

*Note for WPSA: This is an excerpt from a longer dissertation chapter on a legal brief drafted by the NAACP Legal Defense Fund in 1953, as part of Brown v. Board of Education. The full-length chapter argues that the contours of a conceptual and political strategy that I call directed association emerge from the Brown brief. Directed association may be summarized in two constitutive claims: 1) resistance against certain form of social oppression in the name of democracy involves a commitment to democracy of a radically associative kind; 2) coercive state action is the proper means to address such oppression in a manner that creates the conditions for association. In excerpt provided below, I try to spell out the main intellectual historical foundations for this theoretical argument.*

## 1. Introduction

By the end of the 1953 term, the first in which the Supreme Court fully considered *Brown*, the nine justices were sufficiently unclear about “whether, how, and when it ought to strike down state-imposed segregation in the nation’s schools” that rendering a judgment made little sense.<sup>1</sup> As a measure designed to buy more time (the Court scheduled reargument for October 1953) and shed greater light on the jurisprudential stakes of the case, the Court requested all parties to the litigation to prepare briefs in response to five questions. These questions, dealing in turn with the intentions of the framers of the Fourteenth Amendment vis-à-vis public school segregation, the legitimate interpretation of the Amendment, the rate at which ‘Negro children’ should be admitted to schools should segregation be found in violation of the Amendment, and how the Court should decree integration, posed a formidable research task.

The NAACP LDF team met this challenge by composing a 235-page brief. The text is unusually rich, as far as legal briefs go. This is partly because of the nature of the questions it was designed to answer. These were not merely technical, but historical, theoretical, and empirical. It is also due to the fact that the NAACP LDF lawyers did not – indeed, could not – act alone in composing it. The brief was the product of a fascinating collaboration between legal minds, historians, and social scientists of various stripes. In Section 2, I argue that the brief relied on a complex manner of conceptualizing the problems of racial segregation, one that invoked the category of *caste* in explicit analogy with the Indian case. In Section 3, I demonstrate that the brief put forward an activist reading of the Fourteenth Amendment that was both responsive to this diagnosis and deeply reliant on some overlooked histories of the Amendment.

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<sup>1</sup> Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Vintage Books, 2004), 617.

## 2. Caste *Redivivus*

There are three distinct strands of the race-caste analysis, all of which appear in the 1953 brief. Taken together, they set up the problematic to which the NAACP LDF team's interpretation of the Fourteenth Amendment was a response. The first was the discourse of nineteenth century abolitionists and radical Republicans who were central to the framing of the Fourteenth Amendment.<sup>2</sup> The second was a critique of *Plessy v. Ferguson* and the theoretical coherence of the doctrine of 'separate but equal' that took inspiration from Justice John Marshall Harlan's dissenting opinion in that 1896 decision. The third was a contemporary branch of social anthropology called the 'caste school of race relations.' In what follows, I examine each of these and the uses to which they are put in the brief.

### *Charles Sumner and Racial Caste in the Nineteenth Century*

As Susan Ryan points out, the nineteenth century American "appropriation and redeployment" of the category of caste was surprisingly widespread: "a keyword search of the American Periodicals database from 1813 – when the first American Christian missionary went to India – through the end of the century yields over 30,000 hits."<sup>3</sup> Moreover, because Americans first encountered the dynamics of caste in India via missionary reports, the term often served to bolster the image of an atavistic, static, and 'heathen' subcontinent, in contrast to which citizens of the still infantile America could feel a sense of self-satisfaction. It took American individuals of uncommon learning and political purpose to peer behind the layers of exoticism – if not fully, then enough to recognize that the oppressive instincts of caste had a direct analogue at home. Charles Sumner (1811-1874) was one such individual.

A lawyer, abolitionist, and radical Republican, Sumner served as a Senator from Massachusetts from 1851 until his death in 1874. A handful of years into his Senate tenure, on the heels of a blistering speech in which he depicted South Carolina Senator Andrew Butler as a pimp for slavery, Sumner

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<sup>2</sup> I focus on Charles Sumner as a representative voice.

<sup>3</sup> Susan M. Ryan, "India and U.S. Cultures of Reform: Caste as Keyword," in Anupama Arora and Rajender Kaur eds., *India in the American Imaginary: 1780s-1880s* (Cambridge: Palgrave MacMillan, 2017), 200. See also Daniel Immerwahr, "Caste or Colony? Indianizing Race in the United States," *Modern Intellectual History* Vol. 4, No. 2 (2007), 227.

was attacked by another South Carolina Congressman: Preston Brooks. The incident, commonly known as ‘the caning of Charles Sumner’, had a long afterlife – it has come to symbolize the extreme polarization of antebellum American in both popular imagination and historical scholarship. But more relevant for present purposes is the direct effect Manisha Sinha argues the event had on Sumner: “[The caning] strengthened Sumner’s relationship with his abolitionist and free black constituencies and further radicalized his position on slavery and racial equality. During the Civil War and Reconstruction, he would emerge as one of the most powerful voices for black emancipation and the construction of an interracial democracy in America.”<sup>4</sup>

Sumner powerfully articulated the pathologies of American race relations through the idiom of caste. The two most notable instances in which Sumner deployed the caste-race analogy were separated by twenty years (and the Civil War). The first was an 1849 argument before the Supreme Court of Massachusetts (“Equality Before the Law”). Sumner served as the advocate for Sarah C. Roberts, a young African American girl whose family sued the City of Boston for unlawful exclusion from public school instruction. The second was a lecture Sumner delivered at the Boston Music Hall in 1869, entitled simply, “The Question of Caste.”

Both addresses explicitly reply upon a single missionary account, Reverend Joseph Roberts’s *Caste Opposed to Christianity* (1847), in order to lay out an understanding of *varna* – that is, the fourfold classification of Brahmin, Kshatriya, Vaisya, and Sudra, with the Pariahs (Dalits/Untouchables) occupying so ‘degraded’ a place that they exist outside the system.<sup>5</sup> One ventures to say that Ambedkar would have found Sumner’s summary judgment of caste society both strikingly accurate and suitably scathing, despite the Bostonian’s scant source material. Sumner writes, “Such [the *varna* classification] was the original assignment of parts; but, under the operation of natural laws, those already elevated increased their importance, while those already degraded sank lower. Ascent from an inferior class was absolutely impossible. As well might a vegetable become a man. The distinction was perpetuated by the injunction that each should marry only in his own class, with sanguinary penalties inflicted upon any attempted amalgamation.”<sup>6</sup>

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<sup>4</sup> Manisha Sinha, “The Caning of Charles Sumner: Slavery, Race, and Ideology in the Age of the Civil War,” *Journal of the Early Republic* Vol. 23, No. 2 (2003), 236.

<sup>5</sup> Charles Sumner, *The Question of Caste* (Boston: Wright & Potter, 1869), 8-9.

<sup>6</sup> Sumner, *Question of Caste*, 8.

Any caste system, Sumner argued, possessed two main characteristics. The first was the hierarchical separation of groups of people, marked by the extremes of “rank and privilege” at the top and “degradation and disability” at the bottom. The second was the purely hereditary nature of one’s place in the order along with the social pressures that jealously monitored this birth-status. The ultimate effect of the two jointly operating mechanisms was “perpetual separation from generation to generation.”<sup>7</sup> A society structured by caste violated what Sumner called the “unquestionable unity of [the] human family”, a unity which found ample evidence in Christian scripture, the science of ‘ethnology’, and even the behavior of dogs, who are faithful to humans alone, “whether Caucasian white, or Ethiopian black or Mongolian yellow.”<sup>8</sup> For Sumner, the impulse to unity and mixture on equal terms was not only the justified fulfillment of republican government but was also a fundamental ordering principle of the world. He thus declares that, “[e]very human being carries a universe in himself: but here, as in that other universe, is the same prevailing law of Unity, in harmony with which the starry heavens move in their spheres, and men are constrained to the duties of life. The stars must obey; so must men. This obedience brings the whole Human Family into harmony with each other, and also with the Creator.”<sup>9</sup> It was this lofty moral axiom that all caste arrangements violated.

When Sumner turned to the United States, he saw a racial order that seemed to perfectly fit the definition of a caste system. “Change now the scene,” Sumner says, “to our Republic born of yesterday. Here the Caste claiming hereditary rank and privilege is white; the Caste doomed to hereditary degradation and disability is black or yellow...”<sup>10</sup> American apologists for racial caste clung as strongly to their justifications as did upper-caste Hindu advocates thousands of miles away. In his defense of Sarah Roberts, Sumner quotes the School Committee that rejected the girl as writing, “[The issue] is one of *races*, not of *colors* merely. The distinction is one which the All-wise Creator has seen fit to establish; and it is founded deep in the physical, mental, and moral natures of the two races.”<sup>11</sup> Hierarchical separation and hereditary perpetuation infused the American imaginary

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<sup>7</sup> Sumner, *Question of Caste*, 7.

<sup>8</sup> Sumner, *Question of Caste*, 18.

<sup>9</sup> Sumner, *Question of Caste*, 19.

<sup>10</sup> Sumner, *Question of Caste*, 10.

<sup>11</sup> Charles Sumner, “Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts,” in *The Works of Charles Sumner Vol. 2* (Gale Cengage Learning, 2018 [1849]), 350.

as well, leaving on the table the idea that “welfare of class, as well of individuals” that came with “mutual acquaintance.”<sup>12</sup>

Unsurprisingly, the key danger that Sumner perceived in the United States but did not explore in the Indian case was caste’s codification in the law. If caste practices violated an axiomatic impulse toward mixture and unity, then the considered incorporation of such discrimination into political institutions with significant powers of enforcement was a proactive deal with the devil. It was for this reason that Sumner focused his defense of Sarah Roberts on the concept of ‘equality before the law’, which he traced to French thinkers such as Diderot and D’Alembert (editors of the *Encyclopedie*), Condorcet, and the authors of the June 1793 Constitution.<sup>13</sup> Individuals may be distinct in “color and form”; they “may not readily intermingle” for indeed they “may be uninteresting or offensive to the other, precisely as individuals of the same race and color may be uninteresting or offensive to each other.” But these were wholly insufficient to justify caste’s institutionalization. Such “discrimination can furnish no ground for any discrimination before the law.”<sup>14</sup>

Because he was a prominent member of the Senate during the Civil War and Reconstruction, Sumner is mentioned several times in the *Brown* brief. The most important and theoretically rich appearance, however, comes at the beginning of Part Two, as part of the legal team’s argument in support of the proposition that “The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation.”<sup>15</sup> There the brief dwells on Sumner’s 1849 argumentation – it goes so far as to say that the attachment of concrete rights to the Declaration’s ‘abstraction’ that “all men are created equal” was “Sumner’s outstanding contribution to American law” –<sup>16</sup> in order to demonstrate that post-1830 abolitionist meditations on the idea of equality “culminated in a firm intention to obliterate all class distinction as a part of the destruction of a caste society in America.”<sup>17</sup> Most important for the purposes of this chapter: the brief strongly

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<sup>12</sup> Sumner, “Equality Before the Law,” 372.

<sup>13</sup> Sumner, “Equality Before the Law,” 331-340.

<sup>14</sup> Sumner, “Equality Before the Law,” 357.

<sup>15</sup> “Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument,” in Philip B. Kurland and Gerhard Casper ed., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law Vol. 49* (Arlington, Virginia: University Publications of America, 1975 [1953]), 580.

<sup>16</sup> “Brief for Appellants,” 583.

<sup>17</sup> “Brief for Appellants,” 583.

agrees with Sumner that school segregation is a violation of equality before the law – that is, abstract ‘equal creation’ made concrete legal principle. And for Sumner, as I tried to demonstrate above, this violation was one instantiation of a broader caste system. The logic of legalized school segregation was therefore, for the *Brown* team, in an important sense in line with the Sumnerian logic of caste.

*“There is no caste here”*

Justice John Marshall Harlan arguably had the abolitionist and radical Republican discourse of caste in mind when he penned his famous lone dissent in *Plessy v. Ferguson*. In that 1896 decision the Court found against the petitioner, Homer Plessy, who refused to vacate a ‘whites-only’ coach on a Louisiana train and was subsequently imprisoned for this transgression. Notably, it was the case from which flowed the “separate but equal” notion as a legitimate interpretation of the Fourteenth Amendment. In the words of the 1953 brief, “proponents of segregation have relied upon [*Plessy*] repeatedly as a justification for racial segregation as if ‘separate but equal’ had become *in haec verba* an amendment to the Fourteenth Amendment, itself.”<sup>18</sup> Harlan’s dissenting opinion stood – and continues to stand – as a moral and intellectual counterpoint to one of the more insidious decisions in American legal history.

In his opinion Harlan asserted that, “in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here*. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>19</sup> He would go on to claim that

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<sup>18</sup> “Brief for Appellants,” 544.

<sup>19</sup> 163 U.S. 537, 559 (1896). My emphasis. There is an involved debate among legal scholars and judges about whether the proper interpretive emphasis of Harlan’s opinion should fall upon the idea of caste or that of ‘color-blindness’, where the former is associated with the ‘anti-subordination’ school and the latter with the ‘anti-classification’ school. For helpful overviews of this debate, see Reva B. Siegel, “Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*,” *Harvard Law Review* Vol. 117 (2004) and Scott Grinsell, “The Prejudice of Caste: The Misreading of Justice Harlan and the Ascendancy of Anticlassification,” *Michigan Journal of Race & Law*, Vol. 15 (2010). Though this debate is more relevant to the next section of the chapter, one point is worth noting here. In his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), Justice Clarence Thomas appears to have offered an argument that Thurgood Marshall and the *Brown* team adopted a ‘color-blind’ rather than a ‘caste’ reading of Harlan’s opinion (see James E. Fleming, “Rewriting *Brown*, Resurrecting *Plessy*,” *St. Louis University Law Journal*, Vol. 52 (2008) and Sharon Stanley, *An Impossible Dream? Racial Integration in the United States* (Oxford: Oxford University Press, 2017)). On the strength of the evidence, particularly the use

separating citizens racially in public settings such as the railway “is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution.”<sup>20</sup> Separation could not, in fact, be equal because it sanctified and strengthened a social life structured by racial caste. Moreover, the *Plessy* decision itself opened the door to legalized segregation across a vast range of public settings and spaces as well as to the treatment of black Americans in ways that would subvert the intentions of the Reconstruction amendments.

From a historical and legal perspective, Scott Grinsell has convincingly argued that Harlan’s opinion must be understood “in view of the tradition of arguments about social subordination [during his time] and the significance of the caste metaphor in these debates.”<sup>21</sup> On the more theoretical front, George Kateb’s subtle reading of Harlan’s opinion results in the conclusion that “[a]ll the references to caste, and the fear of corruption through physical proximity, and sinister legislation aiming at humiliation and degradation, are manifestations of Harlan’s perception of legal segregation as tyranny, not as odious as slavery, but continuous with it.”<sup>22</sup> In short, Harlan’s use of the term ‘caste’ as well as his insistence that it was unconstitutional to entrench a permanently “dominant” group of citizens evinces a Sumner-like concern with both the hierarchical, hereditary separation of social groups and the unwillingness to see that “[t]he destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.”<sup>23</sup>

The NAACP LDF brief discusses Harlan’s opinion in support of the assertion that “[t]he statutory and constitutional provisions involved in these cases cannot be validated under any separate but equal concept.”<sup>24</sup> After first arguing that the *Plessy* decision constituted a major departure from the intended Reconstruction interpretations of the Fourteenth Amendment, the brief turns to Harlan’s opinion. Justice Harlan, it writes, “evidenced prophetic insight concerning the inevitable

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to which Harlan is put in the 1953 brief, this seems obviously incorrect. Thus while I don’t claim to know the ‘right’ interpretation of Harlan, I do think the evidence suggests that the *Brown* team adopted the ‘caste’ interpretation.

<sup>20</sup> 163 U.S. 537, 562 (1896).

<sup>21</sup> Grinsell, “The Prejudice of Caste,” 353.

<sup>22</sup> Kateb, “*Brown* and the Harm of Legal Segregation,” 98.

<sup>23</sup> 163 U.S. 537, 560 (1896).

<sup>24</sup> “Brief for Appellants,” 544.

consequences of the Court's approval of racial segregation."<sup>25</sup> He did this by recognizing that "the approved regulations [in *Plessey*] supported the inferior caste thesis of *Scott v. Sandford*..."<sup>26</sup>

Despite its brevity, this link the brief makes between the "prophetic" dissenting opinion and *Dred Scott* is the crux of how the Harlan-inspired strain of caste discourse operated within the logic of *Brown*. Harlan does indeed follow the paragraph in which he declares that "[t]here is no caste here" with the suggestion that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*"<sup>27</sup> – that 1857 decision which infamously denied black Americans citizenship status. But by linking *Plessey* and *Dred Scott* via Harlan's use of the term 'caste', the *Brown* brief emphasizes the imbrication of the social oppression of caste with the political status of *citizenship*. That is to say, the brief attempts to prevent the separation of the social and the political which, it argues, was precisely the argumentative means by which "the Fourteenth Amendment was given a restricted meaning..."<sup>28</sup> Racial caste was not only about the hierarchical and hereditary separation of groups. It was also about the denial of citizenship in a putative democracy.

### *The 'Caste School' of Race Relations*

An entirely different intellectual perspective, one that emerged much closer to *Brown's* own time, constituted the third strand of caste-race analysis. This was the "caste school of race relations," a relatively short-lived but very influential social scientific framework for thinking about race in America. Accounts of the "caste school" typically locate their origins in the work of W. Lloyd Warner – and in particular, a 1936 article published in the *American Journal of Sociology* entitled "Caste and Class."<sup>29</sup> Warner's influence, both intellectual and educational, was significant.<sup>30</sup> For example, at both Harvard and the University of Chicago, Warner trained and collaborated with William Allison

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<sup>25</sup> "Brief for Appellants," 553.

<sup>26</sup> "Brief for Appellants," 554.

<sup>27</sup> 163 U.S. 537, 559 (1896).

<sup>28</sup> "Brief for Appellants," 552.

<sup>29</sup> W. Lloyd Warner, "American Caste and Class," *American Journal of Sociology* Vol. 42, No. 2 (1936): 234-237.

<sup>30</sup> As Immerwahr writes, "[i]n the ten years following Warner's article he and his colleagues published as many books advancing his caste thesis, most famously John Dollard's *Caste and Class in a Southern Town* (1937)" (Immerwahr, "Caste or Colony?," 280).



Davis (known more commonly as Allison Davis), who would go on to become one of the first two black faculty members to be granted tenure at the University of Chicago.<sup>31</sup> In 1941 Davis, along with his co-authors Burleigh B. Gardner and Mary R. Gardner, would publish *Deep South: A Social Anthropological Study of Caste and Class*.<sup>32</sup>

Warner wrote the Introduction to *Deep South*. In it, he recapitulated the key claims of his earlier article. As a definitional matter, both caste and class referred to hierarchical arrangements of groups of people in which those higher situated received *pro tanto* greater resources like “privileges” and “opportunities” and “social sanctions” are deployed to “maintain this unequal distribution.”<sup>33</sup> *Caste* was differentiated by the specific social sanction against marriage and the permanent cordoning off of groups: “A caste organization...can be further defined as one where marriage between two or more groups is not sanctioned and where there is no opportunity for members of the lower groups to rise into the upper groups or of the members of the upper class to fall into the lower ones.”<sup>34</sup> In both his *AJS* article and the Introduction to *Deep South*, Warner depicted the relationship he conceived between caste and class with a useful diagram, reproduced at the end of this chapter. The most important feature of this diagram is the “caste line,” which strictly separated the white and “Negro” populations. Though most of the latter fell below the former from an economic perspective, it was possible for black individuals to be born or ascend into relatively high classes. Thus Warner’s concern that “The Negro who has moved or been born into the uppermost group of his caste is superior to the lower whites in class, but inferior in caste. In his own personality he feels the conflict of the two opposing structures...”<sup>35</sup>

*Deep South* concretizes these theoretical claims about caste and class by offering an ethnographic account of “Old City,” the “trading centre of a cotton growing area.”<sup>36</sup> Nowhere are the authors’

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<sup>31</sup> Walter H. Waggoner, “Allison Davis, Psychologist, Dies; Wrote About Blacks in America,” *New York Times*, November 22, 1983. Also notable, from my perspective at least: Davis was a 1924 alumnus of my alma mater, Williams College, and would eventually be appointed the John Dewey Distinguished Service Professor at the University of Chicago.

<sup>32</sup> Allison Davis, Burleigh B. Gardner, and Mary R. Gardner, *Deep South: A Social Anthropological Study of Caste and Class* (Los Angeles: UCLA Center for Afro-American Studies, 1988 [1941])

<sup>33</sup> Warner, “American Caste and Class,” 234.

<sup>34</sup> Warner, “American Caste and Class,” 234.

<sup>35</sup> Warner, “American Caste and Class,” 236.

<sup>36</sup> Ursula Sharma, *Caste* (Buckingham: Open University Press, 1999), 15.

observations and commitments more apparent than in Chapter II: The System of Color-Castes. Davis, Gardner, and Gardner systematize and present the perspectives of Old City's residents into several themes: the presumed inferiority of black people; the spatial separation of black and white residents; the "derogation" of physical features associated with blackness; the punishment associated with violating caste norms; other social factors, such as class and the rural/urban divide which serve to condition the effects of caste; and endogamy.

The last of these comes in for special consideration: "The practice of endogamy is the most significant social control in any caste situation. In Old City it is the most rigidly enforced aspect of Negro-white relations and carries more emotive content than any other."<sup>37</sup> Sexual and marital lines, predictably conditioned by gender,<sup>38</sup> constituted the crux or "keystone" of Old City's caste system. It was, the authors claimed, in and through the most intimate relations between men and women that a racial caste system defined by hereditary hierarchical separation perpetuated itself.

The caste school certainly had India in mind, though references to Hinduism, Indology, or Indian politics are scarce. Instead Warner, Davis, the Gardners and their allies typically made fleeting reference to 'Brahmanic' or 'Hindu' India as an undisputed example of a caste system. Nevertheless, the substantive overlaps between their diagnoses of racial caste and those of Ambedkar can be striking. A clear example of this is the place of endogamy as the 'keystone' of caste. While at Columbia, the early Ambedkar argued that "Caste in India means an artificial chopping off of the population into fixed and definite units, each one prevented from fusing into another through the custom of endogamy. Thus the conclusion is inevitable that *Endogamy is the only characteristic that is peculiar to caste*, and if we succeed in showing how endogamy is maintained, we shall practically have proved the genesis and also the mechanism of Caste."<sup>39</sup> If the precise mechanisms of endogamy were different – Hindu ritual on the one hand, American norms and institutions on the other – the problem of discrete groups being prevented from *fusing* with one another was the common conclusion between Ambedkar and his American contemporaries.

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<sup>37</sup> Davis, Gardner, and Gardner, *Deep South*, 24.

<sup>38</sup> Thus, for example, white men who were intimately involved with black women came in for the least retributive punishment (usually only stigma, if that), while black men who were found with white women often received horrifically violent forms of punishment.

<sup>39</sup> Ambedkar, "Castes in India," *BAWS*, Vol. 1, 9.

The 'caste school' was not without its detractors. Most prominent among these was the Marxist sociologist Oliver Cromwell Cox, whose ideas – like Warner's – found expression in both article and book form.<sup>40</sup> Cox, another Chicago graduate and a faculty member at Lincoln University in Missouri from 1949-1970, argued vehemently that "race relations are not caste relations" and, furthermore, that "Brahmanic-Indian society represents the only developed caste system in the world."<sup>41</sup> Cox retained a consistent style of argumentation throughout the nearly twenty years in which he attacked the caste-race comparison. His starting point was to make explicit what he took to be the caste school's hidden premise – namely, that 'Brahmanic India' was the agreed-upon pinnacle of a caste system. Applicability of the analytic category of 'caste' only followed, Cox then argued, if the substantive characteristics of American race relations were sufficiently similar to those of Brahmanic India. Cox's sociological method thus involved three moves: 1) substantive inquiry into the main features of the caste system in India; 2) the same type of inquiry into American race relations; and 3) a comparison of the two, yielding an evaluative judgment regarding whether race could be understood through the lens of caste.

In "Race and Caste: A Distinction," Cox succinctly summarized the evidence that led him to the conclusion that caste and race were wholly distinct phenomena. His critiques ranged from the capitalist, class-based basis of racial subordination to the physical markers attending race (markers that Cox thought did not feature in Hindu caste differentiation) to the systemic implications of racial subordination as distinct from the 'local' nature of caste grievances.<sup>42</sup> In addition to sociological

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<sup>40</sup> Oliver C. Cox, "The Modern Caste School of Race Relations," *Social Forces* Vol. 21, No. 2 (1942): 218-226; Cox, "Race and Caste: A Distinction," *American Journal of Sociology* Vol. 50, No. 5 (1945): 360-368; Cox, *Caste, Class & Race: A Study in Social Dynamics* (New York: Monthly Review Press, 1948).

<sup>41</sup> Cox, "Race and Caste: A Distinction," 360.

<sup>42</sup> All of Cox's arguments were as follows. First, "race relations or problems are variants of modern political class problems" (361), distinct to modern bourgeois society; by contrast caste was a constitutive component of a more primitive, ancient societal mode. Second, the system of production in the United States meant that black Americans were exposed to labor 'freedom' and exploitation that was wholly alien to caste society, which was defined by hereditary occupations. Third, race distinction was a deeply physical phenomenon whereby external markers separated one group from another; the same was not true of caste, as evidenced by the fact that groups could change caste if the right circumstances presented themselves. Fourth, race unlike caste traveled across societal borders: "Caste has reference to the internal social order of a society; race suggests a whole people, wherever found about the globe" (363). Fifth, because of its different relationship to

critique, Cox took aim at the influence that the caste school had in the broader discourse on race relations. A favored target on this score was one of the most notable (and lengthy) pieces of scholarship on American race in the mid-twentieth century: Gunnar Myrdal's *An American Dilemma*. In *Caste, Class, and Race* Cox devoted an entire chapter to the critique of Myrdal's "mystical" approach to the study of race in America.<sup>43</sup> Cox levelled several criticisms against *An American Dilemma* but I want to highlight three of his pointed ones here.

First, Cox argued that Myrdal uncritically adopted the caste hypothesis, simply choosing the term through a process of elimination because the categories of 'race' and 'class' carried objectionable connotations. Though the resultant study "develops the most elaborate defense of the caste belief," this intellectual commitment was reached in a rather hazy manner. Second, Myrdal misunderstood the sociological implications of using the term 'caste.' This was in evidence, Cox argued, when Myrdal articulated such concepts as 'caste struggle', which was a theoretical impossibility: "This concept of 'caste struggle,' to be sure, is totally foreign to our norm, the Indian caste system. Moreover, this must be so because castes in Brahmanic India do not want to be anything other than castes."<sup>44</sup> Third (and to my mind most persuasively), Cox insists that the very untenability of the caste hypothesis leads Myrdal to invest in it a "mystical" significance. White Americans are crudely

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societal and geographical space, race consciousness was more widespread and enduring than that of caste, "cut[ting] across caste lines and reach[ing] out to the whole people, commanding their loyalty in a body" (363). Sixth, Cox argued that instances of racial conflict called an entire system of exploitation into question, whereas caste conflict had more to do with localized conflict between "little status-bearing groups" inhabiting a stable overall order (364). Seventh, race relations unlike the caste system were "pathological" in a Marxist dialectical sense – they possessed and nurtured the elements that would lead to their destruction. Eighth, black Americans actively aspired to greater heights, they tried to "increase their participation and integration in the dominant culture", whereas this type of "striving" was absent in the caste system (365-366). Ninth, while 'hypergamy' in the case of race (typically white men and black women) occurred, it was more common in the caste system (superior caste men marrying inferior caste women) and did not disrupt caste divisions. Tenth, the characterization of race relations as 'endogamous' was false because "choice of partners in marriage is limited only by matters of cultural compatibility or localized racial antagonisms" (367), whereas in caste society endogamy (barring instances of hypergamy) was the strict and sanctified rule. Finally, minority groups in America tended toward assimilation as a matter of "fundamental social force" while Indian caste society "is turned inward, and its force is centripetal" (367-368).

<sup>43</sup> Cox, *Caste, Class & Race*, 509-538.

<sup>44</sup> Cox, *Caste, Class & Race*, 518-519. As Immerwahr has pointed out, this was a claim made after the impact of figures like Ambedkar and Periyar, that was "not only demonstrably false but plainly absurd" (Immerwahr, "Caste or Colony?," 282).

lumped together and understood as motivated by the maintenance of caste hierarchy and separation. The result is a problematic moral and prejudicial conception of racial oppression: “It thus appears that if *white people* were not so wicked, if they would only cease wanting to ‘exalt’ themselves and accept the ‘American Creed,’ race prejudice would vanish from America.”<sup>45</sup>

As Andrew Abbott (channeling Barbara Celarent) notes,<sup>46</sup> Cox’s work, particularly *Caste, Class, and Race*, “was roundly attacked on its publication.”<sup>47</sup> This was predictable, given the degree of force and vitriol with which Cox advanced his claims. In a scorching review of *Caste, Class, and Race* for *The Journal of Negro Education*, tellingly entitled “Mystical Sociology,” Allison Davis concluded that because Cox had not engaged in ethnographic research to back his claims, the book was best understood as a mere “compendium of reading notes” and “the *Alice in Wonderland* of sociology.”<sup>48</sup> Importantly, Davis also pointed out the faulty simplicity of Cox’s understanding of caste in India: “In spite of the evidence of modern empirical social scientists who have studied Hindu caste, Dr. Cox holds that caste in India, unlike all other social institutions in the world, is unchanging...”<sup>49</sup>

Across the world, from the University of Bombay, this general viewpoint would be echoed by the eminent Indian sociologist and scholar of caste, G.S. Ghurye.<sup>50</sup> Writing the *American Journal of Sociology* review of *Caste, Class, and Race*, Ghurye acknowledged that Cox should be commended for understanding that the caste system was a complex, “well-integrated society itself with a religious basis” and perceiving that engagement with Hindu “intellectual and political history” was therefore necessary.<sup>51</sup> However, Ghurye also argued, Cox “depend[ed] mostly on books written by British bureaucrats and missionaries” for his understanding of Hinduism, entirely avoiding not just eminent scholars known within India but internationally-recognized luminaries like Sarvepalli Radhakrishnan

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<sup>45</sup> Cox, *Caste, Class & Race*, 520.

<sup>46</sup> Or perhaps it is Barbara Celarent channeling Andrew Abbott.

<sup>47</sup> Barbara Celarent, “Review of *Caste, Class, and Race* by Oliver Cromwell Cox,” *American Journal of Sociology* Vol. 115, No. 5 (2010), 1668.

<sup>48</sup> Allison Davis, “Review: Mystical Sociology,” *The Journal of Negro Education* Vol. 17, No. 2 (1948), 161.

<sup>49</sup> Davis, “Review: Mystical Sociology,” 161-162.

<sup>50</sup> Ghurye’s fame was ultimately exceeded by that of his student, M.N. Srinivas.

<sup>51</sup> G.S. Ghurye, “Review of *Caste, Class, and Race: A Study in Social Dynamics* by Oliver Cromwell Cox,” *American Journal of Sociology* Vol. 54, No. 5 (1949), 466.

and Rabindranath Tagore.<sup>52</sup> The result was a caricatured conception of Hindu society neglecting the deeper philosophical principles which Ghurye took to unite all Hindus (regardless of caste), the complex politics that had unfolded in India since antiquity, and modern transformations in the cultural and political dynamics of caste.<sup>53</sup>

The third prominent line of critique against Cox came from comparative social scientists who thought it possible to utilize concepts, like caste, across contexts without shortchanging the specificity of those contexts. In 1960 the anthropologist Gerald D. Berreman published the article “Caste in India and the United States” and argued, with an explicitness that Warner and Davis had never quite reached, that, “the term ‘caste system’ is applicable at the present time in the southern United States, if it is applicable anywhere outside of Hindu India, and that it can be usefully applied to societies with systems of hierarchical, endogamous subdivisions whose membership is hereditary and permanent, wherever they occur.”<sup>54</sup>

In yet another exchange that took place in the pages of the *American Journal of Sociology*, Cox doubled down on his earlier position, arguing that there were differences between caste in India and race in the United States; differences that were sufficiently consequential that they obviated the possibility of meaningful sociological comparison. Most notable among these differences was “the absence of any tendencies toward radical social change in the caste system which is of consequence.”<sup>55</sup>

Berreman responded to Cox by emphasizing (as Davis had earlier) his ethnographic credentials and observing that Cox’s decidedly static conception of the caste system was the product of the colonial and upper-caste sources upon which the African American sociologist depended: “Professor Cox’s view of static Indian caste is much like a White Citizen’s Council member’s view of race relations ‘in the good old days,’ and it is equally well founded.”<sup>56</sup>

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<sup>52</sup> Ghurye, “Review of *Caste, Class, and Race*,” 466.

<sup>53</sup> Ghurye took particular issue with Cox’s discussion of the relationship between ‘hypergamy’ and caste transformation. The former thought the latter too insistent, against clear empirical evidence, on both the prevalence of hypergamous marriage (high caste men marrying low caste women) and the lack of relation between hypergamy and caste transformation/consolidation.

<sup>54</sup> Gerald D. Berreman, “Caste in India and the United States,” *American Journal of Sociology* Vol. 66, No. 2 (1960), 127.

<sup>55</sup> Oliver C. Cox, “Berreman’s ‘Caste in India and the United States,’” *American Journal of Sociology* Vol. 66, No. 5 (1961), 510.

<sup>56</sup> Gerald D. Berreman, “Rejoinder,” *American Journal of Sociology* Vol. 66, No. 5 (1961), 511.

Cox's views represented an important challenge to the claims of the twentieth century caste school of race relations. This is why I have lingered on the particularities of his arguments as well as the rejoinders that caste school defenders offered up. If Cox was reductionistic in his inclination to make racial subordination a subsidiary phenomenon of modern capitalist class relations, he was right to predict the ultimate demise of the caste school. Though Berreman continued to carry its torch into the 1970s, the use of caste as an analytic category to describe race relations largely went out of style by the early 1960s.<sup>57</sup> That being said, historical and textual evidence from the 1953 *Brown* brief quite conclusively demonstrates that Cox occupied the losing position. The twentieth century caste-race analytic was the sociological substratum from which the *Brown* team worked in the final years and months before the Supreme Court's decision.

From a historical perspective, one must begin with the man Thurgood Marshall appointed as the head of non-legal research for the 1953 brief, the chief supervisor of the intellectual labor that would go into this document. This was John Aubrey Davis – co-founder of the New Negro Alliance,<sup>58</sup> longtime professor of Political Science at Marshall's alma mater, Lincoln University (Pennsylvania), and younger brother of one of the authors of *Deep South*, Allison Davis. The political-legal activity that first brought Davis into close contact with Marshall – namely, the Supreme Court case *New Negro Alliance v. Sanitary Grocery Company* – already anticipated the kinds of sociological diagnoses and arguments that would be invoked in *Brown*. As Martin Kilson writes, a brief for *that* case argued that:

[T]he NNA, in pressuring White businesses to employ Black was, in legal terms, the equivalent to a trade union in pressuring industrial firms on behalf of fair working conditions for trade union members. Whereas trade unions were the key instrument for ensuring economic security and egalitarian social rights – for protecting White workers against economic discrimination in short – the NNA's use of boycotts and picketing functioned similarly as a guarantee against *racial-caste* discriminatory practices faced by African American citizens.<sup>59</sup>

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<sup>57</sup> Sharma, *Caste*, 19-20.

<sup>58</sup> See Michele Pacifico, "Don't Buy Where You Can't Work: The New Negro Alliance of Washington," *Washington History: Magazine of the Historical Society of Washington, DC* (Spring-Summer, 1994).

<sup>59</sup> Martin Kilson, "Political Scientists and the Activist-Technocrat Dichotomy: The Case of John Aubrey Davis," in Wilbur Rich ed., *African American Perspectives on Political Science* (Philadelphia: Temple University Press, 2007), 179. My emphasis.

In 1943, two years after the United States' entrance into WWII, Davis assumed the directorship of the Division of Review and Analysis at the Fair Employment Practices Committee (FEPC). From this post he penned an article, entitled "Nondiscrimination in the Federal Services," which appeared in the *Annals of the American Academy of Political and Social Science* and sought to analyze the laws and techniques at the FEPC's disposal as well as the results of federal action in 'policing nondiscrimination.'<sup>60</sup> In the context of a discussion about the weighty task facing 'personnel units' of federal departments that sought to integrate black Americans, Davis writes that, "Negroes came to the new jobs not without both fear and aggression. Significant personnel work in regard to these problems of human behavior, caused by the *American caste system*, was achieved in OPA, WLB, FEA, WMC, TVA, Interior, Labor, War, and Navy."<sup>61</sup>

As I shall show, such implicit embrace of caste as the best analytic through which to understand post-*Plessy* race relations also came through in the text of the *Brown* brief. But the roots of caste sociology – that is, Davis's older brother's research and the subsequent work it inspired – were also explicitly referenced. For example, a memorandum from June Shagaloff, field secretary for the NAACP LDF to Davis, explicitly cites passages relevant to school segregation not only in *Deep South* but also in Cox's *Caste, Class, and Race*.<sup>62</sup> Myrdal's *An American Dilemma*, famously mentioned in the Court's opinion, also made its way into the 1953 brief as an example of recent analysis which highlighted the contradiction between racial caste and America's founding principles.<sup>63</sup>

Some of Davis's team – specifically the academics who gave of their time and resources to the brief's drafting – were also predisposed not just to think in terms of caste but to highlight that central problem of caste: untouchability. For instance, C. Vann Woodward, author of *The Strange Career of Jim Crow* and *Origins of the New South* and a professor of history at Johns Hopkins University in 1953, was one of the scholars brought in by Davis's team to write in a monograph about the

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<sup>60</sup> John A. Davis, "Nondiscrimination in the Federal Services," *The Annals of the American Academy of Political and Social Science* Vol. 244, No. 1 (1946).

<sup>61</sup> Davis, "Nondiscrimination in the Federal Services," 73.

<sup>62</sup> Memorandum from June Shagaloff to Dr. John Davis, 1 May 1952 [sic?], Box 129, Folder 2, NAACP Legal Defense and Educational Fund Records, 1915-1968, Library of Congress, Washington DC, United States.

<sup>63</sup> "Brief for Appellants," 203.



history of reconstruction.<sup>64</sup> In his autobiography, *Thinking Back: The Perils of Writing History*, Woodward recounts within the span of two pages not only his admiration for Myrdal's *An American Dilemma* and involvement with the NAACP LDF (and subsequent friendship with John Hope Franklin), but also his meeting with Ambedkar while stationed in India as a naval officer during World War II. He writes:

With a letter of introduction in hand, I sought out Dr. Bhimrao Ramji Ambedkar, acclaimed leader of India's millions of untouchables and later a figure of first importance in Indian constitutional history. He received me cordially at his home in New Delhi and plied me with questions about the black 'untouchables' of America and how their plight compared with his own people. He also took the time to open to me the panorama of an ancient world of Indian segregation by caste and to show me how it appeared to its victims.<sup>65</sup>

Similarly, Laurent B. Frantz – a lawyer and legal scholar who lent his expertise on the Fourteenth Amendment to the NAACP LDF team<sup>66</sup> – wrote a 1954 article for *Lawyers Guild Review*, reflecting on the significance and implications of the *Brown* decision. Frantz argued that while segregationists would undoubtedly use clever tactics such as school district gerrymandering and vaguely outlined school board discretion in order to make segregation seem freely chosen, what could not be hidden from view was “the die-hard white supremacist's insistence on a ritual purity of segregation which is violated by the presence of a single member of the *untouchable caste*.”<sup>67</sup> However unfamiliar Woodward and Frantz may have been with the particularities of untouchability as practiced in India,

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<sup>64</sup> In an internal memorandum, John Aubrey Davis suggested the names of participants for a late summer 1953 conference. They include: Horace M. Bond, Marion Wright, John Hope Franklin, Woodward, Robert K. Carr, Henry Steele Commager, Milton R. Konvitz, Robert E. Cushman, Howard J. Graham, Carl B. Swisher, John Hazard, and Arthur L. Schlesinger. Memorandum from John A. Davis RE: Suggested Names for Conference, 12 August, 1953, Box 10, Folder 1, NAACP Legal Defense and Educational Fund Records, 1915-1968, Library of Congress, Washington DC, United States. Woodward's contribution to the NAACP LDF team's research is: C. Vann Woodward, “The Background of the Abandonment of Reconstruction,” Box 7, Folder 18, NAACP Legal Defense and Educational Fund Records, 1915-1968, Library of Congress, Washington DC, United States.

<sup>65</sup> C. Vann Woodward, *Thinking Back: The Perils of Writing History* (Baton Rouge: Louisiana State University Press, 1986), 87-89.

<sup>66</sup> Laurent Frantz “The Fourteenth Amendment and the Present Crisis: Synopsis” 1949, Box 6, Folder 5, NAACP Legal Defense and Educational Fund Records, 1915-1968, Library of Congress, Washington DC, United States.

<sup>67</sup> Laurent B. Frantz, “The School Segregation Cases,” *Lawyers Guild Review* Vol. 13 (1954), 17. My emphasis.

it seemed clear to them that there was, at the very least, a visceral, affective parallel in the relationship between white Americans and black Americans.

Textually, it is possible to discern the influence of twentieth century caste thinking in a sixteen-page subsection of the brief bearing the heading: “Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the 14<sup>th</sup> Amendment.”<sup>68</sup> This subsection is particularly revealing because, unlike other portions of the brief, there is no possibility that the referent of the term ‘caste’ is the Civil War and/or Reconstruction system of race relations. Indeed, as the title of the subsection indicates, it clearly frames post-*Plessy v. Ferguson* race relations, defined by the doctrine of ‘separate but equal,’ in terms of caste. This of course was the status quo that the NAACP LDF team sought to overturn.

The subsection begins in the following manner: “The history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and an inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery.”<sup>69</sup> It goes on to detail the depths of the (especially Southern) presumption of black American inferiority, both before and after the Civil War, before moving to the Supreme Court decision most responsible for perpetuating this inferior status: *Plessy v. Ferguson*. *Plessy*, the brief argues, lent legitimacy and the tools of political authority to a comprehensive social system based upon racial caste. It was “the exercise of state power,” sanctified and newly emboldened by *Plessy*, that both blunted the efforts of those Southerners who sought “equalitarian status” for black Americans and correspondingly enabled the perpetrators of racial caste. This, the authors of the brief proclaimed, was the “overriding vice” of the decision: “*Plessy v. Ferguson* had ruled that such subjugation through public authority was sanctioned by the Constitution... For without the sanction of *Plessy v. Ferguson*, archaic and provincial notions of racial superiority could not have injured and disfigured an entire region for so long a time.”<sup>70</sup>

What also comes through in the subsection is an interesting set of counterfactual reflections on social life in the South if only *Plessy* had not been decided the way that it had. The brief demonstrates

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<sup>68</sup> “Brief for Appellants,” 50-66.

<sup>69</sup> “Brief for Appellants,” 50.

<sup>70</sup> “Brief for Appellants,” 61.

a striking, and at times moving, confidence in the integrative capacities of both white and black Americans. Thus claims such as the following: “*Plessy v. Ferguson* chilled the development in the South of opinion conducive to the acceptance of Negroes on the basis of equality”; and “Without the ‘constitutional’ sanction which *Plessy v. Ferguson* affords, racial segregation could not have become entrenched in the South, and individuals and local communities would have been free to maintain public school systems in conformity with the underlying purposes of the Fourteenth Amendment...”<sup>71</sup> At work here is a diagnosis of *Plessy*’s efficacy in perpetuating the racial subjugation alongside two further ideas: first, a claim that political power articulated in the opposite idiom as *Plessy* could enable race relations on terms of equality; and second, a suggestion that precisely such relations were constitutive of democracy. Thus I end this section with three of the brief’s most important sentences, whose content prefigure the arguments I shall make in the remainder of this chapter: “The doctrine of *Plessy v. Ferguson* was essential to the successful maintenance of a racial caste system in the United States. Efforts toward the elimination of race discrimination are jeopardized as long as the separate but equal doctrine endures. But for this doctrine, we could more confidently assert that ours is a democratic society based upon a belief in individual equality.”<sup>72</sup>

### 3. Reading the Fourteenth Amendment

The NAACP LDF brief not only put forward a diagnosis of racial segregation which, as I have demonstrated, invoked the category of caste in explicit analogy with the Indian context; it also offered a philosophically and historically-grounded reading of the Fourteenth Amendment to the US Constitution that was responsive to such a diagnosis. Large portions of the brief – especially Part Two and the Supplement which constituted its final 36 pages (entitled “An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment”) – aimed to elucidate “the moral and ethical opinions that were the matrix of the Amendment...”<sup>73</sup> Unsurprisingly, this reading focused on Sections One and Five of the Amendment, particularly the ‘privileges and immunities,’ ‘due process,’ and ‘equal protection’ clauses of the former. The constitutional language is worth quoting in full, in order to set the backdrop:

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<sup>71</sup> “Brief for Appellants,” 61, 62.

<sup>72</sup> “Brief for Appellants,” 62.

<sup>73</sup> “Brief for Appellants,” 713.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>74</sup>

In this section I present an argument about how the drafters of the *Brown* brief understood these crucial passages of the Constitution. The overall purpose of the brief, to recall, was precisely to clarify the circumstances and intentions surrounding the writing of the Fourteenth Amendment, as well as the content of the Amendment itself, in order to bolster the case that public school segregation stood in violation of these. I argue first that the *Brown* team drew on a strand of historical analysis that focused on the impact of abolitionist thinking and politics on the language of the Fourteenth Amendment. This historiographical literature, as well as the brief's deployment of it, placed novel emphasis on how securing the 'natural rights' of all US citizens, including especially black American slaves/freed-slaves, moved from an abolitionist concern to a legal priority for the drafters of the Fourteenth Amendment.

I then suggest that it is reasonable to conclude that for the NAACP LDF team these 'constitutionalized natural rights' – sometimes clearly enumerated, sometimes vaguely described by their nineteenth century stewards – included what Elizabeth Anderson, writing about the same nineteenth century US context, calls 'social rights'. These are: "the rights of citizens to associate on terms of equality with others in civil society: to share a meal in a restaurant, sit together in a rail car, attend the same schools, work together as colleagues (not only as masters and servant), marry and live together."<sup>75</sup> Social rights, as Anderson's examples indicate, ensure the possibility of association. As such their presence in the *Brown* brief – via histories of abolitionist and Radical Republican thought – point to the goal of such inter-citizen interaction or integration in the NAACP LDF's arguments. Here one sees that if the oppression of racial caste were to be overcome in the name of modern democracy, such a democracy would have to be associational in character. Finally, I examine

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<sup>74</sup> U.S. Constitution Amend. 14.

<sup>75</sup> Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010), 90.

how the brief drew upon the same scholarly resources in order to emphasize the ‘nationalization’ of citizenship and make a case for the securement of ‘constitutionalized natural rights’ – including social rights – through “the instrumentalities of the federal government.”<sup>76</sup>

### *Histories of the Fourteenth Amendment*

While the NAACP LDF brief drew on a wide range of scholarly sources in general, the works of two historians of the Fourteenth Amendment were particularly influential.<sup>77</sup> The first was Howard Jay Graham, a bibliographer at the Los Angeles County Law Library and the sole author of the brief’s Supplement; the second was Jacobus tenBroek, who taught in the Department of Speech at UC Berkeley.<sup>78</sup> As Felicia Kornbluh has documented, the two were actually longtime collaborators who, by the mid 1940s were “writing to one another several times a week and often more than once a day, sharing citations, interpretations of data, and drafts of writing.”<sup>79</sup> Substantively, what the two shared, and what their work infused into the *Brown* brief, was a sense in which the Fourteenth Amendment was the culmination of a decades-long abolitionist project, which in turn possessed notable moral-religious as well as legal-political elements. Indeed, they seem to have been among the first to make these claims.<sup>80</sup>

In a pair of articles published in 1950 in the *Wisconsin Law Review*, Graham examined a variety of abolitionist sources written and disseminated during the years from 1833-1837 in order to argue that there was a “long background of usage by antislavery forces” of the major concepts eventually deployed by John Bingham and the Joint Committee in 1866 – the principal framers of the

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<sup>76</sup> Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley: University of California Press, 1951), 185.

<sup>77</sup> A fact bolstered both by historical accounts and by the number of times they are cited in the brief, relative to other scholars. In addition, as I shall highlight, entire swathes of the brief are taken verbatim from Graham’s work – either his law review articles or his monograph prepared for the Committee on Historical Research.

<sup>78</sup> See Kluger, *Simple Justice*, 628-629 for brief personal profiles of these two men.

<sup>79</sup> Felicia Kornbluh, “Disability, Civil Rights, and Law: Jacobus tenBroek, Howard Jay Graham, and the New Politics of Equality in the Middle Twentieth Century,” Presentation at Center for the Study of Law and Society Boalt Hall School of Law Berkeley, CA, January 30, 2012, 15.

<sup>80</sup> Kornbluh, “Disability, Civil Rights, and Law,” 2.

Fourteenth Amendment.<sup>81</sup> Graham was particularly interested in how the ‘antislavery movement’ started from certain moral-religious ideas, gradually shifted into related moral philosophical and political theoretical principles, and finally translated the latter into the language of the law, so that a constitutional (and not merely ideological) abolitionist movement could be mounted. Similarly, tenBroek penned the influential book *The Antislavery Origins of the Fourteenth Amendment* (1951), which self-professedly took up where Graham left off:

[Graham] has traced the gradual crystallization of equality, governmental protection, due process, and privileges and immunities from a religious-ethical, ‘higher law’ system into a primitive system of constitutional right, concentrating on the period down to 1837...The present writer’s chief concern is with the progressive evolution of this system – especially its crucial transformation into a system of constitutional power – and its popularization and eventual enactment in the Civil War amendments.<sup>82</sup>

Graham’s work allowed the brief to coherently articulate the philosophical origins of the language of the Fourteenth Amendment. In a framing that the historian coined and the legal team took on board, early abolitionists engaged in a program of ‘moral suasion’, “based fundamentally on Judeo-Christian ethic and...formulated in terms of equalitarianism and natural rights.”<sup>83</sup> Drawing upon, *inter alia*, Biblical arguments regarding the innate equality of humans and sin of slavery, the Lockean conception of natural rights( which Jefferson adopted and amended in the American Declaration of Independence), and the ‘reciprocal’ role of government as protector of natural rights, early abolitionist groups like the American Anti-Slavery Society attempted to appeal to the better natures of fellow whites “as patriots, Christians, and ‘free moral agents.’”<sup>84</sup> When such a program was found insufficient, because of the indifference or unreachability of many Northerners as well as the positive political attempt by Southerners to defend the institution of slavery (embodied most clearly in the Pinckney Report of 1836), abolitionist actors changed tactics. In Graham’s words (echoed in the portion of the brief which he authored): “There was a shift from an overwhelming faith in moral

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<sup>81</sup> Howard Jay Graham, “The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systematization, 1835-1837,” *Wisconsin Law Review* (July 1950), 610. See also Howard Jay Graham, “The Early Antislavery Backgrounds of the Fourteenth Amendment: I Genesis, 1833-1835,” *Wisconsin Law Review* (May 1950): 479-507.

<sup>82</sup> tenBroek, *Antislavery Origins*, 4.

<sup>83</sup> “Brief for Appellants,” 717.

<sup>84</sup> “Brief for Appellants,” 718.

suasion to a reluctant resort to political action, from efforts to convince Americans of the expediency and justice of freeing their slaves, to a search for constitutional power to free them.”<sup>85</sup>

It was, according to Graham, in and through the process of translation from the discourses of theology and moral philosophy to that of constitutional law that the terms ‘due process,’ ‘privileges and immunities,’ and ‘equal protection of the laws’ gained significance. He followed the evolution of abolitionist moral philosophical thinking from the Ellsworth-Goddard arguments in the *Crandall Case* of 1834 to the Ohio Anti-Slavery Society’s *Report on the Black Laws of Ohio* to, finally, the pages of James G. Birney’s abolitionist journal *The Philanthropist* in order to mark its gradual ‘systematization’ into a recognizably constitutional discourse. The upshot of his historical analysis – again, adopted by the *Brown* team – was that it was “beyond doubt that the evangelical abolitionists anticipated members of the Joint Committee by a full thirty years in developing the privileges and immunities-due process-equal protection phraseology as a bulwark for the rights of free Negroes and slaves.”<sup>86</sup>

In the brief’s Supplement Graham went beyond much of his previous analysis, both temporally and substantively, by identifying four mechanisms through which this ‘constitutionalized’ abolitionist argument was circulated and popularized in the time leading up to the Joint Committee’s deliberations. First were the documents continually produced by the “original antislavery proponents and converts”;<sup>87</sup> second, the work of “pamphleteers and journalists” who wrote explicitly on the unconstitutional character of slavery;<sup>88</sup> third, the platforms of parties such as Liberty and Free Soil parties as well as, later, the Free Democracy and Republican parties, all of whom invoked “the cardinal articles of faith: human equality, protection, and equal protection from the Declaration, and

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<sup>85</sup> Graham, “The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systematization,” 638; and “Brief for Appellants,” 725.

<sup>86</sup> Graham, “The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systematization,” 658. To quote the brief: “The phrases –‘privileges and immunities,’ ‘equal protection,’ and ‘due process’ – that were to appear in the Amendment had come to have specific significance to opponents of slavery. Proponents of slavery, even as they disagreed, knew and understood what that significance was. Members of the Congress that formulated and submitted the Amendment shared that knowledge and understanding. When they translated the antislavery concepts into constitutional provisions, *they employed these by now traditional phrases that had become freighted with equalitarian meaning in its widest sense*” (“Brief for Appellants,” 748, my emphasis).

<sup>87</sup> “Brief for Appellants,” 733.

<sup>88</sup> “Brief for Appellants,” 734-735.

due process both as a restraint and a source of congressional power”;<sup>89</sup> fourth, the writings and especially speeches of those leaders, like Philomen Bliss, Thaddeus Stevens, John Bingham, Charles Sumner, and Wendell Phillips (to name some of the most notable) who would play large roles in the debates over the Thirteenth and Fourteenth Amendments and the Civil Rights Acts.

Foundational though Graham’s work was, it was tenBroek’s book that clinched the argument that a central authorial intent of the Fourteenth Amendment was to secure the ‘constitutionalized natural rights’ of all persons, including the newly freed slaves. tenBroek argued, on the basis of his reading of the Congressional debates, that the purpose of the Fourteenth Amendment was to ‘reconsummate’ the Thirteenth Amendment and underwrite the constitutionality of both the Freedmen’s Bureau and the civil rights bills being proposed by the Thirty-ninth Congress as well as to protect these previously-won measures from the whims of partisan change. For tenBroek, what the abolition of slavery, the Bureau bills, and the civil rights bills all embodied was a commitment to both negatively limiting state-level statutory infringement of the ‘constitutionalized natural rights’ of freed slaves and positively supplying protection to the vulnerable when and where the violation of their rights took place. The Radical Republicans at the center of this thinking “differed in their designation of natural rights” but it was nevertheless clear that they shared a common discourse: “they agreed that such rights included, at the least, those presented in section I of the civil rights bill and section 7 of the Freedmen’s Bureau Bill.”<sup>90</sup> What was the broad set of such rights? According to tenBroek, these were, at an “irreducible minimum”, “the rights to life, liberty, and property. They were the right to contract, and to own, use, and dispose of property. They were the right to the equal protection of the courts and to the full and equal protection of the laws. They were the rights of unrestricted travel, sojourn, and residence.”<sup>91</sup> While I will make clear shortly that these rights, on tenBroek’s reading, can also be understood to include the ‘social rights’ that made association possible, the point here is that the framers of the Fourteenth Amendment and the debates in which they were enmeshed clearly indicated, for tenBroek, an intention to secure what I have called the ‘constitutionalized natural rights’ of black Americans.

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<sup>89</sup> “Brief for Appellants,” 735.

<sup>90</sup> tenBroek, *Antislavery Origins*, 172.

<sup>91</sup> tenBroek, *Antislavery Origins*, 220.



In the Supplement of the 1953 *Brown* brief, Graham took up this argument about the relationship between the Fourteenth Amendment and ‘constitutionalized natural rights’ by turning to the speeches of Bingham, which were “of special interest” because he was “known to have drafted Sections One and Five of the Fourteenth Amendment”.<sup>92</sup> In an 1859 address in which he criticized the incorporation of Oregon into the union because of a state constitutional measure which discriminated against “free Negroes” by, among other things, forbidding their immigration, Bingham called attention “to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this Constitution guaranteed...”<sup>93</sup> The brief took this to mean that Bingham “regards Milton’s rights of communication and conscience, including the *right to know*, to *education*, as one of the great fundamental natural ‘rights of person which God gives and no man or *state* may *rightfully* take away””.<sup>94</sup> For the NAACP LDF team, seeing abolitionist and post-Civil War history through the eyes of Graham (quite literally) and tenBroek (more indirectly), it was clear that the point of the Fourteenth Amendment was to secure those natural rights which, through a decades-long project of thought and activism, were possible to coherently articulate in constitutional terms. The words of Bingham constituted one particularly strong piece of evidence in support of this claim.

### *Social Rights*

In an influential article entitled “The Anticaste Principle,” Cass Sunstein – like the NAACP LDF team – looks back to the Reconstruction amendments in order to meditate on the idea of equality in twentieth century America.<sup>95</sup> While Sunstein draws inspiration from the fact that one of the key intentions of the Civil War Amendments was “the attack on racial caste”, he argues that the “Civil War Amendments were targeted at caste *legislation*, that is, at specific laws that embodied discrimination and in this way helped to create caste.”<sup>96</sup> He therefore frames his preferred ‘anticaste principle’ as more far-reaching than the political theoretical ideas which informed the framing of the

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<sup>92</sup> “Brief for Appellants,” 741.

<sup>93</sup> Quoted in “Brief for Appellants,” 744.

<sup>94</sup> Quoted in “Brief for Appellants,” 747.

<sup>95</sup> Cass Sunstein, “The Anticaste Principle,” *Michigan Law Review* Vol. 92 (1993): 2410-2455. In a striking parallel with the sociological literature on which the *Brown* team drew, Sunstein writes that, “the similarities between true caste system and existing American inequalities are what make our current practices a reason for collective concern” (Sunstein, “The Anticaste Principle,” 2429).

<sup>96</sup> Sunstein, “The Anticaste Principle,” 2435-2436.

Fourteenth Amendment. In Sunstein's view, a properly "ambitious" anticaste principle "is not directed merely at caste legislation but more generally at a social status quo that, through historical and current practices, creates second-class status."<sup>97</sup> The key point of difference is between explicitly implemented legislation, whether at the state or federal level, and 'historical and current practices' in the sphere of civil society or social life.

For Elizabeth Anderson, it is not clear that the Radical Republicans and Sunstein were in fact so far apart. Drawing heavily on the writings and speeches of Charles Sumner, Anderson argues that "Radical Republicans linked social rights of interracial association in civil society to republican government through two arguments: one based on status equality, the other on the consequences of association."<sup>98</sup> The 'status equality' argument was built on the idea that the public manifestation of any sort of inherited inequality – usefully captured through the category of 'caste' – was antithetical to republican government, which was based on the consent of the governed. Crucially, such a broad formulation meant that this applied not just to 'state action' such as 'caste legislation' but to "privately owned public accommodations" as well.<sup>99</sup>

The 'consequences of association' argument rested upon a robust, almost Deweyan conception of democracy in which purely formal equality before the law and the bare-bones decisional process of majority rule were not just insufficient but sometimes decidedly undemocratic.<sup>100</sup> Democracy instead meant the consent of a public that had the opportunity to discuss its common good. Such a vision of democracy "requires that citizens from all walks of life discuss matters of public interest *together*, as equals. So long as the citizens were divided into distinct and noninteracting groups, the aggregation of their opinions would still not amount to the consent of a unified body of citizens."<sup>101</sup> Anderson, in short, offers compelling evidence that one of the most radical of the Radical

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<sup>97</sup> Sunstein, "The Anticaste Principle," 2436.

<sup>98</sup> Anderson, *Imperative of Integration*, 91

<sup>99</sup> Anderson, *Imperative of Integration*, 91.

<sup>100</sup> In Anderson's words: "Many laws enacted with majority approval can subvert democracy. A majority decision to disenfranchise a minority and forbid its members from assembling, publishing newspapers, petitioning government, or running for office is plainly tyrannical and undemocratic. So is any law that denies citizens equal status in civil society, or any system of regulation that permits private individuals entrusted with operating services for the public good to deny citizens equal access to those services on the basis of race" (Anderson, *Imperative of Integration*, 92).

<sup>101</sup> Anderson, *Imperative of Integration*, 92.

Republicans – Charles Sumner – was thinking about the content of Reconstruction amendments and legislation in terms of the social rights that would make democratic association possible.

From tenBroek's perspective, this move was not limited to Sumner. His research showed how it was in fact a central concern to the actual drafters of the Fourteenth Amendment.<sup>102</sup> In each of his book's two main chapters on the Amendment, tenBroek argued that its scope was meant to extend over violations of the 'natural rights' of black Americans not just by the state but by whites acting in the sphere of civil society. tenBroek's evidence for this claim, which flew in the face of much of the prevailing historical analysis of the time, was, in his words:

[T]he emphasis, at the hearing of the Joint Committee on Reconstruction, on individual violation of the rights of freedmen and southern loyalists... The index to the report of the hearings contains two full pages of entries on 'Freedmen, evidence of general hostility and occasional cruelty towards.' The number of entries listed indicates that the word 'occasional' was rather too mild to be accurate. Witness after witness spoke of beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations – and the impossibility of redress of protection except through the United States Army and the Freedmen's Bureau.<sup>103</sup>

tenBroek goes on to note that the members of the Joint Committee, which included both committed Radicals like Thaddeus Stevens and more moderate voices like Bingham, made sure to get these testimonials of non-state rights violations on the record. He caps off his argument by adding that this was "an odd procedure, to say the least, if they were not to be comprehended within the amendment which the committee was then perfecting."<sup>104</sup> Combined with his insistence (mentioned above) that the 'constitutionalized natural rights' meant to be protected by the Fourteenth Amendment included those such as 'unrestricted travel, sojourn, and residence' as well as other records of his understanding of the implications of his research,<sup>105</sup> tenBroek's effort to

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<sup>102</sup> It is important to note, if this is not clear already, that I myself am agnostic about whether tenBroek's historical analysis is actually correct. The key point is that the *Brown* team obviously leaned heavily on this analysis, which in turn produced theoretical formulations in which I am interested.

<sup>103</sup> tenBroek, *Antislavery Origins*, 186.

<sup>104</sup> tenBroek, *Antislavery Origins*, 187.

<sup>105</sup> tenBroek also wrote, in a letter to a friend, that he and Graham had, "dug up a lot of dope on the intended application of the [Fourteenth] amendment... The upshot of all this is that the Federal government has constitutional jurisdiction, whether it wants or can exercise it or not, against lynchings whether in or out of custody, against economic discriminations, against discriminations in hotels, railroads, and the like" (quoted in Kornbluh, "Disability, Civil Rights, and Law," 20).

clarify that rights violation could – and did – take place in civil society enables us to see that the historiography upon which the *Brown* team relied understood social rights (in Anderson’s sense) to be included not just in the general discourse of Radical Republicanism but in the intentions of the more moderate drafters of the Fourteenth Amendment.

Because the *Brown* brief’s purpose was to demonstrate the unconstitutionality of *legislation* that enforced racial segregation in public schools, the issue of social rights appears less frequently than one might expect. Nonetheless, one subsection of the brief is of particular interest on this score; it is entitled, “During the Congressional Debates on Proposed Legislation Which Culminated in the Civil Rights Act of 1875 Veterans of the Thirty-Ninth Congress Adhered to Their Conviction that the Fourteenth Amendment Had Proscribed Segregation in Public Schools.”<sup>106</sup> Interestingly enough, this subsection brought together Sumner’s insistence on democratic association with tenBroek’s newer emphasis on the drafters’ concern with non-state rights violation. The focal point of the brief’s discussion was the bill Sumner originally introduced in December 1871 and which would eventually be passed as the Civil Rights Act of 1875. In its original form, the bill’s relevant language read as follows:

“Section – That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law...and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude.”<sup>107</sup>

The *Brown* team looked in particular at the issue of school segregation. They argued that substantial proportions of the 42<sup>nd</sup> and 43<sup>rd</sup> Congresses, many of whom were members of the 39<sup>th</sup> Congress and even the Joint Committee that had formulated and passed the Fourteenth Amendment, demonstrated in the course of debate and voting that public school segregation stood in violation of the Amendment. While the final form the bill took – the Civil Rights Act of 1875 – was a notable sore point for the NAACP LDF because it explicitly removed enforcement in the sphere of public schools, it is worth noting that the Act did in fact cover other social rights. Indeed, as Anderson

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<sup>106</sup> “Brief for Appellants,” 126-139.

<sup>107</sup> “Brief for Appellants,” 126-127.

notes, the Sumner bill “guarantee[d] the social rights of blacks by prohibiting discrimination and segregation in public accommodations.”<sup>108</sup> Wrapped up in the *Brown* team’s discussion of the legacies of the Fourteenth Amendment – in particular, the legislation that nineteenth century lawmakers thought needed to be passed in order to ensure the Amendment’s proper implementation – was the historical discovery that social rights were covered by the Amendment. From this understanding of the past flowed the normative-jurisprudential insistence that a “simultaneously originalist, historicist, and non-elite” return to the Amendment’s foundations meant securing these rights once again.<sup>109</sup>

What is the political theoretical significance of the foregoing discussions of both the relationship between abolitionist discourse and the Fourteenth Amendment as well as the importance of social rights to the realization of the Amendment? In short, they lay out two important ideas. The first is that, on the terms of the Fourteenth Amendment (as interpreted by Graham, tenBroek, and the *Brown* brief), racial caste oppression had to be overcome in the name of democracy. This was discernible both in how the Amendment framed the terms of citizenship and what the origins of this framing were. Graham and tenBroek argued that the Fourteenth Amendment was the culmination of an abolitionist project to secure the ‘constitutionalized natural rights’ of citizenship for black Americans. Racial caste ran afoul of the Amendment to the extent that it violated the possibility of such citizenship. Second, the discussion of social rights indicates that the character of modern democracy at stake included the necessity of association. Social rights had to be understood as components of the bundle of ‘natural rights’ that accompanied citizenship. The overcoming of racial caste in the name of modern democracy was, then, only genuinely realized if that democracy had an associational element to it.

### *Federal Government Action*

By way of concluding this section, I turn now to the last argument I want to make about how the *Brown* brief responded to a caste diagnosis of American race relations. This is that the historical analysis upon which the brief drew emphasized a ‘revolutionary’ change in the relationship between state and federal governments that accompanied the Fourteenth Amendment. Such an interpretation

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<sup>108</sup> Anderson, *Imperative of Integration*, 91.

<sup>109</sup> Kornbluh, “Disability, Civil Rights, and Law,” 19.

gave credence to the view that the social rights of black Americans were to be protected by (though not necessarily *exclusively* by) the coercive ‘instrumentalities of the federal government’.

For Graham, the emergence of a clear and decisive role for the federal government was tied to the abolitionist notion of a “paramount national citizenship.”<sup>110</sup> In the course of their evolution from the resources and arguments of theology and moral philosophy to those of constitutional law, abolitionist thinkers of the 1830s and 1840s had wrestled with the “early comity clause-due process usage” in such a way as to arrive at the conclusion that the “federal government...had not only the *power*, but the *duty* to protect the fundamental rights of life, liberty and property wherever and whenever those rights were abridged, either by state action or by flagrant state inaction.”<sup>111</sup> Abolitionists joined their commitment to due process (a reaction against unequal protection of the laws on the ‘arbitrary’ basis of race) with the comity clause’s conception of legal recognition across the states in order to arrive at the idea of an equal national citizenship that was the duty of the federal government to safeguard.

tenBroek was rather more forthright in his discussion of how the Fourteenth Amendment changed the balance of powers between the center and the states. In the first chapter he devotes solely to the Amendment, tenBroek writes that it:

[D]id intrude the federal government between the state and its inhabitants. It did constitute the federal government the protector of civil rights, that is, the natural rights, of the individual. It did interfere with the states’ right to determine disputes over property, contracts, and crimes. It did ‘revolutionize the laws of the states everywhere.’ It did overturn the preexisting division of powers between the state and the central government.”<sup>112</sup>

As was the case elsewhere in *The Antislavery Origins of the Fourteenth Amendment*, tenBroek’s hammering rhetoric indicated that the time for interpretive hesitancy was over. The historical evidence, he thought, demonstrated beyond any doubt that the 39<sup>th</sup> Congress meant to place the protection of the ‘constitutionalized natural rights’ of black Americans beyond both “the power of shifting

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<sup>110</sup> Graham, “The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systematization,” 659.

<sup>111</sup> Graham, “The Early Antislavery Backgrounds of the Fourteenth Amendment: II Systematization,” 658-659.

<sup>112</sup> tenBroek, *Antislavery Origins*, 185.

congressional majorities” and, relatedly, the individual Southern states whose intentions the Radical Republicans viewed with, to put it mildly, a keen suspicion.<sup>113</sup>

Kornbluh notes that the drafters of Part Two of the *Brown* brief, led by Alfred H. Kelly, leaned heavily on tenBroek’s book.<sup>114</sup> It shows. After noting again that the Radical Republicans of the 39<sup>th</sup> Congress “were determined to destroy” the “inferior caste position” which black Americans occupied, the brief notes that Congress well understood that to craft an amendment that would “proscribe any and all future attempts to enforce governmentally-imposed caste distinctions” was to engage in a “veritable revolution in federal-state relations.”<sup>115</sup>

Three points are worth noting in connection with how the brief expressed the force of this revolution. First, the *Brown* team made clear that while the 39<sup>th</sup> Congress understood that Section 5 of the Amendment would place in future congressional hands the power to enforce the other Sections of the Amendment (most notably Section 1), it was equally apparent that the “Amendment in and of itself would invalidate all class legislation by the states.”<sup>116</sup> In other words, even though Congress maintained the capacity to act against practices and legislation reifying racial caste, it was clear to the framers of the Fourteenth Amendment that the Amendment itself swept away the legitimacy of such legislation. There was thus a double-barreled move toward centralization, as both the national constitution and the federal government gained power against the tendencies toward rights violations at the state and local levels.

Second, the brief nicely makes use of opposing viewpoints in the 39<sup>th</sup> Congress in order to demonstrate the significance of the Amendment. The *Brown* team cites Senator Thomas Hendricks of Indiana in order to demonstrate that “the Conservatives in the Senate agreed altogether with...Senate Republicans about the sweeping impact which the prospective amendment would have upon state caste legislation.”<sup>117</sup> Hendricks openly expressed his worry that the Fourteenth Amendment would “crown the Federal Government with absolute and despotic power,”<sup>118</sup> a point

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<sup>113</sup> tenBroek, *Antislavery Origins*, 184.

<sup>114</sup> Kornbluh, *Disability, Civil Rights, and Law*,” 23.

<sup>115</sup> “Brief for Appellants,” 80.

<sup>116</sup> “Brief for Appellants,” 114.

<sup>117</sup> “Brief for Appellants,” 116.

<sup>118</sup> “Brief for Appellants,” 117.

of view which the brief took to indicate that supporters (who won out) and opponents alike fully understood the degree to which the central government was to be made an ally – and a coercive one, from the perspective of states’ rights advocates – of the ‘constitutionalized natural rights’ of black Americans.

Third, in its final and shortest section, which dealt with questions of implementation under the assumption that segregation in public schools was found to be in violation of the Fourteenth Amendment, the brief argues that federal government action could not wait upon a shift in sentiment at the state level. The implication was that federal action could itself help catalyze such a change at the interpersonal level. To the question of the rate at which black students should be admitted the *Brown* team answered, perhaps unsurprisingly, that “[t]here is no equitable justification for postponement of appellants’ enjoyments of their rights.”<sup>119</sup> Moreover, the brief went on to assert that the “Fourteenth Amendment can hardly have been intended for enforcement at a pace geared down to the mores of the very states whose action it was designed to limit.”<sup>120</sup> The need for urgency was, at least in part, because the appellants party to the case were children. Their age meant there was a limited time horizon along which they could enjoy their newly-won rights. Coupled with this was a sense that once federal government action, sanctioned by the Fourteenth Amendment, had initiated the process of bringing white and black people together, those problematic “mores” would begin to give way. Coercive action facilitated by a strong center could pave the way for association.

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<sup>119</sup> “Brief for Appellants,” 189.

<sup>120</sup> “Brief for Appellants,” 191.