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BROWN, HISTORY, AND THE FOURTEENTH AMENDMENT

*Christopher W. Schmidt**

*The legislative history of [the Fourteenth] Amendment is not enlightening,
and the history of its ratification is not edifying.*

—Justice Robert H. Jackson (1955)¹

The Fourteenth Amendment was actually the culmination of the determined efforts of the Radical Republican majority in Congress to incorporate into our fundamental law the well-defined equalitarian principle of complete equality for all without regard to race or color. The debates in the 39th Congress and succeeding Congresses clearly reveal the intention that the Fourteenth Amendment would work a revolutionary change in our state-federal relationship by denying to the states the power to distinguish on the basis of race.

—NAACP Brief on Reargument in *Brown v. Board of Education* (1953)²

*Legal scholars and historians in recent years have sought to elevate Reconstruction to the stature of a “second Founding,” according it the same careful inquiry and legitimating function as the first. Their work marks the latest iteration of a decades-long campaign to displace the far more dismissive attitude toward Reconstruction that permeated historical scholarship and legal opinions in the first half of the twentieth century. In this Article, I present the flurry of engagement with the history of the Fourteenth Amendment during the litigation of *Brown v. Board of Education* (1954) as a key transition point in how historians and legal scholars have*

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1 ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 68 (1955).

2 Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 17–18, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 78288 [hereinafter NAACP Brief].

approached the constitutional history of Reconstruction. I highlight in particular the efforts of the lawyers for the NAACP, who advocated a reading of the Equal Protection Clause that most scholars at the time believed conflicted with the Fourteenth Amendment's original meaning. With the aid of a group of historians sympathetic to their cause, the NAACP lawyers prepared a brief that presented a bold (if often tendentious) revisionist history of the Fourteenth Amendment that advanced an originalist justification for striking down segregation laws. The Supreme Court did not accept the NAACP's reading of history; in his *Brown* opinion, Chief Justice Earl Warren concluded the historical record was "inconclusive" on the question of school segregation. Yet the basic assumption about Reconstruction history on which the NAACP legal brief turned—that the aspirations of the most egalitarian voices of the day deserve special weight in assessing the meaning of the Reconstruction amendments—has today become a core tenet of legal and historical scholarship.

This Article considers how scholars and jurists have approached the history of the framing and ratification of the Fourteenth Amendment. I use as a centerpiece of my inquiry the Supreme Court's confrontation with the Fourteenth Amendment's history in *Brown v. Board of Education*.³ Although Chief Justice Earl Warren's *Brown* opinion conspicuously sidesteps this history—he deemed the historical record "inconclusive" with regard to the issue of racial segregation in public schools⁴ and cautioned against "turn[ing] the clock back to 1868"⁵—the lawyers and the Justices who contributed to this self-consciously ahistorical opinion spent a great deal of time with their clocks turned back to the 1860s. At one point in the litigation, the Supreme Court told the lawyers to reargue the case with a focus on the original meaning of the Fourteenth Amendment.⁶ This produced what was at the time, according to Alexander Bickel, Justice Felix Frankfurter's clerk for the 1952–53 term, "the most extensive presentation of historical materials ever made to the Court."⁷

I consider in this Article the various historical research projects initiated in response to the Court's reargument order. I give particular focus to that of the NAACP Legal Defense and Educational Fund, whose lawyers confronted a historical record that most people at the time believed stood in clear opposition to their argument that the Fourteenth Amendment should be read to prohibit state-mandated racial segregation. I also consider why the Justices, when it came time to write the *Brown* opinion, turned away from this history.

My examination of the history of *Brown* provides a starting point for a more general consideration of how different generations of

3 347 U.S. 483 (1954).

4 *Id.* at 489.

5 *Id.* at 492–93.

6 *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953).

7 Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 6 (1955).

scholars and jurists have approached the Fourteenth Amendment. The *Brown* story showcases two basic approaches to that history—what I label Fourteenth Amendment pessimism and Fourteenth Amendment optimism. At the time of *Brown*, the pessimistic view dominated popular memory, historical scholarship, and the legal academy. It was premised on the view that the framing and ratification of the Fourteenth Amendment was not a particularly admirable moment in American history. The protagonists in this history were flawed figures who were moved not only by moral fervor but also by self-interest and vindictiveness. Their imprecise and inconsistent descriptions of the constitutional transformations they championed left behind for future generations more rhetoric than insight. Accepting this pessimistic perspective, the *Brown* Court treated the history of the Fourteenth Amendment as an obstacle to be pushed aside—a path that most supporters of the Court’s ruling praised as necessary and wise.

The NAACP lawyers charted an alternate path, finding in the history of the Fourteenth Amendment a story of vision and heroism. Expanding on the work of a small group of scholars who had pioneered this optimistic approach in the decades preceding *Brown*, the NAACP portrayed the Radical Republicans who led the drive for Amendment as men of principle with an “almost fanatic devotion” to the egalitarian ideals of the Declaration of Independence.⁸ The Amendment was “the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality.”⁹ Many at the time—including some of the historians who helped the NAACP lawyers research their brief and the Supreme Court Justices who ordered the brief—dismissed the NAACP’s brief as well-meaning but suspect as an effort of historical interpretation. Yet the confident Fourteenth Amendment optimism the NAACP articulated would echo in the work of future generations of historians and legal scholars.

The prevailing account of Reconstruction today resembles the NAACP’s portrait far more than the pessimistic account that dominated at the time of *Brown*. Historians have tempered the more tendentious of the NAACP’s claims about the original meaning of the Fourteenth Amendment. They have also expanded the cast of primary actors beyond the white radical abolitionists who dominated the NAACP’s narrative. But the celebratory, even reverential attitude toward the constitutional project of Reconstruction that the NAACP brief advanced is now embraced by scholars and lawyers across the ideological spectrum. In recent years, originalist scholars, critics of originalism, and historians have all engaged in efforts to elevate

8 NAACP Brief, *supra* note 2, at 69.

9 *Id.*

Reconstruction to the stature of a “second Founding,” accorded the same careful inquiry, legitimating status, and appreciation as the first.¹⁰ I consider the significance of this development for present-day efforts to interpret the meaning of the Fourteenth Amendment.

BROWN AND THE HISTORY OF RECONSTRUCTION

At the time of *Brown*, most assumed that the weight of history went against the cause of civil rights. Segregationists routinely called upon history to defend against what they saw as the integrationists’ dangerous challenge to the racial status quo. And even those with some degree of sympathy for the cause of racial equality generally saw the experience of Reconstruction, the most relevant potential model for racial reform in the mid-twentieth century, as a warning against precipitous social reform.

The Justices of the *Brown* Court embraced, for the most part, the prevailing assumption in mainstream society that Reconstruction was an unfortunate and embarrassing episode of American history. Those Justices who expressed the most interest in bringing the historical record into constitutional analysis were often the most critical of the quality and value of that record when it came to Reconstruction. They generally accepted the premises of the Dunning School of Reconstruction history that dominated the first half of the twentieth century and presented Reconstruction as a lamentable example of misguided federal intervention into the South and political empowerment of African Americans.¹¹ In a 1945 dissent, Justice Felix Frankfurter described the landmark civil rights legislation of the period as “born of that vengeful spirit which to no small degree envenomed the

10 Just a decade ago, Jamal Greene observed that “[j]udges, scholars, and ordinary citizens writing or speaking in the originalist tradition consistently ignore the original understanding of the Fourteenth Amendment.” Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012). This is no longer true. See, e.g., 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021); 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

In recent years, two scholars of quite different ideological persuasions published books titled “The Second Founding.” ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020).

11 See, e.g., FONER, *supra* note 10, at xxi–xxiv. For a descriptive background of the Dunning School, see LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 7 (2015).

Reconstruction era.”¹² Claude Bowers’s *The Tragic Era* (1929), one of the most widely read texts of the Dunning School, was praised by Justice Hugo Black¹³ and cited by Justice Robert H. Jackson in a 1951 opinion.¹⁴ In his unpublished concurring opinion in *Brown*, Justice Jackson declared Reconstruction “a passionate, confused and deplorable era.”¹⁵

Despite the Justice’s expressed distaste for the history of Reconstruction—a sentiment leading constitutional scholars of the day regularly echoed¹⁶—the Court could not avoid engaging, to some degree, with the history of the Fourteenth Amendment when they considered whether that amendment prohibited state-mandated racial segregation in public schools. In *Plessy v. Ferguson*,¹⁷ the ruling that the Court had to effectively overrule in order to strike down segregation in schools, the Court had relied on a claim about the framing of the Fourteenth Amendment to justify its decision upholding state segregation statutes. “The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law,” Justice Henry B. Brown observed, “but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political[,] equality, or a commingling of the two races upon terms unsatisfactory to either.”¹⁸ It was hard to see how the Justices could avoid coming to terms with the history of the Fourteenth Amendment in their challenge to *Plessy*.

12 *Screws v. United States*, 325 U.S. 91, 140 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting).

13 ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 143 (2d ed. 1997).

14 *Collins v. Hardyman*, 341 U.S. 651, 657 n.8 (1951).

15 Unpublished Opinion of Robert H. Jackson in *Brown v. Board* (Mar. 15, 1954), in DAVID M. O’BRIEN, JUSTICE ROBERT H. JACKSON’S UNPUBLISHED OPINION IN *BROWN V. BOARD* 123, 125 (2017).

16 Thomas Reed Powell, in the process of defending late-nineteenth-century Court’s rulings striking down Reconstruction-era civil rights statutes, referred to the work of Radical Reconstruction as an “orgy.” Thomas Reed Powell, *Judicial Protection of Civil Rights*, 29 IOWA L. REV. 383, 386 n.13 (1944). Charles Fairman wrote in a 1948 edition of his casebook that Reconstruction was characterized by leadership and supporters who were “weak, inexperienced, often corrupt.” Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1204 n.42 (1995) (quoting CHARLES FAIRMAN, *AMERICAN CONSTITUTIONAL DECISIONS* 308 (1948)). Fairman (a frequent correspondent of Justice Frankfurter) also criticized the Framers of the Fourteenth Amendment for their “hazy” thinking. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 138–39 (1949). Fairman’s bias against Reconstruction is discussed in AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181–214, 303 (1998); Aynes, *supra*, at 1204 n.42, 1231–1233.

17 163 U.S. 537 (1896).

18 *Id.* at 544.

Events particular to *Brown* dramatically heightened attention to the historical record. After first hearing oral arguments for *Brown* in the fall of 1952, the Justices remained divided. There was probably majority support for the NAACP's position that segregated schools were unconstitutional, yet by the spring of 1953 that majority appeared slim. Justice Frankfurter particularly feared a sharply divided decision on this momentous issue, and he devised a plan to delay resolution of the case by asking the litigants to give a new round of arguments the following Term.¹⁹ He suggested to his colleagues that they request reargument based on a series of questions they would pose to the opposing sides (and they would ask the Justice Department to participate again).²⁰

Justice Frankfurter's unusual²¹ proposal was not embraced by all the Justices. Justice Hugo Black, with Justice Douglas's support, objected in particular to the content of the questions. Black approached the history at a high level of abstraction and had little doubt that a desegregationist reading of the Fourteenth Amendment could be justified on originalist grounds.²² He feared the proposed

19 Scholars and interested observers have debated Justice Frankfurter's motivations in seeking to delay ruling on *Brown*. His supporters argue that he sought to solidify a strong majority in favor of overruling *Plessy*. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 596–602 (1976); Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 823 (1987). His critics counter that he needed time to rationalize his own support for the decision. See, e.g., Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1906, 1929 (1991); see also Memorandum by William O. Douglas, Assoc. J., U.S. Sup. Ct. (May 17, 1954) (on file with the *Notre Dame Law Review* from the William O. Douglas Papers, Library of Congress, Container 1149) (stating that Frankfurter was not prepared to overrule *Plessy* in either the 1952 or 1953 conferences).

20 Drafts of Justice Frankfurter's questions are found in Felix Frankfurter's Papers. Draft Questions for *Brown* Argument (June 4, 1953) (on file with the *Notre Dame Law Review* from the Harvard Law School's Modern Manuscripts Collection, Felix Frankfurter Papers [hereinafter FFP-HLS], Part II, Reel 4, Frames 219–23). Justice Frankfurter drafted the questions with the assistance of his clerk, Alexander Bickel. Interview by Richard Kluger with Alexander Bickel, Professor of Law, Yale Univ., in New Haven, Conn. (Aug. 20, 1971), at 3 (on file with the *Notre Dame Law Review* from Yale University Library, *Brown v. Board of Education* Collection [hereinafter *Brown v. Board of Education* Collection], Series 1, Box 1, Folder 4) [hereinafter Bickel Interview].

21 “[O]ne wonders whether, in asking Negro counsel to search for and present evidence of framer-intent on this specific issue of school segregation the Court remembered that no such request ever had been made—or ever could have been made—with regard to countless matters and fields over which it previously had extended the Amendment’s protection.” Howard Jay Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFF. L. REV. 1, 6 (1953).

22 Justice Black expressed his views at the December 1952 *Brown* conference. THE SUPREME COURT IN CONFERENCE (1940–1985), at 648 (Del Dickson ed., 2001) [hereinafter IN CONFERENCE]. Justice Black asserted his support for a desegregation decision and

reargument order “would bring floods of historical contentions on the specific points we asked about which would dilute the arguments along broader lines. I doubt if it would be possible to isolate framers’ views about segregation in the primary schools.”²³ The other Justices disagreed. They welcomed the prospect of additional time to work out this volatile issue and gave their support to Justice Frankfurter’s proposal.²⁴

The reargument order listed five questions for the attorneys to consider in their briefs and oral arguments scheduled for the following fall.²⁵ The first question asked whether either the Congress that drafted the Fourteenth Amendment in 1866 or the states that then ratified it intended to outlaw segregation in the schools. The second question asked whether, assuming the research into question one revealed that the original intention of the Amendment was not the immediate abolition of school segregation, the Framers intended for the Amendment to grant either Congress or the courts the power to end school segregation at some later date. The third asked whether, in the absence of clear guidance from history, the Court had the power to abolish segregated schools. And the final two questions concerned the issue of possible implementation of a desegregation decision. The result of the first two questions was to bring history to a new level of prominence in the legal battle against segregated schooling.²⁶

The order for reargument spawned four separate projects of historical investigation and interpretation. The NAACP lawyers embarked on the most ambitious research agenda, contacting for guidance numerous professional historians, enlisting some to pursue research on specific topics, and convening a conference to bring together the lawyers and historians. They produced a lengthy brief

argued that the basic purpose of the Reconstruction Amendments was to abolish caste distinctions and discrimination on account of color. *Id.*

Justice Black would publicly declare his originalist defense of *Brown* years later in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 677 n.7 (1966) (“In my judgment the holding in *Brown* against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color.”).

23 NEWMAN, *supra* note 13, at 433.

24 *Id.*

25 *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953) (ordering reargument).

26 One of Justice Frankfurter’s goals in drafting the reargument order was to avoid the appearance of favoring either party. The challenges of implementation, not the history of Reconstruction, was what most interested the Justices. But the historical questions were needed to avoid the appearance of siding with the NAACP. As Justice Frankfurter put it, “By looking in opposite directions the questions would not tip the mitt.” Letter from Felix Frankfurter, Assoc. J., U.S. Sup. Ct., to Fred Vinson, C.J., U.S. Sup. Ct. (June 8, 1953) (on file with the *Notre Dame Law Review* from FFP-HLS, *supra* note 20, at Part I, Reel 4, Frame 237).

arguing that the preponderance of the historical material supported their argument that segregation violated the Fourteenth Amendment's Equal Protection Clause.²⁷ The lawyers for the states that were defending their segregation statutes were confident that the historical record would vindicate their position.²⁸ They conducted a more modest research project than that of the NAACP, keeping the work largely in-house and eventually drafting a summary of the original intentions of the Framers and drafters of the Fourteenth Amendment that supported their position.²⁹ The lawyers for the Justice Department also kept their research efforts among their own staff. Their brief cut a middle path between the arguments of the NAACP and the states and concluded that the material was ultimately "inconclusive"—although on balance the Justice Department brief leaned in the direction of the NAACP's position.³⁰ Finally, Justice Frankfurter had his clerk Alexander Bickel spend a summer concluding an examination of the

27 NAACP Brief, *supra* note 2. I discuss the NAACP's research and the resulting brief below, *see infra* notes 43–79; *see also* KLUGER, *supra* note 19, at 617–46; Alfred H. Kelly, *An Inside View of "Brown v. Board," Address Delivered Before the American Historical Association (Dec. 28, 1961); Hearing on the Nomination of Thurgood Marshall Before a Subcomm. of the Comm. on the Judiciary, 87th Cong.* 166 (1962) [hereinafter *Kelly, An Inside View*]; Alfred H. Kelly, *When the Supreme Court Ordered Desegregation*, U.S. NEWS & WORLD REP., Feb. 5, 1962, at 86; JOHN HOPE FRANKLIN, *The Historian and the Public Policy* (1974), reprinted in RACE AND HISTORY: SELECTED ESSAYS, 1938–1988, at 309 (1989); C. VANN WOODWARD, THINKING BACK: THE PERILS OF WRITING HISTORY 88–89 (1986); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 180–89 (1994).

28 KLUGER, *supra* note 19, at 646–50; WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 508–09 (1973); PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN *BROWN V. BOARD OF EDUCATION* 156–80 (1995).

29 Brief for the State of Kansas on Reargument, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1) [hereinafter *Kansas Brief on Reargument*], reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 759 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 49 LANDMARK BRIEFS]. On the drafting of this brief, see HARBAUGH, *supra* note 28, at 483–519; KLUGER, *supra* note 19, at 646–50; WILSON, *supra* note 28, at 177; Interview by Richard Kluger with J. Lindsay Almond, J., U.S. Ct. of Customs & Pat. Appeals, in Washington, D.C. (Jan. 5, 1972) (on file with the *Notre Dame Law Review* from *Brown vs. Board of Education* Collection, *supra* note 20, Series 1, Box 1, Folder 2). This research was later collected in SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES (Bernard D. Reams, Jr., & Paul E. Wilson eds., 1975).

30 *See* Supplemental Brief for the United States on Reargument, *Brown*, 347 U.S. at 483 (Nos. 1, 2, 4, 8, 10), reprinted in 49 LANDMARK BRIEFS, *supra* note 29, at 853, 972; Appendix to the Supplemental Brief for the United States on Reargument, *Brown*, 347 U.S. at 483 (Nos. 1, 2, 4, 8, 10), reprinted in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 3 (Philip B. Kurland & Gerhard Casper eds., 1975); *see also* HERBERT BROWNELL & JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 186–201 (1993); KLUGER, *supra*

historical record of the Fourteenth Amendment that Bickel had begun the previous summer. Justice Frankfurter would distribute the final product of this research, which like the Justice Department brief stressed the ambiguity of the record of the framing of the amendment, to his fellow Justices prior to the reargument hearings.³¹ The sheer mass of material presented to the Court was impressive. Paul E. Wilson, attorney for Kansas, observed that all the submitted briefs on reargument together took up eight inches of shelf space.³²

SCHOOL SEGREGATION AND FOURTEENTH AMENDMENT ORIGINALISM AT THE TIME OF *BROWN*

When the Supreme Court issued its 1953 reargument order, most people who had considered the original meaning of the Fourteenth Amendment on the question of school segregation had come to the same conclusion: the Framers of the Amendment did not intend, and it was not generally understood at the time, to prohibit racial segregation in schools. Not all scholars agreed that the issue was so cut and dry,³³ and the NAACP would highlight the work of the small cadre of scholars who were challenging the dominant account. But the mainstream wisdom on the issue among legal scholars and historians was that the evidence against reading the history of the framing and ratification as justifying school desegregation was overwhelming.

This standard account relied on three primary sources of evidence: the legislative history of the drafting of the Fourteenth Amendment; state practices and public opinion at the time of the

note 19, at 650–52; John J. Cound, *A Very New Lawyer's First Case: Brown v. Board of Education*, 15 CONST. COMMENT. 57 (1998); Elman, *supra* note 19, at 834–36.

31 Drafts of Bickel's research are found in FFP-HLS and Alexander M. Bickel Papers, Box 22, Manuscripts and Archives, Yale University, New Haven, Connecticut. Bickel's work, in revised form, was published as Bickel, *supra* note 7. See also KLUGER, *supra* note 19, at 652–55; Bickel Interview, *supra* note 20; Letter from Alexander M. Bickel, Clerk, Chambers of J. Felix Frankfurter, to Felix Frankfurter, Assoc. J., U.S. Sup. Ct. (Aug. 22, 1953) (on file with FFP-HLS, *supra* note 20, at Part III, Alexander Mordecai Bickel Correspondence with Felix Frankfurter, Box 205, Folder 4, Page 5) (ProQuest) [hereinafter Letter from Bickel to Frankfurter].

32 WILSON, *supra* note 28, at 179. In oral argument, John W. Davis estimated that the reargument order resulted in "somewhere between 1500 and 2000 pages to the possible entertainment, if not the illumination, of the Court." ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–1955, at 206 (Leon Friedman ed., 1969) [hereinafter ARGUMENT].

33 See, e.g., JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment: I Genesis, 1833–1835*, 1950 WIS. L. REV. 479; John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 133 (1950).

drafting and ratification; and federal policy on school segregation during this period.

Legislative History. The argument that the Framers did not intend for the Fourteenth Amendment to prohibit racial segregation in schools drew on the words of members of the Thirty-Ninth Congress in debates over the Civil Rights Act of 1866 and the Fourteenth Amendment. Proponents of this position first pointed to the fact that the issue of racial segregation, whether in schools or elsewhere, was almost never discussed in these debates. The implication was that if the Framers had meant to strike down segregation in schools, they would have said so. They also pointed to critics of the Civil Rights Act who argued in Congress that the law was too sweeping and that it would have a litany of undesirable consequences, such as banning prohibitions on interracial marriage and granting the vote to black men; requiring integration of public schools was occasionally included in this list.³⁴ In response to these attacks, Congressman James Wilson of Iowa, the Chairman of the Committee on Judiciary who introduced the Civil Rights Bill in the House, insisted that the right to vote, to be on a jury, and to “attend the same schools . . . are not civil rights or immunities.”³⁵ In Bickel’s assessment, the “obvious conclusion,” to which the legislative history “easily leads,” is that the Amendment “as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.”³⁶

Defenders of the standard account viewed this relatively scant legislative record through a Dunning School inflected skepticism, which predisposed them to be dismissive of the quality of constitutional engagement of the Radical Republicans. They criticized the Framers for failing to adequately engage with the ramifications of their work, offering instead a record of political opportunism, a desire to

34 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 500 (1866) (remarks of Sen. Edgar Cowan) (describing the possibility of requiring integrated schools as “monstrous”); *id.* at 541 (remarks of Rep. John L. Dawson) (similar); *id.* at 1268 (remarks of Rep. Michael Kerr) (similar); *id.* at 1121 (remarks of Rep. Andrew Rogers) (similar).

35 *Id.* at 1117 (remarks of Rep. James Wilson). Michael McConnell notes of Wilson’s response: “This was the only statement by a proponent of the bill during the debates specifically denying its applicability to school desegregation.” Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 947, 960 (1995).

36 Bickel, *supra* note 7, at 58; see also *id.* at 59 (“If the fourteenth amendment were a statute, a court might very well hold, on the basis of what has been said so far, that it was foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be, and no language barrier stands in the way of construing the section in conformity with it.”); Kansas Brief on Reargument, *supra* note 29, at 15 (“All available evidence points to the conclusion that a majority of the Congress which submitted the Fourteenth Amendment, did not contemplate or understand that it would abolish segregation in the public schools.”).

punish the South, and a good deal of abstract rhetoric.³⁷ John W. Davis, the famed attorney who defended South Carolina's school segregation policy before the Court, complained to the Justices at oral argument that "perhaps[] there has never been a Congress in which the debates furnished less real pabulum on which history might feed. It was what Claude Bowers calls in his book *The Tragic Era*, well-named—flames of partisan passion were still burning over the ashes of the Civil War."³⁸

State Practices. The historical claim that the American people generally did not see the Fourteenth Amendment as in conflict with segregated schools centered on the fact that many states had segregated schools at the time they voted to ratify the Amendment, and that even more states created segregated schools in the years immediately following ratification.³⁹ A related piece of evidence for the standard account is a claim that public opinion, as best it could be determined, generally opposed integrated education at the time of the framing and ratification of the Fourteenth Amendment.⁴⁰

Federal Policy. The final pillar of the standard account centered on the actions Congress took (or failed to take) on school segregation. Congress allowed segregation in the public schools in the District of Columbia.⁴¹ And during deliberations over a bill that would eventually

37 See, e.g., Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 134 (describing a "general aura of vagueness that surrounded the passage of the Fourteenth Amendment in the two Houses" and noting that "[t]he debate was conducted almost entirely in terms of grand symbolism—that of the Declaration of Independence in particular—and remarkably little in terms of the specific legal implications of the new amendment").

38 ARGUMENT, *supra* note 32, at 208. Davis went on to say that Radical Republican Thaddeus Stevens was "called by historians perhaps the most unlovely character in American history, more concerned to humiliate the aristocrats of the South, as he called them, even than to preserve the rights of the Negro." *Id.*; see also Bickel, *supra* note 7, at 62 ("It is, of course, giving the men of the 39th Congress much more than their due to ennoble them by a comparison of their proceedings with the deliberations of the Philadelphia Convention.").

39 See, e.g., Kansas Brief on Reargument, *supra* note 29, at 15; ARGUMENT, *supra* note 32, at 215; McConnell, *supra* note 35, at 965–70.

40 See, e.g., Alfred H. Kelly, *The Congressional Controversy over School Segregation, 1867–1875*, 64 AM. HIST. REV. 537, 539 (1959) (noting "comparatively little popular interest in national mixed school legislation"); McConnell, *supra* note 35, at 956 (noting that school segregation "almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction").

41 See, e.g., Kelly, *supra* note 40, at 545–46; McConnell, *supra* note 35, at 977–80. Chief Justice Fred Vinson cited this evidence in the Justices' conference following the first round of oral arguments in *Brown*, in December 1952. As Justice Jackson recorded his comments, Vinson said: "Congress pass[ed] no statute [to the] contrary. [The same m]en [were] there who passed [the] amendments. Hard get[ting] away [from] that interpretation of Amendments." Michael J. Klarman, Response, *Brown, Originalism, and Constitutional*

be passed as the Civil Rights Act of 1875, members of Congress removed a provision that would have prohibited school segregation.⁴² According to this argument, if the members of Congress saw the Fourteenth Amendment as prohibiting segregation in schools, they would have used their power to actually end this practice when they had the opportunity to do so.

THE NAACP'S COUNTER-HISTORY

The lawyers for the NAACP Legal Defense and Educational Fund ultimately produced a counter-history. Their brief argued that the Reconstruction Amendments should be seen as the culminating achievement of abolitionism, that they were understood at the time as having transformed the balance of power between the federal government and the states, and that their Framers intended them to prohibit “all forms of state-imposed racial distinctions”⁴³—including racial segregation in schools.

When they began their research following the Court's reargument order, however, the NAACP lawyers ran into a wall of skepticism. The historian Henry Steele Commager questioned the basis of the entire research project. “The framers of the amendment did not, so far as we know, intend that it should be used to end segregation in schools,” he wrote in response to an NAACP request for assistance. “I strongly urge that you consider dropping this particular argument as I think it tends to weaken your case.”⁴⁴ Carl Swisher, a political scientist from Johns Hopkins University, offered a similarly pessimistic response to the NAACP legal team.⁴⁵ Louis Pollak, a lawyer with the State Department who for several years had been advising the NAACP, also thought the historical angle impossible to win. “If we win,” he confided to an NAACP lawyer, “it'll be on the basis that the clause requires an increasingly high standard of achievement as times and mores

Theory: A Response to Professor McConnell, 81 VA. L. REV. 1881, 1908–09 n.67 (1995) (alterations in original) (quoting Justice Robert Jackson, Conference Notes, Segregation Cases (Dec. 12, 1952) (on file with Library of Congress, Robert H. Jackson Papers, 1816–1983 [hereinafter Robert H. Jackson Papers], Box 184)). Justice Felix Frankfurter pressed Assistant Attorney General J. Lee Rankin on this point in oral argument. ARGUMENT, *supra* note 32, at 242.

42 See 3 CONG. REC., 43rd Cong., 2d Sess., 1010–11 (1875); Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179 (1967).

43 NAACP Brief, *supra* note 2, at 17; see also ARGUMENT, *supra* note 32, at 182–85.

44 KLUGER, *supra* note 19, at 620. For more on Commager's racial positions in this period, which were generally supportive of the NAACP efforts, yet never outspokenly so, see NEIL JUMONVILLE, HENRY STEELE COMMAGER: MIDCENTURY LIBERALISM AND THE HISTORY OF THE PRESENT 145–53 (1999).

45 KLUGER, *supra* note 19, at 620–21.

change.”⁴⁶ An originalist interpretation of the Fourteenth Amendment, Pollak concluded, could only hurt their cause.⁴⁷

The NAACP eventually secured several prominent scholars to undertake research for their cause. Horace Mann Bond, president of Lincoln University and the leading scholar of African American education of his day, drafted a study on the impact of the Fourteenth Amendment on public schools in the South.⁴⁸ Alfred H. Kelly, professor of constitutional history at Wayne State University, contributed a study of the original intention of the Framers of the Amendment,⁴⁹ while Howard Jay Graham, a librarian at the Los Angeles County Law Library, contributed research on the antislavery background of key Framers of the Fourteenth Amendment.⁵⁰ C. Vann Woodward, at the time a history professor at Johns Hopkins and author of several well-received studies of the post-Civil War South, wrote a paper on the decline of Reconstruction in which he emphasized the nation’s abandonment of the original purposes of the Reconstruction Amendments.⁵¹ John Hope Franklin also wrote of the decline of Reconstruction, focusing on the growth of segregation and the rejection of the egalitarian impulse embodied in the Equal Protection Clause of the Fourteenth Amendment.⁵² William T. Coleman, a lawyer working in Philadelphia, used contacts he had cultivated as a student

46 Letter from Louis H. Pollak, Special Assistant, Dep’t of State, to Robert L. Carter, Legal Assistant, NAACP Legal Def. Fund (Aug. 1, 1953) (on file with the *Notre Dame Law Review* from Library of Congress, NAACP Legal Defense and Educational Fund Records, 1915–1968 [hereinafter NAACP Papers], Part II, Series B, Container 140).

47 *Id.*

48 Alfred H. Kelly, *The School Desegregation Case*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 307, 325 (John A. Garraty ed., rev. ed. 1987).

49 Kelly’s revised efforts were published as Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956).

50 Graham’s contribution to the NAACP was a summary of a study he had previously published as Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment: I Genesis, 1833–1835*, *supra* note 33, and Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systemization, 1835–1837*, 1950 WIS. L. REV. 610.

51 Woodward’s contribution, entitled, “The Background of the Abandonment of Reconstruction,” is available in several locations, including as page scans at *Loren Miller Papers, 1876–2003*, HUNTINGTON, <https://hdl.huntington.org/digital/collection/p15150/coll7/id/38962/rec/6> (last visited Apr. 25, 2022); NAACP Papers, *supra* note 46, at Part II, Series, B, Container 140.

52 The essay Franklin prepared for the NAACP is not in the NAACP papers at the Library of Congress, but a revised version of the essay was published as John Hope Franklin, *Jim Crow Goes to School: The Genesis of Legal Segregation in Southern Schools*, 58 S. ATL. Q. 225 (1959). Franklin refers to this article as based on his NAACP paper in a letter to Richard Kluger. Letter from John Hope Franklin, Professor, Univ. of Chi., to Richard Kluger (Jan. 25, 1972) (on file with the *Notre Dame Law Review* from *Brown v. Board of Education* Collection, *supra* note 20, at Box 2).

at Harvard Law School, as a clerk for Justice Frankfurter (he was the first African American to clerk for a Supreme Court Justice), and as a practicing lawyer to commission studies of the circumstances surrounding the ratification of the Fourteenth Amendment in the various states.⁵³

The challenge of locating the right balance between objective historical scholarship and legal advocacy was ever-present. When Woodward expressed concern to an NAACP lawyer about maintaining his role as a historian, the attorney assured him,

Your conclusions are your own[.] . . . If they do not help our side of the case, in all probability the lawyers will not use them. If they do help our argument, the present plan is to include them in the overall summary argument and to file the whole work as a brief in an appendix. No matter what happens, your work will be of real educational value to the men who must argue before the Court. . . .⁵⁴

This sort of hands-off approach worked well during the summer months when the historians were working on their individual monographs. By the fall, when it came time to write their brief, however, the lawyers and historians confronted hard questions about how to address the historical questions posed by the Court.

These questions about objective scholarship versus advocacy never resulted in anything approaching direct confrontation between the lawyers and historians. All the historians who signed on were sympathetic to the cause of desegregation, and the common goal of the historians and lawyers created an atmosphere that was, by all accounts, collegial. Yet, there were important differences in how the two groups approached the task at hand. The division between the work done by the NAACP lawyers and that done by the scholars they hired was clearly defined from the beginning. The internal memorandums of the NAACP described the scholars as engaged in “non-legal research.”⁵⁵ Even though the historians were employed by the lawyers and thus in a sense responsible to them, the nature of their work and the NAACP’s view of that work allowed for each group to maintain its distinct professional identity, even as they worked toward a common goal. But there were also particular expectations on the lawyers’ part in terms of what the historians were supposed to offer. In a revealing letter from John A. Davis, who was in charge of organizing the historical research,

53 Two folders of research material Coleman gathered are in the Library of Congress, NAACP Papers, *supra* note 46, at Part II, Series B, Container 141.

54 KLUGER, *supra* note 19, at 624 (last alteration in original).

55 Letter from John A. Davis, Counsel, NAACP Legal Def. Fund, to Thurgood Marshall, Director-Counsel, NAACP Legal Def. Fund (Sept. 9, 1953) (on file with the *Notre Dame Law Review* from NAACP Papers, *supra* note 46, at Part II, Series B, Container 140).

to Thurgood Marshall updating the chief NAACP lawyer on the progress of the “non-legal research,” Davis summarized the work of the historians. “It is hoped,” Davis wrote, “that the net effect of this research will be to show that it was the intent of those persons who proposed the Fourteenth Amendment to outlaw state or federal distinctions because of race where governmental action, service, or protection was involved.” In the following sentence, Davis wrote, “It is also proposed to show that the states and the Congress at the time of the Amendment felt that segregation in education was improper” Davis prefaced further points that the scholars will make with the following: “The research will show . . .”; “The research will then outline . . .”; “The research will dwell on . . .”; “It will indicate . . .”; “Lastly, the research will show . . .”⁵⁶ The tentative nature of the first sentences (“It is hoped”) had shifted into declarative statements about what the research would produce. Even without any overt pressure, the NAACP had clear expectations of the work of the historians.

The lawyers and the historians first got a chance to work together directly in September 1953 when the NAACP organized a conference to discuss the work these scholars produced during the previous summer. Along with the contributors, there were about forty legal scholars and historians in attendance to assist the NAACP legal team.⁵⁷ The conference was organized as a series of seminars in which an effort was made to integrate the historical material into an effective legal argument. It was at this point that the stirrings of tensions between the approaches of the two groups began to appear. Evidence that seemed to contradict or challenge the NAACP’s case was eagerly examined by the lawyers because they wanted to be ready to rebut the opposing legal team’s arguments.⁵⁸ But in deciding how to use the historical material for their own argument, the lawyers, in Alfred Kelly’s words, “appeared to . . . plunge[] into a state of vast uncertainty.”⁵⁹ While the historical material was not necessarily damaging to the NAACP’s case—according to Kelly, it “was both good and bad”—Davis’s expectations of what the historians would bring back had not been fully realized.⁶⁰ The historical research was complicated and open to a variety of interpretations, as the historians emphasized during the conference. This was not what the lawyers wanted to hear. As NAACP lawyer Robert

56 *Id.*

57 The number is Kelly’s estimate. Of the individuals who contributed research, only Graham did not attend the September conference. Others attending included Robert K. Carr, Robert Cushman, Jr., Milton Konvitz, Walter Gellhorn, and John Frank. Kelly, *supra* note 48, at 325–26.

58 Kelly, *An Inside View*, *supra* note 27, at 172.

59 *Id.*

60 Kelly, *supra* note 48, at 326.

Carter would later explain, “We wanted the historians to look at the whole thing from the viewpoint of the blacks and their aspirations, not from some cloud All history is a distortion of sorts, depending on the historian’s myopia and precepts.”⁶¹ This type of attitude toward the historian’s craft, while perhaps epistemologically sound, had the potential to cause some tension, or at least a measure of self-reflection, among the historians working for the NAACP.

The historian who was most affected by the experience of working for the NAACP in *Brown* was Alfred Kelly. Of all the historians he, along with John Hope Franklin, worked most closely with the NAACP lawyers. Following the September conference, Kelly returned to the NAACP New York legal office in the middle of October and again in early November to advise the lawyers drafting the brief that would eventually be submitted to the Supreme Court in time for oral arguments in December.⁶²

When Kelly reflected back on his contribution to *Brown*, which he did often in the following years, he invariably focused on the conflict he felt as an historian working in the legal arena. In 1961 he gave a paper at the annual meeting of the American Historical Association, titled *An Inside View of Brown v. Board*. In addition to detailing his work with the NAACP, this paper offered an extended meditation on the distinction between historical objectivity and legal advocacy. That there was a clear distinction, Kelly was sure. That his work with the NAACP in effect blurred this distinction, he was also sure. “I was facing for the first time in my own career,” Kelly recalled, “the deadly opposition between my professional integrity as a historian and my wishes and hopes with respect to a contemporary question of values, of ideals, of policy, of partisanship, and of political objectives. . . . [I]t bothered me terribly.”⁶³ Kelly’s solution to this dilemma was to embrace the role of legal advocate, abandoning his identity as a historian. As Kelly explained it:

The problem we faced was not the historian’s discovery of the truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of a historical case. Never has there been, for me at least, a more dramatic illustration of the difference in function, technique, and outlook between lawyer and historian. It is not that we were engaged in formulating lies; there was nothing as crude and naive

61 KLUGER, *supra* note 19, at 623–24.

62 Kelly, *supra* note 48, at 327–29.

63 Kelly, *An Inside View*, *supra* note 27, at 171; see *Nomination of Thurgood Marshall: Hearings Before the S. Comm. on the Judiciary*, 90th Cong. 163 (1967). Kelly noted that historian Howard K. Beale told him at the conference that he felt similarly. Kelly, *An Inside View*, *supra* note 27, at 171–72.

as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts, and above all interpreting facts in a way to do what Marshall said we had to do—“get by those boys down there.”⁶⁴

Kelly's words were later used by segregationist Senators to question Marshall's legal ethics during his 1962 confirmation hearing for an appointment as a federal judge. After Marshall defended himself, the Judiciary Committee called Kelly to the hearing, where he was given an opportunity to explain his role in *Brown* and his impressions of the nominee. In his defense of Marshall, Kelly further elaborated on what he saw as the critical distinction between history and advocacy: “[T]o imply that because Marshall and his professional associates did not write professional history when they prepared their brief in *Brown v. Board*, that they were thereby guilty of professional malfeasance, is grossly to misconstrue the modus operandi of the legal profession.”⁶⁵

Two years later, Kelly was again writing about his experience working on *Brown*. Again, he made the point of distinguishing between history and legal advocacy, making clear that the NAACP brief, and his own contribution to that brief, was legal advocacy, not history.⁶⁶ Then in 1965 Kelly devoted an article to the potential pitfalls of what he called the “[i]llicit [l]ove [a]ffair” of history and the Supreme Court. He defended the “law-office history” in the NAACP brief because it “manipulated history in the best tradition of American advocacy.”⁶⁷ In all these reflections of his experience in *Brown*, Kelly never abandoned his belief in the need to draw a sharp distinction between history and activism. The historian could successfully cross this divide, as Kelly admitted he had, but he insisted that this crossing amounted to a shift in the historian's professional identity.

John Hope Franklin never expressed the kind of angst Kelly did over the challenges of engaging in legal advocacy. When Franklin discussed the issue, he chose a different starting point. As a pioneering black historian in an overwhelmingly white profession, his primary concern was negotiating the terrain of Jim Crow America as an African American citizen and an historian.⁶⁸ On the one hand, Franklin felt a

64 Kelly, *An Inside View*, *supra* note 27, at 174.

65 *Nomination of Thurgood Marshall: Hearings Before the S. Comm. on the Judiciary*, 90th Cong. 185 (1967).

66 Kelly, *supra* note 48.

67 Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119, 144.

68 Franklin published the first edition of his landmark *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES* in 1947. In 1956, after a decade on the faculty of Howard University, Franklin was appointment chair of the history department at Brooklyn College, the first African American appointed chair in any department at a traditionally white

particular burden to faithfully practice the commonly accepted methods of his profession. The racism the black historian encountered in American society, Franklin noted, might lead to “the temptation to pollute his scholarship with polemics, diatribes, arguments,” but doing this would only undermine the historian’s scholarly credibility.⁶⁹ The black scholar must “mak[e] certain that his conclusions are sanctioned by universal standards developed and maintained by those who frequently do not even recognize him.”⁷⁰

Yet the black historian also has a responsibility to the cause of social progress. “[T]he major choice for the Negro scholar,” Franklin wrote,

is whether he should turn his back on the world, concede that he is the Invisible Man, and lick the wounds that come from cruel isolation, or whether he should use his training, talents, and resources to beat down the barriers that keep him out of the mainstream of American life and scholarship.⁷¹

For Franklin, the danger was failing to appreciate the power of the trained mind to improve society. The theme of education and responsibility featured in the research he prepared for the NAACP, where he described segregated schools as “an important means of social control and a device for perpetuating the ignorance of a great mass of blacks.”⁷² Franklin insisted that to counter the dangers of oppression through educational neglect, scholars, particularly those who had overcome the obstacles of an unjust system, as he had, must recognize their special duty to society.

Franklin, like Kelly, acknowledged the distinction between scholarship and advocacy, but, unlike Kelly, he saw this distinction as fluid, negotiable. Historical scholarship and advocacy could be fruitfully combined through “the use of objective data in the passionate advocacy of the rectification of injustice.”⁷³ Franklin felt flattered when Marshall told him the paper he prepared for the NAACP sounded like a lawyer’s brief. “I had deliberately transformed the objective data provided by historical research into an urgent plea for justice,” he recalled.⁷⁴ “I hoped that my scholarship did not suffer.”⁷⁵

institution. In 1964 he joined the history department at the University of Chicago. *John Hope Franklin*, BRITANNICA, <https://www.britannica.com/biography/John-Hope-Franklin> [<https://perma.cc/4DSE-PSZ8>].

69 JOHN HOPE FRANKLIN, *The Dilemma of the American Negro Scholar* (1963), reprinted in RACE AND HISTORY, *supra* note 27, at 304–05.

70 *Id.*

71 *Id.* at 307.

72 Franklin, *supra* note 52, at 234.

73 FRANKLIN, *supra* note 69, at 306.

74 *Id.*

75 *Id.*

The work with the lawyers, Franklin noted at another point, “was not easy, for I was too much committed to truth to try to distort history.”⁷⁶ He never abandoned the idea of historical objectivity, nor did he consider his dedication to this ideal in conflict with his involvement in the developing civil rights movement.⁷⁷ When he reminisced about his contribution in *Brown*, he described how well the historians and lawyers worked together—it was, he remembered, “one of the greatest experiences of my life.”⁷⁸ The challenge in Franklin’s mind was simply a matter of placing the historical material into a legal setting.⁷⁹ The dilemma that so preoccupied Kelly was much less of a concern for Franklin, who viewed the issue, first and foremost, as one of social responsibility.

THE *BROWN* COURT’S TURN FROM HISTORY

For all the hours and angst that went into the NAACP’s efforts to find in history a line of argument challenging segregation, their brief had little impact on the Court. Although the NAACP’s briefs contained historical insights that would gain credence within the historical profession in the coming years, the Justices did not think much of the NAACP’s conclusions. Indeed, several of them had already made up their minds that there was no way in which the original meaning of the amendment required desegregation. In the Justices’ conference following the first round of oral arguments in late 1952, Justice Frankfurter declared that he had “read all of [the Fourteenth Amendment’s] history” and he “can’t say that it meant to abolish segregation.”⁸⁰ Jackson agreed, noting that he could find “nothing in the *text* [of the Constitution] that says this is *unconstitutional*. Nothing in the opinions of the courts say it is unconstitutional. Nothing in the

76 Letter from John Hope Franklin, Professor, Univ. of Chi., to Richard Kluger (Nov. 28, 1973) (on file with the *Notre Dame Law Review* from *Brown vs. Board of Education* Collection, *supra* note 20, at Series 1, Box 2, Folder 33) [hereinafter Letter from Franklin to Kluger].

77 Peter Novick emphasizes Franklin’s dedication to “the universalist and objectivist norms of the profession,” in *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 472 (1988). Franklin wrote to Richard Kluger, “I had never distorted history, and I would not do so in the *Brown* case. The pieces I wrote reflected my attitude toward the canons of history.” Letter from Franklin to Kluger, *supra* note 76.

78 Letter from John Hope Franklin, Professor, Univ. of Chi., to Richard Kluger (Oct. 23, 1973) (on file with the *Notre Dame Law Review* from *Brown vs. Board of Education* Collection, *supra* note 20, at Series 1, Box 2, Folder 33).

79 FRANKLIN, *supra* note 27, at 312.

80 IN CONFERENCE, *supra* note 22, at 651; *see also* ARGUMENT, *supra* note 32, at 188 (asking of this historical research, “now that we have got it, what are we to get out of it?”).

history of the Fourteenth amendment”⁸¹ In the spring of 1954, when Jackson was drafting a concurrence in the case, he remained skeptical. In his unissued opinion, he wrote, “It is hard to find an indication that any influential body of the movement that carried the Civil War Amendments had reached the point of thinking about either segregation or education of the Negro as a current problem, and harder still to find that the Amendments were designed to be a solution.”⁸² By the time of the decision, Justice Frankfurter was asking whether “it is . . . too much to hope that no further appeal will be made to the legislative history of the Fourteenth Amendment to support arguments, one way or the other, as to the intended scope of the Amendment.”⁸³ Justices Frankfurter and Jackson, at least, had had more than their fill of the history of the Fourteenth Amendment.⁸⁴

Chief Justice Warren chose not to adopt an interpretation that went against the conventional wisdom on the original meaning of the Fourteenth Amendment that the Justices basically accepted. Rather, he opted to de-emphasize the importance of the historical material. In doing so he had two guides: the Justice Department’s brief, and Bickel’s research. Of the four research projects spawned by the reargument order, these two fit comfortably between the findings of the NAACP and the states. Both found the original meaning of the Fourteenth Amendment “inconclusive” with regard to school segregation. In the end, the work of the legal teams for the contesting parties took

81 IN CONFERENCE, *supra* note 22, at 652.

82 Unpublished Opinion of Robert H. Jackson in *Brown v. Board*, *supra* note 15, at 125.

83 Memorandum for the Conference from Felix Frankfurter, Assoc. J., U.S. Sup. Ct. (May 18, 1954) (on file with the *Notre Dame Law Review* from University of Kentucky Libraries, Stanley Forman Reed Papers, Box 324).

84 Before the school segregation cases arrived at the Court, Justices Frankfurter and Jackson had been expressing their frustration with originalist inquiries into the history of the Fourteenth Amendment. See Letter from Robert H. Jackson, Assoc. J., U.S. Sup. Ct., to Charles Fairman, Professor, Stanford Univ. (Oct. 18, 1949) (on file with the *Notre Dame Law Review* from Robert H. Jackson Papers, *supra* note 41, at Container 12) (“I think you have done a great service to the legal profession, not only in bringing to light the real facts about the Fourteenth Amendment but in demonstrating the danger of going into history to reconstruct past attitudes as a basis for changing the constitutional doctrine. I am one who believes that we have gone too far in going into legislative history to clear up ambiguities which we sometime go to legislative history to create. It is even more treacherous ground in constitutional matters, as you have so well demonstrated. While I would not want to say that we should never take into account legislative history or the history of the times, it is certainly a path to tread with care.”); Letter from Felix Frankfurter, Assoc. J., U.S. Sup. Ct., to Charles Fairman, Professor, Stanford Univ. (Jan. 27, 1950) (on file with the *Notre Dame Law Review* from FFP-HLS, *supra* note 20, at Part III, Box 184, folder 16) (“[T]his business of trying to find the scope of the Fourteenth Amendment in this or that pamphlet or this or that individual expression of hope of what was accomplished by the Amendment is . . . no way of dealing with a ‘constituent act’ like the Fourteenth Amendment.”).

a back seat to the other research projects, which Chief Justice Warren considered more reliable.

The Justice Department brief particularly impressed the Chief Justice. Assistant Attorney General J. Lee Rankin told the Court at oral argument that the Justice Department lawyers believed it their “duty” to approach the relevant history “much as historians would.”⁸⁵ They sought “to draw from it the facts just as objectively as any party could on either side” and to “present what the history showed, whether it hurt or helped either side.”⁸⁶ Chief Justice’s faith in the government’s work was revealed in his first draft of *Brown*, where he singled out the Justice Department brief as “particularly objective and helpful” and specifically noted that the Court’s “inconclusive” finding came from that brief.⁸⁷ In subsequent revisions explicit reliance on the Justice Department was whittled away. One of the Chief Justice’s clerks, Earl Pollock, revised Chief Justice Warren’s draft to include the line: “We conclude, as did the Government, that the legislative history of the Amendment is inconclusive”⁸⁸ The eventual wording of this section was a mixture of Pollock’s revision and that of his fellow clerk, Richard Flynn. Flynn’s version, referring to the Justice Department, read: “Their efforts and our own convince us that these sources cast little light on the problem with which we are faced. At best, they are inconclusive.”⁸⁹ By the final draft of the opinion, specific reference to the Justice Department brief was gone, and the inconclusiveness of the

85 ARGUMENT, *supra* note 32, at 240.

86 *Id.*

87 Draft Memorandum from Earl Warren, C.J., U.S. Sup. Ct. 2–3 (c. 1954) (on file with the *Notre Dame Law Review* from Library of Congress, Earl Warren Papers [hereinafter Earl Warren Papers], Container 571) (typed draft without footnotes). Note: The version quoted is the typed version of the handwritten first draft; the phrase “objective and” was added by hand in Chief Justice Warren’s writing and is not included in the handwritten version of the first draft. Compare *id.*, with Draft Memorandum from Earl Warren, C.J., U.S. Sup. Ct. 3 (c. 1954) (on file with the *Notre Dame Law Review* from Earl Warren Papers, *supra*, at Container 571) [hereinafter Handwritten Draft] (handwritten draft). Earlier in the first draft Warren also noted that the Justice Department “ably” responded to the reargument order. Handwritten Draft, *supra*, at 3. Chief Justice Warren had praised the Justice Department brief in the Justices’ conference and in conversation with Attorney General Herbert Brownell. IN CONFERENCE, *supra* note 22, at 654; ROBERT FREDRICK BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 140 (1984).

88 Revision of Draft Memorandum from Earl Warren, C.J., U.S. Sup. Ct., by Earl Pollock, Clerk, Chambers of C.J. Earl Warren 3 (May 4, 1954) (on file with the *Notre Dame Law Review* from Earl Warren Papers, *supra* note 87, at Container 571).

89 Revision of Draft Memorandum from Earl Warren, C.J., U.S. Sup. Ct., by Richard J. Flynn, Clerk, Chambers of C.J. Earl Warren (May 3, 1954) (on file with the *Notre Dame Law Review* from Earl Warren Papers, *supra* note 87, at Container 571).

history was attributed to the “discussion” that resulted from reargument and “our own investigation.”⁹⁰

Bickel’s research also influenced the Justices’ deliberation. Justice Frankfurter distributed drafts of his clerk’s work to the other justices on at least two occasions, one directly prior to reargument and again following the *Brown* ruling. With its first distribution Justice Frankfurter attached a memorandum stating: “The memorandum 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.”⁹¹ Pollock relied on the Bickel memorandum in writing to the Chief Justice, “The best that can be said is that the evidence is ‘inconclusive.’”⁹² Bickel’s memorandum must have been what the law clerk had in mind when he revised Chief Justice Warren’s first draft to reference the Court’s own research (“We conclude”) as an influencing factor—a reference that would remain in the final opinion (“our own investigation”).⁹³

The “inconclusive” conclusion, as presented to the Court in both the Bickel memorandum and the Justice Department brief, served the necessary purpose of getting around a key defense of the segregationist position, while appearing to take a moderate, unbiased stance on the historical debate. It justified the Justices’ move away from what they saw as the constraints of the history of the Fourteenth Amendment.

OPTIMISM AND PESSIMISM IN RECONSTRUCTION HISTORY

The research historians produced on behalf of the NAACP’s desegregation campaign joined a steadily growing stream of accounts

90 *Brown v. Bd. of Educ.*, 347 U.S. 483, 489. This basic wording first appeared in a later draft, which was a composite of the clerk’s rewriting efforts. Draft Memorandum on the State Cases from Earl Warren, C.J., U.S. Sup. Ct. 3 (c. 1954) (on file with the *Notre Dame Law Review* from Earl Warren Papers, *supra* note 87, at Container 571) (typed draft with footnotes).

91 Memorandum for the Conference by Felix Frankfurter, Assoc. J., U.S. Sup. Ct. (Dec. 3, 1953) (on file with the *Notre Dame Law Review* from Earl Warren Papers, *supra* note 87, at Container 571). Bickel had used the same word, “inconclusive,” to describe the material in a letter to Justice Frankfurter attached to the first draft of his study. Letter from Bickel to Frankfurter, *supra* note 31, at 3. In concluding his presentation of the material, Bickel would argue that although the historical material was inconclusive, the Constitution must be seen as a document flexible enough to deal with the changing times. This concept of a “living Constitution,” which was also an approach favored by Frankfurter, would also be integrated into Warren’s decision. See Letter from Bickel to Frankfurter, *supra* note 31.

92 Bench Memo for Nos. 1, 2, 4, 8, and 10, at 14 (c. 1954) (on file with the *Notre Dame Law Review* from Earl Warren Papers, *supra* note 87, at Container 574).

93 *Brown*, 347 U.S. 483, 489 (1954).

of Reconstruction that sought to topple the still prevalent Dunning School historiography.⁹⁴ This revisionist scholarship emphasized the egalitarian principles that animated the legal and constitutional achievements of Reconstruction, and the dire consequences of white America's abandonment of these principles in the long Jim Crow era.⁹⁵ "The civil rights revolution destroyed the pillars of the Dunning School, especially its overt racism, and historians completely overhauled the interpretation of Reconstruction," writes Eric Foner.⁹⁶ "If the era was tragic, we now think, it was not because it was attempted but because in significant ways it failed, leaving to subsequent generations the difficult problem of racial justice."⁹⁷ The historical account of Reconstruction that the NAACP presented to the Court captured the sentiment of future generations of historians far better than any of the other historical projects launched by the Court's reargument order.

Yet even if the Dunning School has been displaced, many of the premises of the Reconstruction history that stood in opposition to the NAACP's brief—those expressed in the briefs of the states, the Justice Department, and Bickel's conclusions—still resonate. Reconstruction scholarship has tended to operate in two opposing registers: an optimistic register that echoes the conclusions of the NAACP in *Brown*; and a pessimistic register that echoes the conclusions of the other briefs. Some scholars settle comfortably into one register; some slide back and forth between the two. And as was the case in the historical research *Brown* produced, demands of constitutional politics play a key role in sorting people into one camp or the other.

Reconstruction optimism emphasizes the radicalism of the period. This point is typically achieved by centering attention on the abolitionists and Radical Republicans who were the most egalitarian voices of the period and locating the meaning of the Fourteenth Amendment (and other achievements of Reconstruction) in their words and work. An early example from the legal academy was John P. Frank and Robert F. Munro's influential 1950 article on the original

94 See, e.g., LAWANDA COX & JOHN H. COX, *POLITICS, PRINCIPLE, AND PREJUDICE, 1865–1866: DILEMMA OF RECONSTRUCTION AMERICA* (1963); ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960); JAMES M. MCPHERSON, *THE STRUGGLE FOR EQUALITY* (1964); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877* (1965); JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTIONS, 1861–1877* (1965).

95 See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at xix–xxvii (1988) (discussing the transformation of historiography of Reconstruction in the 1960s, '70s, and '80s).

96 FONER, *supra* note 10, at xxiv.

97 *Id.*

understanding of the Equal Protection Clause.⁹⁸ Their analysis of the origins of the phrase “equal protection of the laws” centered on the work of Charles Sumner and attributed the addition of this principle to the Fourteenth Amendment to a small group of Sumner’s Radical Republican congressional allies.⁹⁹ Having reduced the number of “insiders” who were responsible for the Equal Protection Clause to fifteen members of Congress, they then located its original meaning by determining what it meant to these men.¹⁰⁰ They find that a majority of these men understood the Equal Protection Clause as “preclud[ing] any use whatsoever of color as a basis of legal distinctions,” with the others either on record allowing that some limited forms of racial classification could be permissible or not on record expressing a position on the reach of the equal protection principle.¹⁰¹ By paring away moderate and conservative voices and centering attention on a small number of the most uncompromising egalitarian white lawmakers, Frank and Munro advanced an originalist reading of the Fourteenth Amendment as an egalitarian instrument with revolutionary potential.

Another key move of Reconstruction optimists is to assume that the period’s goals and constitutional achievements are best understood at relatively high levels of abstraction. Graham, the Los Angeles librarian who worked with the NAACP legal team and who had published seminal articles advancing an optimistic perspective on the drafting of the Fourteenth Amendment, chastised legal scholars and historians for their “narrow antiquarianism” in which “[f]acts are being determined and treated in isolation, one at a time, and virtually out of their contexts.”¹⁰² The proper approach, Graham explained, was to focus on the “thrilling story” of how the Fourteenth Amendment emerged as the culminating achievement of abolitionism,¹⁰³ and that the antislavery campaign was, at heart, a campaign against all

98 Frank & Munro, *supra* note 33. The article featured prominently in the NAACP brief on reargument. NAACP Brief, *supra* note 2, at 93, 96–101.

99 Frank & Munro, *supra* note 33, at 136–38, 141.

100 *Id.* at 141–42.

101 *Id.* at 142.

102 Graham, *supra* note 21, at 7. On the problems with “narrow antiquarianism” in approaching Fourteenth Amendment history, Graham wrote: “[E]ven if applied evenhandedly this method is open to serious objection. It tends to make 1866 the decisive date in American history; it gives rise to innumerable searches of records for guidance that simply isn’t there; it leads to obscurantism and conjecture; almost inevitably it transforms the humble ‘argument from silence’ into both a murderous and a suicidal weapon.” *Id.* (quoting Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 *YALE L.J.* 371, 386–87 (1938)).

103 *Id.* at 9.

forms of racial discrimination.¹⁰⁴ The NAACP took the same generalizing approach to Reconstruction history in its *Brown* brief.

The significance of level of generality in efforts to interpret the history of the Fourteenth Amendment can be seen with particular clarity in Bickel's history of the Fourteenth Amendment.¹⁰⁵ He engaged the historical material on two distinct levels. First, he analyzed the history at a narrow, particularistic level, concluding that the Framers did not intend the Fourteenth Amendment to prohibit segregated schools. Then, at the end of the article, he shifted registers, recognizing that the Framers' work could also be understood at a more general level, which left open the possibility that future lawmakers and future judges could understand the amendment as prohibiting school segregation.¹⁰⁶ Only by shifting to this more abstract mode of analysis did he arrive at a defense of the *Brown* decision on originalist grounds.¹⁰⁷

This very same abstracting move was the analytical centerpiece of the first generation of modern originalists. For those who advocated an originalist approach to constitutional interpretation in the 1970s and 1980s, the assumption that originalism could not justify *Brown* was a key obstacle. To respond to this critique, they typically asserted that at a general level the original meaning of the Fourteenth Amendment supported *Brown*.¹⁰⁸ In 1990, Robert Bork, who had offered a tentative

104 *Id.* at 10 n.34 ("It is impossible to overstress the fact that the antislavery movement merely was the largest part of an anti-race discrimination movement. The discriminations against free Negroes, and those against Indians for example, were as vigorously attacked as slavery, and for the same reason: race and color were arbitrary, irrational bases for distinctions in men's rights."); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 9 (1954) ("Slavery is so odious a concept today that we are apt to forget that essentially it was a system of race discrimination and a denial of the protection of law.").

105 Bickel, *supra* note 7.

106 Bickel, *supra* note 7, at 59 ("Should not the search for congressional purpose . . . properly be twofold? One inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.").

107 *Id.* at 63–65.

108 *See, e.g.*, Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 27 (1985) (contending that *Brown* did not involve "adapting a 'living,' 'flexible' Constitution to new reality" but rather "restoring the original principle of the Constitution to constitutional law"); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971) (defending *Brown* as aligned with the original intentions of the drafters of the Fourteenth Amendment based on two historical claims: that the drafters "were not agreed about what the concept of racial equality requires"; and that they "intended that the Supreme Court should secure against government action some large measure of racial equality," and this intention constitutes "the core meaning of the amendment").

originalist defense of *Brown* in his seminal 1971 article,¹⁰⁹ confidently asserted, “*Brown* is consistent with, indeed is compelled by, the original understanding of the fourteenth amendment’s equal protection clause,”¹¹⁰ which he defined, with little elaboration or historical support, as a commitment to “black equality.”¹¹¹

But this leap of faith into the realm of generalities about the intention or meaning of the Fourteenth Amendment strained against the foundational aspiration of early originalists: constraining interpretive discretion. In an effort to address this perceived weakness of originalism, Michael McConnell advanced a defense of *Brown* in his 1995 law review article *Originalism and the Desegregation Decisions* that did not rely on abstracting egalitarian principles from Reconstruction history.¹¹² He summarized his findings in another article: “A close examination of the [congressional] debates and votes on segregation between 1870 and 1875 now convinces me that *Brown v. Board of Education* was correctly decided on originalist grounds, not on the basis of any high level of generality about equality, but on the basis of the actual discussions and understandings of school segregation in the period immediately following ratification of the Amendment.”¹¹³ Originalist scholars have embraced McConnell’s carefully researched and argued originalist defense of *Brown*.¹¹⁴

McConnell’s argument turns on several interpretive choices. One was to loosen the linkage between the 1866 Civil Rights Act and the Fourteenth Amendment. He emphasized that the Framers of the amendment understood its reach to be broader than that of the civil rights law, thus weakening the primary evidentiary basis for arguing

Early proponent of originalism Raoul Berger, by contrast, argued that *Brown* was indefensible on originalist grounds. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363–72 (1977).

109 Bork, *supra* note 108, at 13–15.

110 ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 76 (1990).

111 *Id.* at 81.

112 McConnell, *supra* note 35.

113 Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457, 458 (1996).

114 See, e.g., ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 108–16 (2017); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 495 (2013) (“[T]he ability of originalism to justify the Court’s decision [in *Brown*] is now a widely shared assumption of originalist scholarship.” (citing Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 686 (2009))). McConnell’s article has also been the subject of extensive critiques. See Klarman, *supra* note 41.

that the congressional Framers saw no conflict between the Amendment and segregated schools.¹¹⁵ Another was to shift the focus of analysis from 1866–1868, when the Thirty-Ninth Congress drafted and the states ratified the Fourteenth Amendment, to 1870–1875, the period when Congress debated federal public accommodations legislation—legislation that would ultimately be passed in the Civil Rights Act of 1875 and that included for most of this period a provision prohibiting racial discrimination in public schools.¹¹⁶ McConnell notes that in the 1866–1868 period the historical record of debate in Congress, on the campaign trails, and in the states includes few mentions of school segregation; with regard to this material, he seems to agree with Chief Justice Warren that the historical record is inconclusive. The situation shifted dramatically in the early 1870s, when school segregation became “the dominant political issue,” as Congress considered federal legislation that would ban racial discrimination in certain public spaces, including schools.¹¹⁷ (The school provision would be removed from the bill prior to its passage in 1875.) These debates, he argues, offer the only real engagement with the issue of racial segregation and education by those who framed and defended the Fourteenth Amendment to the nation. Since the congressional authority for the proposed legislation came from the enforcement clause of the Fourteenth Amendment, McConnell equates support for the legislation with a belief that the Fourteenth Amendment prohibited segregated schooling. And he finds majority support in Congress for the legislation, even when it included the school provision.¹¹⁸

In their recently published book, Randy Barnett and Evan Bernick offer an originalist defense of *Brown* that revolves around many of the same interpretive choices favored by other Reconstruction optimists.¹¹⁹ They elevate a group of abolitionists and Radical Republicans as guiding lights in understanding the original meaning of the

115 “This course of events strongly suggests that the Civil Rights Act of 1866 was not understood to forbid school segregation, but it does not necessarily mean the same for the Fourteenth Amendment.” McConnell, *supra* note 35, at 960 (footnote omitted). He then argues: “A fair inference is that the Amendment was understood to encompass the broad range of ‘civil rights and immunities’ that were entailed by the original draft of the 1866 Act.” *Id.* at 961. And: “Whether segregation of schools, transportation, or places of public accommodation represented an inequality with respect to those rights was not debated or resolved in 1866. As will be seen, the issue arose soon after ratification and was debated at length. Those later debates, rather than the debates of 1866, hold the real answer to the segregation question.” *Id.* at 962.

116 *Id.* at 984–90.

117 McConnell, *supra* note 113, at 459.

118 McConnell, *supra* note 35, at 1104–05.

119 BARNETT & BERNICK, *supra* note 10, at 30.

Fourteenth Amendment.¹²⁰ They expand the time period in which the Amendment's original meaning can be discerned, looking back to pre-Civil War abolitionists thought¹²¹ and forward to debates over the 1875 Civil Rights Act.¹²² These choices advance their distinctive originalist defense of *Brown*, which is that the original meaning of the Fourteenth Amendment prohibits school segregation not necessarily because segregation violates the equal protection of the laws but because schooling is among the privileges or immunities of national citizenship.¹²³

As this brief summary shows, legal historians with a range of ideological commitments and in pursuit of various goals have advanced variations of what I have labeled as optimistic frameworks for understanding the Fourteenth Amendment. Reconstruction optimism can elevate the significance of the expanding cast of historical actors who historians now recognize as having contributed to the achievement of the Fourteenth Amendment. It is also a critical assumption for those who, like the NAACP legal team in 1953, seek to defend *Brown* on originalist grounds.

Reconstruction pessimism, by contrast, emphasizes the limitations of Reconstruction, in terms both of its vision and achievements. Proponents have spanned the ideological spectrum, from early twentieth century white supremacists to modern-day racial progressives. They align on the foundational assumption of the resilience of white supremacy through American history, and a belief that Reconstruction

120 *Id.* at 89, 97–99 (presenting the constitutional thought of abolitionists such as Lysander Spooner and Joel Tiffany as reflecting a theory of “Republican [c]itizenship” on which the Fourteenth Amendment was based); *id.* at 128 (praising John Bingham, the principal drafter of the Fourteenth Amendment, as “an extraordinary figure on whom scholars of the Fourteenth Amendment have rightly focused their attention”); *id.* at 140 (describing Representative Jacob Howard’s speech defending an expansive reading of the Fourteenth Amendment as “more probative of the ratified amendment’s public meaning than any other congressional speech concerning Section I”). Barnett has described his scholarship on the Fourteenth Amendment as an effort to resurrect the insights of Howard Jay Graham and Jacobus tenBroek, key contributors to the NAACP’s brief on the history of the Fourteenth Amendment. Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 169–70 (2011).

121 BARNETT & BERNICK, *supra* note 10, at 89–108 (chapter titled “The Antislavery Origins of Republican Citizenship”).

122 *Id.* at 185–93.

123 *Id.* at 30 (“We think the ‘separate but equal’ doctrine was correctly held to be unconstitutional because it is a construction that was unfaithful to the concept of Republican citizenship comprising the original spirit of the clause.”); *see also* WURMAN, *supra* note 10, at 4 (describing *Brown* as “astonishingly easy to defend . . . on the original meaning of the privileges or immunities clause”).

must be understood within this framework. Dunning School proponents accepted and often celebrated this fact;¹²⁴ others have lamented it. Historians who felt the Reconstruction optimism of the 1960s failed to appreciate the persistence of racial and constitutional conservatism have offered what has been termed “postrevisionist” account, characterizing Reconstruction as basically a moderate or even conservative constitutional project.¹²⁵ C. Vann Woodward, a contributor to the NAACP’s historical research efforts in *Brown*, rejected the optimistic portrait of Reconstruction and the Fourteenth Amendment put forth in the NAACP’s brief, instead describing the legal achievements of the period as “lacking in clarity, ambivalent in purpose, and capable of numerous interpretations.”¹²⁶ Modern racial progressives offer their own version of Reconstruction pessimism, centered on the unbending force of white supremacy that operates to snuff out egalitarian impulses of the period. The recent 1619 Project offers a vivid example of this progressive variant.¹²⁷ According to Reconstruction pessimists, the legal achievements of Reconstruction, while significant efforts to break from the past, were ultimately too limited, too threatening to white control of the levers of power, and hence destined to fail.¹²⁸

In its modern, progressive version, the tragic heroes of this story are the freedpeople who demanded their rights and then fought and sacrificed, often with their lives, to make them a reality. But the people who ultimately dictated the course of history were the unrepentant Confederates who lurked in the shadows of the early years of Reconstruction, awaiting their moment to reassert themselves and their white supremacist commitments, deploying intimidation and violence to wrest control of southern governance from black Americans and their

124 See, e.g., Ulrich B. Phillips, *The Central Theme of Southern History*, 34 AM. HIST. REV. 30, 31 (1928) (describing the central theme of southern history as ensuring the South “shall be and remain a white man’s country”).

125 See, e.g., MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE* (1974); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65 (1974).

126 C. VANN WOODWARD, *Seeds of Failure in Radical Race Policy*, in AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE 163, 168 (1971).

127 See, e.g., Nikole Hannah-Jones, *The 1619 Project: Our Founding Ideals of Liberty and Equality Were False When They Were Written. Black Americans Fought to Make Them True*, N.Y. TIMES MAG., Aug. 18, 2019, at 14, 21 (describing Reconstruction as a “fleeting moment,” whose achievements were quickly undercut by white southern resistance and federal government apathy—all evidence of how “[a]nti-black racism runs in the very DNA of this country”). As Adam Serwer has written, the vision of American history at the heart of the 1619 Project is “a kind of pessimism, not about black struggle but about the sincerity and viability of white anti-racism.” Adam Serwer, *The Fight over the 1619 Project Is Not About the Facts*, ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/> [<https://perma.cc/LB5R-M3R6>].

128 See Hannah-Jones, *supra* note 127, at 21.

white allies. The Supreme Court also features prominently in this historiography as the institution that narrowed or closed down the egalitarian impulses contained in the Reconstruction amendments and legislation.

The tension between these two accounts allows for a dramatic account of Reconstruction, in which we have a war of diametrically opposed ideologies. As Laura Edwards has recently summarized Reconstruction historiography: “The demands of the present weigh so heavily on this particular period that the literature veers wildly between hope and despair, a situation that says as much about historians’ concerns with law and government now as it does about their involvement in the past.”¹²⁹ The history of *Brown* was but one particularly dramatic and consequential moment in which Americans battled over the meaning of Reconstruction, crafting narratives of hope and despair, all in an effort to respond to the demands of their contested present.

CONCLUSION: THE AMBIGUITIES AND POSSIBILITIES OF HISTORY

The task of locating meaning in the history of the Fourteenth Amendment necessitates certain choices. The Justices of the *Brown* Court, the members of the NAACP’s legal team, and the others who took part in the historical research project that emerged from the *Brown* litigation all confronted these choices. They had to decide on the appropriate timeframe for their historical inquiry. They had to determine the relevant sources and assess their reliability and value. They had to decide how much to generalize from the particularities of the historical moment when describing the ideological commitments of past historical actors. And lurking behind all these choices is a question of what to do with the ambiguities of history that present themselves at every turn.

How one approaches these ambiguities in the historical record is conditioned by professional training and perspective. Historians, Jack Rakove has noted, “can rest content with—even revel in—the ambiguities of the evidentiary record, recognizing that behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion.”¹³⁰ For historians the goal of understanding the past is an end of itself. Lawyers, by contrast, often treat the ambiguities of history as puzzles to be solved. This was the approach of the NAACP lawyers in the summer and fall of 1953 when faced with the Supreme Court’s questions for reargument in *Brown*.

129 EDWARDS, *supra* note 11, at 174.

130 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 9–10 (1996).

And it is the approach of recent generations of legal scholars who have searched Reconstruction history for the meaning of the Fourteenth Amendment. For these lawyers, understanding history is a means to an end, the end being to *use* history to give authority to legal interpretation.

In practice, the line between the historical work of historians and lawyers can be cloudy, as shown in the experience of the historians who worked with the NAACP in *Brown*. The historian, C. Vann Woodward insisted, “has obligations to the present as well as to the past he studies.”¹³¹ Historians often search for a usable past as a way to explain the present and advocate for a better future. And lawyers and judges do, sometimes, accept the ambiguities of the historical record. This was basically what the Justice Department did in its brief on reargument in *Brown* when it declared the historical record on the question at hand “inconclusive,” and it is of course what Chief Justice Warren did when he echoed this conclusion in the *Brown* opinion, writing that a review of the framing of the Fourteenth Amendment, “convince[s] us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”¹³² The Court, Chief Justice Warren insisted, had to face the problem of segregated schools in 1954 squarely.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.¹³³

The proud ahistoricism of *Brown* is one of its most remarkable characteristics, all the more remarkable because history and historical analysis played such a prominent role in the litigation process leading up to the decision.

At the time, many celebrated *Brown* as a triumph of the present over the past. Justice Reed, the most reluctant of the Justices to join Chief Justice Warren’s opinion, described his reasoning in a letter to Justice Frankfurter shortly after the decision was announced. “[T]he factors looking toward a fair treatment for Negroes,” he explained, “are more important than the weight of history.”¹³⁴ A sense of relief

131 WOODWARD, *supra* note 27, at 98.

132 *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

133 *Id.* at 492–93.

134 Letter from Stanley Reed to Felix Frankfurter (May 21, 1954) (on file with FFP-HLS, *supra* note 20, at Part II, School Desegregation Cases and Legislative History of the Fourteenth Amendment in the 39th Congress, Box 72, Folders 6–14, Page 406) (ProQuest).

that the Court was able to extricate itself from historical constraints was also found outside the Court. “It is futile to make war ‘to keep the past upon its throne,’” wrote Harvard Law School professor Charles Fairman in praising the Court’s decision.¹³⁵ Edmond Cahn of New York University Law School effused: “Never was Thomas Jefferson more clearly vindicated in his insistence that the Constitution belongs to the living generation of Americans.”¹³⁶

Others in later generations have taken a different view of the Court’s turn from history. Robert Bork lamented the Court’s dismissal of history in *Brown* as having “a calamitous effect upon the law.”¹³⁷ By rejecting the constraints of original meaning (which Bork believed justified the holding in *Brown*), and by being celebrated for doing so, the Court came to see itself, according to Bork, as “virtually invulnerable.”¹³⁸ The Court’s unwillingness in *Brown* to engage with the history of the framing of the Fourteenth Amendment showed that the “Court can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency.”¹³⁹

Bork’s critique of the *Brown* Court for being too quick to push the history of Reconstruction aside has merit, but not for the reason he identifies. The belief that anchoring constitutional interpretation to the attitudes, commitments, and actions of past generations serves to effectively constrain judicial authority¹⁴⁰ is premised on a flawed understanding of the nature of history. Although history is built on a bedrock of facts about the past that is largely stable, historical understanding requires interpretive decisions about what to do with these facts. The deeper one delves into the world of the past, the more of these interpretive decisions one must make. For those who seek in history some sort of guidance for the present, what emerges is not constraint but choices. Historical inquiry, when done well, is more likely to multiply interpretive options than to reduce them.¹⁴¹

135 Charles Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 94 (1956).

136 Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 152 (1955).

137 BORK, *supra* note 110, at 76.

138 *Id.* at 77.

139 *Id.*

140 The most prominent proponent of this defense of originalism was Justice Antonin Scalia. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (describing “the main danger in judicial interpretation of the Constitution” as judges who “mistake their own predilections for the law” and defending originalism because it “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself”).

141 See Sarah A. Seo, *User’s Guide to History*, in RESEARCH HANDBOOK ON MODERN LEGAL REALISM 464, 476–72 (Shauhin Talesh, Elizabeth Mertz & Heinz Klug eds., 2021).

Despite the best efforts of originalists to make *Brown* their own, the decision still does more to highlight originalism's limitations than its purported value. The approach to originalism that at the time of *Brown* most scholars and most members of the Court treated as orthodox centered on the intentions of the Constitution's Framers toward the relevant issue. This approach has the benefit of narrowing the scope of historical inquiry in a way that may produce determinate historical findings. And these findings may, if conscientiously applied as a method of constitutional interpretation, operate to constrain courts in the way that Bork envisioned.¹⁴² But there are at least two major problems with this approach. One is *Brown*. This version of originalism produces the wrong outcome in *Brown*. The weight of historical evidence indicates that the Framers of the Fourteenth Amendment did not believe that it would have the effect of prohibiting racial segregation in schools. The other problem is that this approach to originalism—one focused on the minds of a small group of elite lawmakers and how they expected new constitutional provisions to be applied—has been displaced by more robust and more defensible versions of originalism. The focus of modern originalist analysis is on the original meaning of constitutional text to the people at the time in which the text was added to the Constitution.¹⁴³ This approach shifts attention toward broader principles embodied in the constitutional text. It also allows for a much wider cast of historical actors to contribute to the meaning of the Constitution. But once we make this move, once we bring into the conversation the claims expressed in conventions of freedpeople, the rumblings of defiant Confederates, the murmurs of fearful moderates, the silence (to history at least) of countless others, we are left with a rich, passionate cacophony of voices that hardly produces the determinate facts that can direct future judges that the text of the Fourteenth Amendment must be interpreted a particular way. The deeper we engage with the historical record, the less effectively history constrains constitutional interpretation. History does not produce the clear, stable answers that Bork and other originalists claim to find—it did not do so in *Brown*, and it does not do so with regard to the most pressing questions of constitutional interpretation that we bring to the Reconstruction Amendments.

142 See Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

143 See, e.g., Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018) (reviewing RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017)).

The members of the *Brown* Court went too far, however, in pushing aside the record of Reconstruction as grounds for their ruling. The Court's opinion famously struggled to locate adequate footing for its legal reasoning. Chief Justice Warren turned away from 1866. He also turned away from 1896 and the sordid history of white supremacy and black oppression during the Jim Crow Era.¹⁴⁴ He was left with an argument about the changed place of public education in mid-twentieth-century American life and claims about the damages state-mandated racial segregation inflicts on black children—not the most solid of foundations for a Court ruling, and certainly not one of *Brown's* significance. The Justices came to terms with the limitations of the historical record of Reconstruction, but in their eagerness to get beyond what they assumed was nothing but an obstacle to a desegregation ruling, they failed to recognize the possibilities of this historical record.

For it is the generative possibilities of this history that is the most obvious change in how historians and legal scholars approach Reconstruction as compared to the mid-twentieth century. The idea of what constitutes the proper sources for understanding the constitutional transformations of Reconstruction has dramatically expanded. Most notably, black Americans have a far more prominent role in this history, and historians have pushed a more decentralized, bottom-up story of constitutional transformation.¹⁴⁵ To demand that history give us the one correct way to interpret the Fourteenth Amendment diminishes the complex, variegated, often contradictory and ambiguous historical record. But this does not mean that our efforts to apply the Fourteenth Amendment require pushing aside its history. Rather, it means exploring the struggles and ambiguities of the past and using these past experiences to inform our present-day choices. History may be limited as a constraint on constitutional interpretation, but it can provide illumination to help guide us on our way.

144 Charles Black's famous article defending *Brown* urges a more direct confrontation with this aspect of the historical record. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–25 (1960).

145 See, e.g., EDWARDS, *supra* note 11, at 175 (“To the extent that national legal principles emerged during Reconstruction, they owed as much to the various efforts of diverse groups of people working in localized contexts as they did to federal policy.”); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION xvi (locating the Fourteenth Amendment as the “culmination of a decades-long movement” for racial equality led by black and white activists in the northern states).