Segregation Cases," May 17, 1954, William O. Douglas papers, Box 1149, file titled "Segregation Cases O[ctober] T[erm] 1953 – Segregation Cases No. 1, 2, 4, 8, 10," Manuscript Division, LOC.

44 Felix Frankfurter, informal memorandum to the other justices, with handwritten notation in upper right corner: "Written during the Summer 1952 and [reworked?] on September 26, 1952 by F.F." Earl Warren papers, Box 571, "SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953, File titled "SEGREGATION – STATE CASES," LOC. Frankfurter circulated the draft questions with a prefatory note, in which he expressed the belief that they properly reflected the ambivalence of the Court — and in which he also revealed the ubiquity of psychological thinking in the Court in the middle 1950s by writing about pro-segregation thought in psychological terms: "I know not how others feel, but for me the crucial factor in the problem presented by these cases

The first two questions, revised slightly with input from the other justices, were:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> a. that future Congresses might, in the exercise of their power under [section] 5 of the Amendment, abolish such segregation, or
>
> b. that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?[45]

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is psychological — the adjustment of men's minds and actions to the unfamiliar and the unpleasant. Time, in truth, is the ameliorative factor in the process of adjustment. It is therefore, in my mind, all to the good that the minds of those who are opposed to a change should accustom themselves to the idea of it long before they are confronted with it." Felix Frankfurter, Note accompanying Memorandum for Conference on the Segregation Cases, June, 1953, Felix Frankfurter papers, Harvard Law School, microfilm edition, held at the LOC, Series II, Reel #4, Position 00243.

[45] These queries may, as Mark Tushnet has suggested, have represented a genuine effort on Frankfurter's part to settle his mind by means of some dispositive historical evidence. Or perhaps, as Frankfurter himself later suggested, it was a play for time that he thought would allow for greater consensus both on and off the Court (of course, the delay did in fact lead to the unexpected resolution of the issue when Chief Justice Vinson died and Earl Warren was appointed to his place). Douglas copy, Felix Frankfurter, "Memorandum for the Conference, RE: The Segregation Cases," June 4, 1953, William O. Douglas papers, Box 1149, folder titled "SEGREGATION CASES O.T. 1953 – Segregation Cases No. 1, 2, 4, 8, 10," LOC; Original and subsequent drafts of the questions for reargument, Frankfurter Papers, Harvard Law School, microfilm edition, held at the LOC, Series II, Reel #4, Positions 00219-00242; Frankfurter, "Memorandum for the Conference . . ." June 4, 1953, copy, papers of Earl Warren, Box 571, "SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953 – SEGREGATION – STATE CASES,"

These questions set in motion a flurry of historical research concerning the nineteenth-century meanings of the Reconstruction Amendments. The NAACP legal team pursued the most far-reaching and labor-intensive effort, engaging professional historians such as John Hope Franklin and C. Vann Woodward, devoting countless hours of research time by in-house and affiliated counsel, gathering data from allies throughout the United States, and drawing upon such help as was available from scholars of constitutional law, including especially Howard Jay Graham, then employed as a bibliographer at the Los Angeles County Law Library, and Alfred Kelly of Wayne State University. In the fall of 1953, the NAACP submitted a brief of over two hundred pages covering the questions the Court had posed, with an unsigned appendix by Graham that summarized his argument about the abolitionist roots of the Reconstruction Amendments.[46] Graham's appendix played a role in the brief for reargument that paralleled the

LOC; and final Court Order, including questions, quoted in NAACP Legal Defense and Educational Fund, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, in the Supreme Court of the United States, October Term, 1953, No. 1 Oliver Brown, et al., Appellants, vs. Board of Education of Topeka, et al., Appellees, No. 2 Harry Briggs, Jr., et al., Appellants, vs. R.W. Elliott, et al., Appellees, No. 4 Dorothy E. Davis, et al., Appellants, vs. County School Board of Prince Edwards County, Appellees, No. 10 Francis B. Gebhart, et al., Petitioners, vs. Ethel Louise Belton, et al., Respondents. Appeals from the United States District Court for the District of Kansas, the Eastern District of South Carolina and the Eastern District of Virginia, and on Petition for a Writ of Certiorari to the Supreme Court of Delaware, Respectively, 13.

46 [Howard Jay Graham] "SUPPLEMENT: An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment," NAACP Legal Defense and Educational Fund, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, in the Supreme Court of the United States, October Term, 1953, No. 1 Oliver Brown, et al., Appellants, vs. Board of Education of Topeka, et al., Appellees, No. 2 Harry Briggs, Jr., et al., Appellants, vs. R.W. Elliott, et al., Appellees, No. 4 Dorothy E. Davis, et al., Appellants, vs. County School Board of Prince Edwards County, Appellees, No. 10 Francis B. Gebhart, et al., Petitioners, vs. Ethel Louise Belton, et al., Respondents. Appeals from the United States District Court for the District of Kansas, the Eastern District of South Carolina and the Eastern District of Virginia, and on Petition for a Writ of Certiorari to the Supreme Court of Delaware, Respectively, 199–235. Compare with Howard Jay Graham, "SCHOOL SEGREGATION CASES – APPENDIX TO APPELLANTS' BRIEFS The purpose and Meaning of Sections One and Five of the Fourteenth Amendment: The Historical Evidence Reexamined," n.d., NAACP papers, Group II, Box B 143, "Schools – Kansas – Topeka – Brown v. Board of Education (and other cases) – 2nd Reargument – Legal papers – 1954," LOC.

role of the statement signed by social and medical scientists in the original *Brown* brief. The authority of constitutional history — as practiced by an amateur scholar with an outsiderly, socio-legal orientation — here took the place of the authority of social psychology. (In the final *Brown* opinion of May, 1954, the authority would of course switch back from history to social and medical science.)

Lawyers within the U.S. Department of Justice, too, studied the record of the past and produced a gloss on the history and historiography of constitutional Reconstruction. The Justice Department authors (chiefly, the former Frankfurter clerk, Philip Elman) relied heavily upon Graham's and tenBroek's scholarship.[47] The legal advocates of the southern and border states engaged in their own historical investigations, to prove that the Reconstruction Congress did not contemplate racial integration in the public schools or a legislature that was empowered to take such sweeping action.[48] And the Supreme Court itself, specifically the chambers of Justice Felix Frankfurter, became a laboratory for the study of the constitutional past. Frankfurter assigned his clerk, Vincent McKusick, to gather historical evidence related to the segregation cases.[49] By September of 1952, Frankfurter had passed the assignment to McKusick's successor, Alexander Bickel. Bickel spent untold hours reading the *Congressional Globe* and other primary sources, as well as exploring the secondary material. As he was leaving the Court, he drafted a memorandum of over fifty pages on

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47 See discussion of Justice Department Brief in Kluger, *Simple Justice*, 650–652, and below.

48 See discussion in Kluger, *Simple Justice*, 646–650.

49 Letter from Vincent [McKusick], to Alexander Bickel, Esq., Washington, D.C., September 2, 1952, Felix Frankfurter papers, Harvard Law School, microfilm edition, LOC, Series II, Reel #4, at position 0329. "Dear Al: . . . [T]he chief thing that comes to my mind [that Frankfurter wanted] is his desire that you look into the 'sociological state of the art' in regard to segregation and its consequences. He had in mind that you should investigate whether in 1897 or whatever the date of the Plessy v. Ferguson case was, the literature showed that people realized the psychological and other subtle handicaps imposed by segregation. He also wanted you to make the same investigation in regard to the time of the Gaines case . . . As I remember Harlan's opinion . . . at least when the opinion is read in the light of our present knowledge, that he has some inkling of these intangible factors. Of course, Harlan's allusion to these factors does not mean that in 1897 they could be documented scientifically with the state of knowledge of that time."

the legislative history of the Fourteenth Amendment. Frankfurter invested countless effort in editing Bickel's work and summarizing it for his colleagues. He presented his main findings to the other justices while they were deliberating over the reargument, but Warren's opinion made little use of this evidence.[50] The dissertation or disquisition Bickel produced under Frankfurter's tutelage became grist for the younger man's scholarly career, but it was virtually useless in the Court's jurisprudence.[51]

ABOLITIONIST CONSTITUTIONALISM IN THE TWENTIETH-CENTURY COURT

The brief for the reargument of *Brown* by the NAACP utilized Graham's and tenBroek's conclusions about the abolitionist roots of constitutional thought. The NAACP lawyers encountered the same problems in answering the questions Frankfurter posed in 1953 that tenBroek and Graham had encountered when they began to research the legislative history of the Fourteenth Amendment in the 1940s: It was not at all clear that members of Congress or state legislatures who approved the Amendment believed that it would integrate public schools. The "Framers" of the Reconstruction Constitution were not all champions of thorough-going integration; some simply never considered educational integration, and others were appalled at the idea of frequent social contact or intermarriage between whites and blacks. In addition to arguing, then, that the Congressional majority during Reconstruction intended the Fourteenth Amendment to create sweeping changes in African Americans' status in the direction of complete equality, Marshall and his team drew upon tenBroek's and Graham's writing to argue that the mandate for the abolition of Jim Crow lay in the far-reaching equalitarian passions of the movement for the abolition of slavery — in the work of moralists, activists, propagandists, and politicians who began decades before the Civil War to give meaning to the phrases that were ultimately included in the Amendments.

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50 See details below.

51 Bickel, "Original Understanding"; *The Least Dangerous Branch* (New York: Bobbs–Merrill, 1962); and *Politics and the Warren Court* (New York: Harper and Row, 1965).

Part Two of the brief was the center of the NAACP's argument, and of the query the Court had posed. It contained the most new information, legal-historical data that had not been available to the Court when it deliberated over *Brown* the first time and that was directly germane to the question before it. In its first twenty-six pages, tenBroek's *Antislavery Origins of the Fourteenth Amendment* was the only piece of contemporary scholarship cited.[52] Following Graham and tenBroek, the brief argued that "[t]he framers of the Fourteenth Amendment were men who came to the 39th Congress with a well-defined background of Abolitionist doctrine."[53] They were, it was claimed, enlightenment humanists inspired by the Declaration of Independence. The brief continued: "The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in light of this revolutionary idealism that the questions propounded by this Court can best be answered."[54] In a section titled "The Framers of the Fourteenth Amendment," the NAACP argued, again following tenBroek's and Graham's research, that the Joint Committee of Fifteen that drafted the Fourteenth Amendment "was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition."[55] In conclusion, according to Part Two of the brief, "[t]he Fourteenth Amendment," as drafted and approved, "was intended to write into the organic law of the United States the principle of absolute and complete equality in broad constitutional language."[56]

The Justice Department's Supplemental Brief, too, drew upon tenBroek's and Graham's scholarship and the framework of their argument.[57]

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52 NAACP Brief for Reargument (1953), 67–93.

53 Brief for Reargument, 68. The footnote here was to tenBroek, *Antislavery Origins*, 185–186.

54 Brief for Reargument, 69. The passage also reads: "In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have surprised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion."

55 Ibid., 93.

56 Ibid., 103. Note that this is a section heading.

57 Herbert Brownell, Jr., Attorney General, J. Lee Rankin, Assistant Attorney General, and Philip Elman, Special Assistant to the Attorney General, "Supplemental Brief for the United States on Reargument," NAACP papers, Series II, Box B143, Folder 1,

The second section of the brief, immediately following the introduction, covered the "historical origins and background of the Fourteenth Amendment," and included two subsections, the first of which was "[t]he antislavery origins of the reconstruction amendments."[58] Rather than utilizing legislative history of the Fourteenth Amendment, narrowly understood, to grasp its framers' original intentions, the Government echoed Graham and tenBroek in claiming that "the conception of the principles incorporated in the Constitution by the Reconstruction Amendments, and the line of their development and growth, are to be found in the long and bitter political and ideological conflict over slavery that preceded the Civil War. The abolitionists," the brief claimed, citing tenBroek, Graham, and a small number of other scholars, "propounded a philosophy of equality expressed most frequently in terms derived from the Declaration of Independence, an equality which implied a duty of government to apply laws impartially to protect the 'natural and fundamental' rights of all persons, white and black alike."[59]

In the end, the Supreme Court made little use of the multiple mini-monographs on legislative, doctrinal, and social-movement history that were written to answer Frankfurter's queries. Despite the historical research it received, or perhaps because of it, the Court created what is referred to today as the jurisprudence of the living Constitution. The internal debate over *Brown v. Board* also planted a seed that grew over decades, by means of the scholarship of former Frankfurter clerk Alexander Bickel, into what we call originalism. It virtually erased from memory the abolitionist, activist, socio-historical, and "hearthstone" approach to constitutional interpretation practiced by tenBroek and Graham — driving this fugitive mode of interpretation underground, from which it reemerged late in the

pp. X–XI, listed citations to Graham's essays, "The Early Antislavery Backgrounds of the Fourteenth Amendment," *Wisconsin Law Review* (May, 1950), 479-507, and "Extra-Judicial Rise of Due Process," and multiple citations to tenBroek, *Antislavery Origins of the Fourteenth Amendment*. By comparison with the work of professional historians who were involved in the case, it cited C. Vann Woodward's book, *Reunion and Reaction*, once, and John Hope Franklin not at all.

[58] Justice Department Supplemental Brief, I.

[59] Ibid., 9–10. This statement was followed, pp. 10–11, by an extended quotation from tenBroek, *Antislavery Origins of the Fourteenth Amendment*.

twentieth century as an occasional academic practice but never as a mainstream judicial one.

It is easy to understand why the justices' deliberations were different after the reargument than they had been after the initial argument. Chief Justice Vinson died in September, 1953, and Warren replaced him. These events not only gave the Court a new personality at its helm but also changed the vote on segregation from 4–3–2 (as Douglas had it) to 5–2–2, a clear majority in favor of overturning *Plessy*.[60] It is also easy to imagine that the justices were disappointed by the historical evidence they received from the NAACP, the Justice Department, and the segregating states. I do not think that the argument Earl Warren ultimately chose to emphasize in the *Brown* opinion was *per se* stronger or more true than the one from abolitionist constitutionalism that he rejected. The Supreme Court ultimately based its judgment in *Brown* upon supposedly scientific data suggesting that African Americans emerging from Jim Crow were damaged, even disabled — data that raised immediate questions about whether integration would endanger the educational experiences of white students or the overall quality of schools. The apparent consensus among researchers about the negative effects of segregation on African-American children, which undergirded the scientific appendix to the first *Brown* brief, appears to have been a chimera; Daryl Scott has argued persuasively that the empirical record was thin, and that some of the limited evidence available indicated that children who left the segregated south for integrated northern school systems in which they were outnumbered had *worse* self-images and educational outcomes than the children in all-black schools.[61] However, psychologists and sociologists appeared overwhelmingly to support the claims made in the scientific appendix.[62] In place of large numbers

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60 Kluger, *Simple Justice*, 694–695, reports that Justice Jackson was seriously considering writing a concurrence, perhaps with Frankfurter's signature as well. Jackson had a heart attack and was hospitalized before he had the opportunity to draft anything.

61 Daryl Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche* (Chapel Hill: University of North Carolina Press, 1996), 123–124, and, generally, 93–136. Some of Scott's writing is heavy-handed; I do not find all of his claims or suggestions, such as the idea that Kenneth Clark "manipulat[ed images of damaged African Americans] to gain white sympathy" (96) persuasive.

62 Statement of Counsel, Appendix to Appellants' Briefs, "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," in the Su-

of empirical studies supporting their arguments, the authors of that appendix introduced a poll of social scientists, who had not necessarily investigated the issues in question empirically but virtually all shared the NAACP's "opinion . . . concerning the probable effects of enforced segregation under conditions of equal facilities."[63] By contrast, in 1953, there was no consensus among professional historians, political scientists, or law professors about abolition, Reconstruction, or the Reconstruction Amendments. Nor was there a large body of scholars with elite credentials in these fields who could sign a brief in response to Frankfurter's historical queries — nor an overwhelming majority in those fields that would agree in a poll that the Constitution, as amended after the Civil War, demanded educational integration.

The historical arguments were rejected by their original champion, Justice Frankfurter, once it was clear that the Court would vote in favor of the NAACP plaintiffs. Frankfurter and Bickel were not interested in pursuing tenBroek's or Graham's "hearthstone" approach to constitutional history, and appear to have misunderstood the Californians' arguments somewhat. Moreover, Frankfurter bypassed the findings of the more conventional legislative history of the Fourteenth Amendment that Bickel wrote (at Frankfurter's insistence) because they went the wrong way; as tenBroek and Graham, and the NAACP LDEF, and the Justice Department lawyers, had realized earlier, Reconstruction-era Republicans did not necessarily support the social or educational mixing of blacks and whites.

Frankfurter had Bickel pursue a conventional but exhaustive legislative history, reading virtually everything printed in the *Congressional Globe* related to passage of the Fourteenth Amendment. However, Bickel did not consider primary documents from before the Civil War, or go beyond official sources. "Valid legislative history," he wrote, "is the study of what a legislative body was on notice of before it voted. Period."[64] However, Bickel

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preme Court of the United States, October Term, 1952 – Brown, et al., v. Board of Education, NAACP papers, Box B138, Folder 10, LOC, no page: "The following statement was drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations. It represents a consensus of social scientists with respect to the issue presented in these appeals."

63 "Social Science Statement," 10–11.

64 Letter from Alexander Bickel to Felix Frankfurter, August 22, 1953, Frankfurter papers, Harvard Law School, Microfilm Edition, Held at the LOC, Series II, Reel #4, at position 00212.

and Frankfurter considered tenBroek and Graham's argument insofar as it impinged directly on the legislative history of the Amendment. "Abolition thought went far," Bickel's draft memorandum, as edited by Frankfurter, read, "but it does not conform to the facts to say that it actuated the majority which submitted the Fourteenth Amendment or that it was embodied in the measure."[65]

There was a mismatch between Bickel's and Frankfurter's research method, a narrowly historical quest to divine the framers' original intentions, and their conclusions. Bickel argued privately to Frankfurter that it was "impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."[66] However, he ultimately claimed that the Fourteenth Amendment permitted jurists in the twentieth century to extend its reach in the service of racial equality well beyond what was explicitly endorsed by Congress or the state legislatures that ratified the Amendment.[67] He wrote: "[T]he legislative history leaves this Court free to remember that it is a *Constitution* it is construing. I think also that a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge that it was a *Constitution* they were

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[65] Alexander Bickel, "Legislative History of the Fourteenth Amendment," n.d., with edits by Felix Frankfurter, Frankfurter papers, Harvard Law School, Microfilm Edition, Held at the LOC, Series II, Reel #3, at positions 00979–00980. Bickel cited tenBroek's *Anti-Slavery Origins of the Fourteenth Amendment*. Bickel made much the same point in Bickel to Frankfurter, August 22, 1953, at position 212: Bickel to FF: "There was of course the uncompromising abolitionist tradition behind a number of men in the Congress: Sumner, and Stevens, too, and others. Abolitionist thought went far, but it does not conform to the facts to say that it was consciously embodied in the Fourteenth Amendment by the 39th Congress. Cf. tenBroek, The Antislavery Origins of the Fourteenth Amendment. Stevens didn't think it had been. And if anything is clear, it is clear (it was bitterly clear to Sumner) that the Amendment did not extend suffrage."

[66] Bickel to Frankfurter, August 22, 1953, at position 00213.

[67] Ibid.: The Congressional majority "pointed . . . in Section 1 of the Fourteenth Amendment to the general manner in which problems similar to those with which it was dealing should in future be solved. This I believe is the most that can be said, and it is supported it seems to me by the authority of this Court which has extended the solution of the Fourteenth Amendment to problems — notably jury service — which were as little in focus in 1866 as segregation, and concerning which an even better case can be made out to show that the 39th Congress affirmatively indicated that they were without the scope."

writing."[68] Frankfurter summarized Bickel's main finding in a note to his Brethren that circulated in December, 1953: Bickel's work, he wrote, "indicates that the legislative history of the Amendment is, in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the public schools or authorized legislation to that end, nor that it manifested the opposite."[69] Having thus reached an originalist dead end, Frankfurter and Bickel made the leap into a living constitutionalism, arguing that the original meaning left wide scope for changes in the Amendment's interpretation and application to new problems.

Earl Warren arrived at a 'living' interpretation of the Constitution with a lot less hand-wringing and historical research effort than Frankfurter and Bickel expended. His overwhelming interests were in maximizing the unanimity of the Court and in not inflaming southern segregationist opinion. It was his judgment call that relying upon a narrative of change in the available scientific evidence from 1896 to 1954 was a better route to those ends than rehearsing the record of the past — whether by means of what would have had to have been a careful reading of the legislative debates over the Fourteenth Amendment or (following the NAACP, Justice Department, tenBroek, and Graham) of a declaration of final victory for the radical abolitionists. Warren concluded before drafting the opinion, and without any apparent angst, that *Brown* could not "be decided on the basis of the intended scope of the Fourteenth Amendment because the evidence is inconclusive." His turn away from history in this sense was one death knell for the tenBroek–Graham approach. Warren marched even more steadfastly away from that approach when he added: "The opinion

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[68] Bickel to Frankfurter, at position 00214.

[69] [Douglas's Copy of] F.F. [Felix Frankfurter], "Memorandum for the Conference," December 3, 1953, Papers of William O. Douglas, Box 1149, File titled "SEGREGATION CASES O.T. 1953 — Segregation Cases No. 1, 2, 4, 8, 10," LOC. Frankfurter argued in a separate memorandum on the legislative history that his labors convinced him that it was "reasonably clear what the majority in the 39th Congress did not have specifically in mind." It was less clear exactly what that majority did have in mind. [Felix Frankfurter], "Prefatory Note to LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT," n.d., from Earl Warren papers, Box 571, "EARL WARREN – SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953," Folder titled, "SEGREGATION – STATE CASES."

should be *short*, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory. No section of the country and no segment of our population can justly place full responsibility on others. They must assume a measure of that responsibility themselves."[70]

Despite these warnings, there was language in the early drafts of the opinion that was destined to be left by the chief justice on the editing room floor. These drafts did not reprise the tenBroek–Graham argument, but they did include verbiage about racial subordination, history, and sharp divisions within the American body public. Warren's clerk William W. Oliver, for example, signed a draft (perhaps based upon an earlier draft by Warren himself that did not survive in the archives[71]) that included this passage: "[T]he Court has been guided . . . by that which all men know in their hearts about segregated schools. Segregated schools exist for one reason — as an expression of the dominant group's belief in the inferiority of the minority group. No equality of physical facilities can remove that implication."[72] The Oliver draft explained the Supreme Court's choice not to utilize the historical evidence it had gathered by suggesting that the Fourteenth Amendment was poorly crafted (not an idea that would quiet southern segregationist complaints about the Court's role in their lives), and by reminding readers about "[t]he four years of fratricidal warfare" that had created the conditions for its creation.[73] Oliver's version of the opinion included one passage that Warren decided to keep, in support of the Court's decision to disregard the historical evidence it had amassed. In a section on the changed role of education in the U.S. in the twentieth versus the nineteenth century, the Oliver draft read: "In approaching this

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[70] Warren Memorandum, Draft II, May 5, 1954. Note that this is a second draft; the first no doubt preceded the Oliver and Pollock drafts, below.

[71] Kluger, *Simple Justice*, 695, says that Earl Pollock himself remembered seeing a draft by Warren in April, 1954.

[72] [William W. Oliver], DRAFT OPINION, Brown v. Board, Supreme Court of the United States, Nos. 1, 2, 4, 8 and 10 – October Term, 1953, Earl Warren papers, Box 571, Folder titled "SEGREGATION – STATE CASES," LOC, 9. On Oliver, who taught for forty-one years at the University of Indiana Maurer School of Law, see http://law.indiana.edu/support/special/chairs/oliver.shtml [accessed November 3, 2012].

[73] Oliver Draft, 4. In another politically risky passage, Oliver reminded readers that the Fourteenth Amendment was endorsed only grudgingly by the states of the former Confederacy, which "were opposed to its letter and spirit" (4).

important question [of public primary and secondary education], we cannot turn back the clock to 1868 when the Amendment was adopted, or even to 1895 [sic], when Plessy v. Ferguson, supra, was decided."[74]

An early draft on which the chief justice's other clerk, Earl E. Pollock, worked was closer to the tone and substance Warren ultimately chose for the *Brown* opinion. Pollock, too, included references to the "fratricidal warfare" and "[i]ntense emotion" that were the backdrop to drafting the Amendment, and of the absence of representatives of the former Confederate states from the Congress that passed it.[75] However, the Pollock draft bypassed the argument about abolitionist origins, and the Justice Department's deployment of that argument in its brief. It included the suggestion that the Court "conclude, as did the Government [??], that the legislative history of the Amendment is inconclusive as far as the problem presented in these cases is concerned."[76] He also included language that was similar to that in the final opinion regarding the social and psychological consequences of segregation. Pollock's draft included the quotation from the Kansas court regarding the harms African Americans suffered under conditions of segregation, and the retardation of their education. "To separate them from others of similar age and qualifications solely because of their color," the draft read, "puts the mark of inferiority not only upon their status in the community but also upon their young hearts and minds in a way that is unlikely ever to be erased."[77]

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[74] Oliver Draft, 6.

[75] Note from E[arl] P[ollock] to Mr. Chief Justice, May 3, 1954, and, attached, Draft, May 7, 1954 (with edits in pencil), 3, Earl Warren papers, ibid.

[76] Pollock Draft, 3.

[77] Pollock Draft, 8 and [Pollock], handwritten draft, n.d., 8, in ibid. This language was added originally in the margin of the hand-written draft, perhaps indicating that it was added by Warren. Thinking in disability terms, the language here about students' "qualifications" seems to suggest that educational segregation on the basis of intellectual ability or disability would be acceptable. This issue would re-emerge in consideration of the implementation decree in *Brown II*, and in the local integration battles that followed. Note that the social-science brief in *Brown I* (first argument) made reference to the issue of segregation on the basis of intellectual ability, and argued that this might be damaging to young people in much the same way that segregation on the basis of race was damaging to them. The metaphor of "hearts and minds" was popularized by the British in the Malayan war of 1948–60. That language, too, seems to resonate in a disability register: it suggests that social circumstances can imprint upon people and change their psychological make-up.

In the final drafting of the *Brown* opinion, Warren and the other justices removed even more the history that gave rise to the Reconstruction Amendments and suggestions that white southerners did anything illegal or wrong. They relied ever more on the "modern authority" of Kenneth and Mamie Clark's doll studies and the fortress of apparent consensus among elite social scientists. They overturned *Plessy* without really imputing fallibility, or bad motives, to their predecessors on the Court, and without calling into question (as an abolitionist constitutionalism that asserted a true meaning for the Fourteenth Amendment that had been abrogated by appellate courts in the nineteenth century would have) decades of constitutional doctrine.[78]

Most of this change was accomplished by the time Chief Justice Warren completed his edits of the extant drafts on May 4. Warren removed the language about "fratricidal warfare" and the contentious, perhaps hasty, historical process that produced the Fourteenth Amendment. He substituted phrases that were close to the bland language that appears in the final opinion: "The historical evidence brought to the Court on reargument of *Brown*," he wrote, "and our own investigation convince us that these sources cast little light on the problem with which we are faced. At best, they are inconclusive."[79] Warren's draft did not explore the pre–Civil War period or engage the suggestions that abolitionist politics caused the Civil War and the battles of Reconstruction, and provoked the passage of the Fourteenth Amendment. Focusing only on the postwar period, his draft reflected on the divisions within the 39th Congress and enacted a kind of blue-grey (or at least a moderate-radical) peace that mirrored the peace

[78] For Graham, and, on at least two occasions for Justice Black (and once for Douglas), such a fundamental rethinking of post–Civil War constitutional doctrine would allow for a rethinking of the modern doctrine of corporate personhood. See Black's dissent in *Connecticut General Life Insurance Company v. Johnson* [303 U.S. 77] (1938), which cited Graham's two articles against a "conspiracy theory" of a corporate Constitution as scholarly support for the argument that corporate personhood with Fourteenth Amendment protection was a product of simply erroneous nineteenth-century appellate doctrine. See also Douglas's dissent (with Black's concurrence) in *Wheeling Steel Corporation v. Glander* [337 U.S. 562, 576–581] (1949); and Graham, "An Innocent Abroad: The Constitutional Corporate 'Person," reprinted as Chapter 9, *Everyman's Constitution*, 382; and "The Early Antislavery Backgrounds of the Fourteenth Amendment," reprinted as Chapter 4, *Everyman's Constitution*, 158.

[79] Chief Justice Warren, Mark-up and Draft, May 4, 1954, 4–5.

for which he clearly hoped in the middle twentieth century: "The most avid proponents of the post–Civil War Amendments," his draft read, "undoubtedly intended them to remove all distinctions among 'all persons born or naturalized in the United States.' Its opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect."[80] He removed language in prior drafts to the effect that separate educational institutions had never, in fact, been equal. And he incorporated and elevated in importance the phrase from the Oliver draft about time: "In approaching this question, we cannot turn the clock [Warren crossed out the words "of education"] back to 1868 . . . or even to 1896."[81] Warren at first removed, and then re-added, the language about "hearts and minds," and preserved the quotation from the Kansas court that claimed segregation had a " 'detrimental effect upon the colored children . . . [and] a tendency to retard the educational and mental development of negro children."[82]

The final drafts completed the work of effacing the bitter historical and political antecedents to the Reconstruction Amendments and their interpretation by the courts. In an unsigned draft of May 7, someone, presumably Warren, removed the last remaining use of the phrase, "Civil War," from the opinion.[83] In the draft that contained edits by the other justices, Justice Black was the only one who amended the opinion slightly in favor of the historical data, changing the passage about the data presented at reargument from "these sources cast little light on the problem with which we are faced" to "these sources cast *some* light *but not enough to resolve* the problem with which we are faced."[84] On the side of effacement, Frankfurter and Justice Stanley Reed appear to have concurred in removing a paragraph on

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80 Ibid., 5–6.

81 Ibid., 6.

82 Ibid., 8–9.

83 [Earl Warren], Draft with edits, May 7, 1954, 3, ibid.: "In the first cases in this Court construing the Fourteenth Amendment, decided shortly after ITS ADOPTION [someone has written this in pencil and crossed out the phrase "the Civil War"], the Court interpreted IT [crossed out: 'the Amendment'] as proscribing all state-imposed discriminations against the Negro race."

84 Mark-up of the Brown Decision with Edits from the Justices, Earl Warren papers, 3, Box 571, EARL WARREN – SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O[ctober] T[erm] 1953, Folder titled, "SEGREGATION – STATE CASES," LOC.

state legislative review of the Fourteenth Amendment.[85] Justices Harold Burton and Tom Clark altered historical sections that contained hints of accusation toward the south: Burton amended a passage that had the education of African Americans "forbidden by law in most Southern States" to read that education of blacks was "forbidden by law in some States."[86] Clark changed the passage that had education for African-American children having "received wide acceptance in the North," to read that it "had advanced further in the North" than in the South.[87] None of the justices amended the passage averring that they could not "turn the clock back to 1868 . . . or even to 1896." Endorsing the argument from social psychology, or, in Daryl Scott's terms, "black damage" (or, in mine, disability), Frankfuter amended the claim that segregation "puts the mark of inferiority . . . upon their hearts and minds" to read instead that educational segregation "generates a *feeling* of inferiority . . . that *may affect* their hearts and minds."[88] All of the justices let stand the reference to the Kansas court that found that segregation harmed "colored children" — but did not acknowledge the social science finding that white students under Jim Crow were susceptible to psychological harm and to becoming 'ordinary Germans' under authoritarian political rule.[89]

Frankfurter and Bickel, and Warren and his clerks, bypassed the argument from abolitionist constitutionalism. They considered only the arguments the NAACP and Justice Department — and Bickel himself — made about the post–Civil War legislative history of the Fourteenth Amendment. Unsurprisingly, they arrived at the same conclusions tenBroek and Graham had reached in the late 1940s: the 39th Congress was no place to look for a consensus about integration by race into all sectors of American life. However, once Earl Warren became chief justice, there was no chance that the Supreme Court would rule on the basis of that troubling history to uphold

[85] Mark-up with Justices' Edits, 3. The passage read: "The records of congressional and state legislative debates is not adequate for this purpose and in many of the State Legislatures ratification was accomplished with little or no formal discussion."

[86] Ibid., 4.

[87] Ibid.

[88] Ibid., 8.

[89] Ibid.

Plessy. Historical findings that could have been treated as conclusively opposed to integration were instead interpreted as "inconclusive" — and not just by Warren, but by the future tribune of opposition to countermajoritarian judicial action, Alexander Bickel, and the standard bearer for judicial deference, Felix Frankfurter. In the final stages of crafting an opinion, Warren and the other justices edited ever more of the historical specificity from it, virtually disappearing the Civil War and suggesting that neither the promise of Reconstruction (1868) nor the depredations of the early Jim Crow era (1896) was relevant. As they left the historical content on the cutting room floor, they relied instead upon the argument from social science (black disability) to support their twentieth-century interpretation of the Fourteenth Amendment.

Why did this occur? Historians concur in thinking that Warren and others wanted the opinion to be non-accusatory and non-inflammatory — to maximize the Court's unity and because white segregationists would, Warren no doubt believed, read the opinion carefully. But it is difficult to write honestly about the history of slavery, abolition, Reconstruction, and Jim Crow without being accusatory — including being accusatory toward some of the Republicans who formed the Congressional majority that approved the Fourteenth Amendment. Abolitionist constitutionalism was a stronger foundation upon which to build a modern, equalitarian understanding of the Fourteenth Amendment than was the legislative history offered by Bickel. But it recalled to mind more sharply the "fratricidal warfare" that eliminated the evil of slavery. TenBroek and Graham argued essentially that there were two irreconcilable factions in early nineteenth-century America. One of these factions was victorious in the Civil War and the other was defeated. The meaning of the Fourteenth Amendment was the meaning imputed to its terms by the winning side. There was little room in this picture of the past for the kind of blue-grey, moderate-radical temporizing that Warren ultimately wrote into the *Brown* opinion.

I place considerable stock as well in the state of scholarship in the middle 1950s. If the Supreme Court was going to take the risks that accompanied an abolitionist constitutional understanding of the past, then it would have wanted a strong scholarly consensus behind it. No such consensus existed at the time *Brown v. Board* was argued. The situation was different in terms of sociology and social psychology (if not also of the medical

sciences). Scholarly agreement appears to have been as persuasive to the Court as were the specific findings of the "doll studies" and other empirical data.

As an historian, I understand why Earl Warren and the other key actors in this drama did what they did. In 1954, the *Brown* opinion, which avoided so many potential political pitfalls, struck many as a work of genius.[90] At the same time, however, I am aware that much was lost in the Court's unwillingness to turn back the clock to the nineteenth-century roots of the nationally defining issues that came before it in *Brown*. Of course, as we know now, the intellectual maneuvering of the opinion did not prevent bitter, "fratricidal" battles over school integration in the 1950s, 1960s, and 1970s. The suggestion that African Americans were intellectually and psychologically damaged came to haunt the Court in *Brown II* in the local implementation battles that followed — and set the stage for the limited forms of integration that ultimately occurred in many parts of the country. The doll studies came under persistent assault as a basis for the judgment. And the Court never said in a clear voice that the abrogation of Reconstruction was a legal or moral wrong.

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[90] In introductory notes to the reprinted version of an essay based upon his work for the NAACP, Graham noted the lack of overt reference to the historical data in the final opinion. However, he allied himself and his own scholarly method with the "living" one (although he did not use that word) that ran through Warren's work. See Graham, Editorial Note, Chapter 6, *Everyman's Constitution*, 269: "The *School Cases* were decided May 17, 1954, with scant reference to the historical rebriefings or to framer intent or original understanding. Rather, political and judicial ethics, social psychology — what the equal protection of the laws means, and must mean, in our time . . . these were the grounds and the essence of Chief Justice Warren's opinion for a unanimous Court. *Affirmative* constitutional protection in short. *Affirmative equal* protection. Psychoanalysis of draftsmen and ratifiers, and obeisance to a dead past, can provide no Constitution for Everyman in this century. That is the argument here."