

# CONSTITUTIONAL HISTORY, SOCIAL SCIENCE, AND *BROWN V. BOARD OF EDUCATION* 1954–1964

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*The following article is the first of a two-part critique of the constitutional history and social scientific arguments that formed the basis of the 1954 Supreme Court decision, Brown v. Board of Education.*

## PART I: THE HISTORICAL AND SOCIAL SCIENCE EVIDENCE

### FOR AND AGAINST *BROWN*

The full significance of *Brown v. Board of Education* (1954) will be apparent only with the passage of more time. In at least three respects the Supreme Court's ruling was a blessing. By ending de jure segregation, *Brown* was a boon to American foreign policy; it reconciled the nation's official policies with its basic principles; and it allowed many individual African Americans to enjoy opportunities that would not have been available if *Brown* had not dealt a fatal blow to the Jim Crow system. Most writers have emphasized these benefits. America would not have remained a viable society if blacks had continued to be consigned to separate water fountains and to seats at the back of the bus.

But *Brown* was also a bane. As this article will show, *Brown* was problematical in terms of constitutional history and social science. In addition, the quality of American education eventually suffered because of the tensions and disorder that followed in the wake of desegregation and because of the unintended consequences of progressive educational innovations that were implemented to "make integration work." *Brown* also established a precedent for judicial policy-making in areas that had nothing to do with race or education. As a result, the Supreme Court has been politicized, while America's schools still face daunting challenges in the twenty-first century.

### PROBLEMATIC PRECEDENTS

When state or local governments insisted that black children must attend separate schools, those governments were placing their stamp of approval on the doctrine of racial inferiority. Government officials were understood to be saying that the intellectual and cultural standards of African Americans were so different from those of Caucasians, and so inferior, that the races

should not associate with one another in social and educational situations. This amounted to officially disparaging the Negro race, a humiliation that reinforced the message that mean-spirited people conveyed when they refused to shake hands; when they did not address black men as "Mister" but rather as "boy," "Howard," or "nigger Jones"; and when they called black women "aunt" or perhaps by their first name but never "Mrs." Nevertheless, in the early 1950s neither Congress nor many state legislatures were prepared to end segregation.

Segregation also tarnished the reputation of the United States at a time when the nation was vying with the Soviet Union for influence in the Third World. American diplomats assured foreign leaders that segregation was a regional rather than a national practice, a relic of times past, a policy that was on the way out. The Justice Department's amicus brief in *Brown* argued that desegregation was in the national interest because of foreign policy. *Brown* gave the U. S. government the decision it had been hoping for, and the State Department quickly made use of the ruling. Within an hour after the Supreme Court released its opinion, a Voice of America radio broadcast trumpeted the news abroad.<sup>1</sup>

*Brown* also legitimized and helped to shape views that were emerging as a moral consensus among white Americans. In the Deep South many whites opposed desegregation, but elsewhere most whites accepted the principle that the government should not discriminate.<sup>2</sup> *Brown* condemned an entrenched injustice and helped to prepare the way for the civil rights movement.

Although *Brown* struck down an injustice, the rationale of the Supreme Court was spurious. In 1953, when the *Brown* litigation was pending, the Court asked opposing counsel whether the framers of the Fourteenth Amendment had contemplated and understood that their handiwork would render segregated schools unconstitutional. Or had the framers, as a possible alternative, intended that either Congress or the Supreme Court could abolish segregation in light of future conditions? The questions suggested that the Court wanted to rule against segregation but feared that doing so could be justified only by the sort of judicial activism that several of the justices had denounced during the years of the New Deal. The justices therefore asked the NAACP to provide historical evidence to protect the Court against the charge that it would be legislating if, without regard to historical intent, the Court discovered a new meaning in the amendment. The Court asked for additional information about the Thirty-ninth Congress, which submitted the amendment to the states in 1866, and about the subsequent state ratifying conventions.

The NAACP then employed several historians, three of whom later expressed ambivalence if not regret over their role in the venture. At the outset, the black historian John Hope Franklin noted "the difference between scholarship and advocacy" and expressed concern about "the temptation to pollute...scholarship with polemics."<sup>3</sup> So did the white historian C. Vann Woodward.<sup>4</sup> But

Franklin and Woodward nevertheless prepared papers which maintained that segregation frustrated the egalitarian intent of the Fourteenth Amendment. In 1963, Franklin confessed that he had “deliberately transformed the objective data provided by historical research into an urgent plea for justice.”<sup>5</sup> And Woodward later retracted his earlier statements that the Fourteenth Amendment was prompted by egalitarian intentions.<sup>6</sup> In time Woodward conceded that he was mistaken even to contend that segregation was designed to insure inequality – because, given the sentiments that prevailed when Southern public schools were established in the 1860s and 1870s, the alternative to segregation was not integration but exclusion.<sup>7</sup>

The most important historical work in the *Brown* litigation was done by the constitutional scholar Alfred H. Kelly. Yet when Kelly delved into the historical records, he discovered that “unhappily, from the NAACP’s point of view, most of what appeared there at first blush looked rather decidedly bad.”<sup>8</sup> To begin, there was the fact that the Congress that submitted the Fourteenth Amendment to the states also established segregated schools in the District of Columbia. It hardly seemed likely that Congress intended to destroy the states’ right to maintain segregated schools when that very same Congress provided a system of segregated schools in the federal district. In addition, although a few states discontinued segregation after endorsing the amendment, most continued with segregation and some introduced segregation contemporaneously with passage of the amendment. They did not think there was any conflict between the two actions. All things considered, it seemed clear that neither the Congress nor the ratifying states understood that the Fourteenth Amendment would destroy the states’ right to maintain segregated schools. Alexander M. Bickel, a leading authority on the original understanding of the Fourteenth Amendment, concluded that “The evidence of congressional purpose is as clear as such evidence is likely to be.”<sup>9</sup> Congress neither intended nor expected the Fourteenth Amendment to prohibit segregation.

At first Kelly’s role was to alert the NAACP to the difficulties posed by the historical record. Only then could the NAACP formulate “an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of a historical case.”<sup>10</sup> “It was not that we were engaged in formulating lies,” Kelly later wrote. “There was nothing as crude and naïve 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 [NAACP lawyer Thurgood] Marshall said we had to do....”<sup>11</sup> Initially Kelly, like John Hope Franklin and C. Vann Woodward, hoped it would suffice to emphasize the general spirit of humanitarianism and social idealism that allegedly “dominated the rise of the abolitionist movement and which by implication thereby had determined the objectives of the radical Republicans who had written the Fourteenth Amendment.”<sup>12</sup> Eventually, Kelly also added something of a conspiracy thesis: that John A. Bingham, a principal author of

the Fourteenth Amendment, had purposely used the broad language of the equal protection clause with the secret intention of making it constitutional for a later federal government to prohibit segregation.

It was a dubious argument. There was no evidence that Bingham camouflaged an undisclosed purpose. Even if such evidence had been discovered, it would not be conclusive, for the doctrine of ratification presumes that the states understand what they are ratifying. Kelly later admitted that he had “manipulated history in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible.”<sup>13</sup> Kelly recalled that he was “facing for the first time in my own career the deadly opposition between my professional integrity as a historian and my wishes and hopes with respect to a contemporary question.... I suppose if a man is without scruple this matter will not bother him, but I am frank to say that it bothered me terribly.”<sup>14</sup>

While Kelly and other historians were working for the NAACP, Justice Felix Frankfurter asked Alexander Bickel, then a law clerk at the Supreme Court, to undertake yet another examination of the historical record. Unlike Kelly et al., Bickel concluded that the Congress that submitted the Fourteenth Amendment neither intended that segregation be abolished nor foresaw that, under the language they were adopting, it might be.<sup>15</sup> The most that could be said for the NAACP, Bickel later wrote, was that the framers of the Fourteenth Amendment realized that they were writing a *constitution*, and understood that constitutional language always contains a certain *elasticity* that allows for reinterpretation to satisfy the requirements of future times. Like some modern “deconstructionists,” Bickel argued that, through wordplay, constitutions can (and should) be interpreted without regard to original intent to mean whatever the interpreters want them to mean.

Bickel’s argument was clever but not new. It essentially reiterated an opinion that Chief Justice Charles Evans Hughes had expressed in 1934, when Hughes rejected the contention that the Supreme Court should interpret “the great clauses of the constitution” according to their original intent. According to Hughes, “it was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—‘we must never forget that it is a *constitution* we are expounding—a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.’”<sup>16</sup>

The *Brown* Court may have had something like Bickel’s exegesis in mind when it termed the historical evidence “inconclusive.”<sup>17</sup> Or perhaps the justices simply meant to say that, in their opinion, the evidence was so diverse that it was hard to determine the historical truth.

Ironically, other historians might have fashioned a better historical argument for *Brown*. According to Robert H. Bork, the Supreme Court could (and should) have noted that the purpose of the equal protection clause was to ensure that Negroes were not significantly disadvantaged by state laws; that at the time and for some years thereafter it was assumed that separate schools could be equal; but by 1954 it had become apparent that the separate facilities provided for blacks were not as good as those provided for whites. The Court could then have ruled that to achieve the equality that the Fourteenth Amendment had promised, it was necessary to desegregate the public schools. In this way *Brown* could have been defended as consistent with the original understanding of the equal protection clause.<sup>18</sup>

Michael W. McConnell has presented another originalist argument for *Brown*. Since section five of the Fourteenth Amendment gave Congress the authority to enforce the amendment with appropriate legislation, McConnell maintained that contemporary congressional debates were germane to the original understanding with respect to segregated schools. He then noted that on eighteen recorded votes in the early 1870s a majority of either the House or Senate voted to prohibit school segregation, although "because of procedural problems and Democratic filibustering, a two-thirds vote was required at key junctures and the support for [school desegregation] fell just short of two-thirds."<sup>19</sup>

Yet these arguments were not developed until years after *Brown*. Bork and McConnell are distinguished conservative scholars who have served as federal judges, and each recognized that no one could be confirmed for a federal appointment without supporting *Brown*. They therefore had practical reasons for defending *Brown* on originalist grounds. Whether or not Bork and McConnell are correct, the point is that in 1954 the justices of the Supreme Court would have welcomed an originalist defense of desegregation, but they were unable to conceive of one. Instead, the justices apparently thought that there was no warrant for their ruling in the historic Constitution. Instead, they mentioned the impossibility of "turn[ing] back the clock to 1868 when the Amendment was adopted." They said they had to "consider public education in the light of its full development and its present place in American life...."<sup>20</sup> They had to find modern meanings to deal with contemporary problems.

Years later, after the ruling in *Brown* had become sacrosanct, liberal activists endorsed the argument that *Brown* could not be reconciled with the original understanding. They sensed that if it was understood that *Brown* could not be reconciled with the original meaning of the Fourteenth Amendment, then many people would conclude that something was wrong with the idea that the Constitution should be interpreted in accord with the intentions of the framers. Thus in 1982 Michael J. Perry admitted that *Brown* (and some other Supreme Court decisions) could not plausibly be defended as interpretations of the Constitution. But Perry praised the modern Court for taking a "noninterpretivist" approach to constitutional law. According to Perry, the justices



of the Court were modern “prophets” selected by an “American Israel” and authorized to strike down laws they deemed mistaken.<sup>21</sup> In 1997 David Garrow similarly praised *Brown* for its “repudiation of historical intent.” By ignoring “the burdens and limitations of history,” by freeing the Court from “the Constitution’s historical limitations,” *Brown* established a precedent that later courts could cite to justify overruling the decisions of elected legislators with respect to abortion, criminal justice, equality, religion, and other matters.<sup>22</sup>

Meanwhile, conservatives lambasted *Brown* for subverting democracy by departing (as, indeed, the Court thought it was doing) from the original understanding in order to achieve a socially desirable end. On the fiftieth anniversary of the Court’s ruling, Thomas Sowell found little to celebrate. By then, he said, it had become “painfully clear that the educational results of *Brown* have been meager for black children.” Meanwhile, “the kind of reasoning used in *Brown* has had serious negative repercussions on our whole legal system, extending far beyond issues of race and education.”<sup>23</sup> George F. Will joined in lamenting the “myriad reverberations” from *Brown*; and Will complained especially about *Brown*’s tendency to aggrandize the judiciary – to invest judges with “a prestige that begot arrogance,” with a belief that judges should find that policies they considered mistaken were also “unconstitutional.”<sup>24</sup>

### A WARRANT FOR FORCED INTEGRATION?

After asserting that the history of the Fourteenth Amendment was inconclusive, the *Brown* Court held that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>25</sup> One year later, the Court ordered school districts to “make a prompt and reasonable start” toward admitting students to public schools “on a nondiscriminatory basis.”<sup>26</sup> *Brown* was ambiguous, however, when it came to the question of whether the Constitution prohibited separation that was not the result of official state policy. At two points in his opinion for the Court, Chief Justice Earl Warren wrote that the case concerned the official, legal segregation of children in public schools “solely on the basis of race” and “solely because of race”<sup>27</sup> – thereby implying that there was no constitutional problem if the races failed to mingle because of unofficial and nonracial factors such as choice or residence in racially imbalanced neighborhoods.

This offered reassurance to many Americans, a reassurance that was related to a paradox that lies at the core of the nation’s racial thought. As the Swedish scholar Gunnar Myrdal noted in his classic study, *An American Dilemma* (1944), even before *Brown* most whites opposed bigotry and supported equal rights. They were troubled by the contradiction between egalitarian principles and the reality of racial discrimination. They wanted their practices to be consistent with their ideals.<sup>28</sup> But they also feared that desegregation would lead to an increase in miscegenation, which they feared partly because they felt a sense of racial identity and pride; and partly because of what they considered the low cultural and social standards of African Americans. Many whites who

opposed official segregation also insisted on their right to discriminate when it came to choosing friends, associates, and neighborhoods. They recognized that the moral, intellectual, and cultural standards of whites left something to be desired, but they would not accept African Americans socially until American Negroes approached these standards in large numbers.<sup>29</sup>

These views were not expressed openly in some sections of the country, but throughout the twentieth century white homeowners would leave their neighborhoods if more than a token number of blacks moved in, and most white parents with sufficient means removed their children from schools that became predominantly nonwhite. Most Americans, it seemed, favored a system of segmented development in which people voluntarily chose to live in communities that were predominantly of their own race, living, as W. E. B. Du Bois once recommended, "side by side in peace and mutual happiness," with each group making its own "peculiar contribution...to the culture of their common country."<sup>30</sup>

At first *Brown* seemed to be consistent with this sort of pluralism. Because it held that government officials could not separate blacks from whites "solely" on the basis of race, *Brown* was initially understood to require only that states must desist from official racial discrimination. In the 1950s and early 1960s hardly anyone favored the formal assignment of students (or the employment of workers) on the basis of race so as to achieve more racial mixing than could be achieved by racially neutral policies. *Desegregation* would be required. But *integration* would not be imposed. Until the late 1960s, *Brown* was understood to forbid the public schools from practicing any sort of racial discrimination. At that time most civil rights activists said that race and color were irrelevant to the proper consideration of a person's worth. They sought the advancement of blacks but assumed this could be accomplished if the schools treated students as individuals, without regard to race, color, or creed.

The idea that official racial discrimination was prohibited also seemed to be implied in *Bolling v. Sharpe* (decided the same day as *Brown*), in which the Supreme Court ruled against segregation in the public schools of the District of Columbia — on the grounds that racial classifications were too arbitrary to satisfy the requirements of the due process clause.<sup>31</sup> That *Brown* prohibited official racial discrimination also seemed to be the message in several per curiam decisions in which the Court later invalidated laws requiring segregation of municipal parks and recreational facilities.<sup>32</sup> In 1955 the implementation decision in *Brown* was worded so as to condemn "discrimination" rather than "segregation" in education.<sup>33</sup> Three years later, in *Cooper v. Aaron* (1958), a case that arose in Little Rock, Arkansas, the Court held that *Brown* had established that children have "the constitutional right...not to be discriminated against in school admission on grounds of race or color."<sup>34</sup> Civil rights activists and sympathizers understood this to mean that the Court had declared that official classification by race was unconstitutional per se.

In response to the decisions of the Supreme Court, lower federal courts affirmed that racial discrimination was prohibited and that the Constitution required the government to treat each person as an individual without regard to race. Stated most fluently, perhaps, by Circuit Judge John J. Parker in *Briggs v. Elliott* (1955), this point of view was frequently called the *Briggs* dictum. For more than a decade it was the authoritative construction of *Brown*: "It is important that we point out exactly what the Supreme Court has decided and what it has not decided.... The Constitution...does not require integration. It merely forbids discrimination."<sup>35</sup>

Echoing this view, Congress passed the Civil Rights Act of 1964, which endorsed the common understanding that official discrimination should not be tolerated but racial mixing need not be compelled. Section 407 of the Civil Rights Act authorized the attorney general to initiate school desegregation actions, and section 401 defined desegregation: "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools to overcome racial imbalance."<sup>36</sup> *Brown*, *Briggs*, and the Civil Rights Act were understood to be about de jure segregation and not about de facto racial imbalances and concentrations.

Some critics raised objections to the reasoning displayed in the *opinion* (as distinguished from the holding) of *Brown*; and some others cautioned that in a democracy important changes should not be instigated by unelected judges, appointed for life. But the great majority of influential Americans considered the outcome of the case so morally right, and so clearly in the interests of whites as well as blacks, that *Brown* became a venerated symbol. By the mid 1960s *Brown* was revered for having brought an end to shameful official segregation. Because it relieved blacks from stigma and whites from guilt, the Supreme Court received the thanks of a grateful nation. *Brown* became the example par excellence of what the black activist and legal scholar Derrick Bell has called "interest convergence" as a motivation for racial policy making. In this instance, Bell explained, "the interest of blacks" was "accommodated" because it "converge[d] with the interests of whites in policy-making positions."<sup>37</sup>

The celebration of *Brown* would not have been so widespread if Americans had had a better understanding of all that the opinion of the Supreme Court could be interpreted to imply. After holding that the relevant historical evidence was inconclusive, and after repeatedly stating that the litigation arose from segregation compelled by law, the *Brown* Court engaged in psychological and sociological theorizing that later was held to mean that actual racial mixing was called for, not just an end to state-enforced segregation. Both *Brown* and the later rulings were influenced by social science arguments that, given the evidence available at the time, could best be characterized as not clearly erroneous; social science arguments which, after subsequent research, came to be regarded as either dubious or mistaken.



Specifically, *Brown* held that racial isolation damaged the confidence of black youths and depressed their ambitions and self-esteem. It said that the segregation of black students generated "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." It approvingly repeated the conclusion of a Kansas court: that segregation tended "to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they could receive in a racial[ly] integrated school system."<sup>38</sup> *Brown* embraced what is sometimes called "the harm and benefit thesis." It held that school segregation harmed black students and implied that desegregation would help African Americans develop more self-esteem and do better academically.<sup>39</sup>

In endorsing arguments from social science, and especially from social psychology, the *Brown* Court turned away from the main line of argument that attorney Thurgood Marshall had presented in his legal briefs for the NAACP. Marshall had acknowledged that the Constitution allowed for some discrimination against groups (as with the all-male military draft and restrictions on the freedom of minors), but Marshall said the due process and equal protection clauses required not only that discrimination must be justified but also that especially weighty evidence was necessary to justify racial discrimination. Marshall said that no such evidence had been presented in *Brown*, and even suggested that it was just as arbitrary and capricious to discriminate against people with dark skins as it would have been to discriminate against people who had blue eyes or blond hair. According to Marshall, racial segregation fell within a group of unreasonable classifications that the due process and equal protection clauses prohibited.<sup>40</sup>

Marshall and other NAACP lawyers made these points repeatedly and unequivocally. They said that classifications based "solely on race or color" were "arbitrary and unreasonable" and "the very kind the equal protection clause was designed to prohibit." They said it was their "dedicated belief" that the Constitution was "color-blind." They said that the Fourteenth Amendment had "stripped the state of power to make race and color the basis for governmental action."<sup>41</sup> And they also renounced discrimination as a remedy for previous discrimination. They said they were

not asking for affirmative relief.... The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board...to assign children on any reasonable basis they want to assign them on....

What we want from this Court is the striking down of race....

Do not deny any child the right to go to the school of his choice on the grounds of race or color.... [D]o not assign them on the basis of race.... If you have some other basis...any other basis, we have no objection. But just do not put in race or color as a factor.<sup>42</sup>

The Supreme Court embraced this rationale in *Bolling v. Sharpe*, a companion case that was decided with *Brown* on May 17, 1954. The *Bolling* case rose from the District of Columbia and was decided separately for legal reasons. The Fourteenth Amendment (which asserted that no *state* could deprive a person of the equal protection of the laws) did not apply to the federal government. But the Fifth Amendment prohibited the federal government from depriving citizens of liberty without due process. In *Bolling* the Court recognized that “discrimination may be so unjustifiable as to be violative of due process.” It said that “classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions, and hence constitutionally suspect.”<sup>43</sup>

In *Brown*, however, the Court said nothing about the arbitrariness of racial discrimination. Instead, the Court pointed to the damage that segregation supposedly did to blacks. It said that segregation so victimized black students as to make an equal education impossible.

Perhaps it would have been better if *Brown* had repeated the rationale of *Bolling* and the implications of the per curiam rulings; if *Brown* had simply said it was inherently arbitrary for government officials to discriminate on the basis of race; if it had endorsed the major argument that Thurgood Marshall had presented in *Brown*, or the dictum that Judge Parker had announced in *Briggs*, or the definition that Congress later provided in the Civil Rights Act of 1964.<sup>44</sup> Instead, after citing evidence from the social sciences, *Brown* held that segregation was unconstitutional because it damaged blacks psychologically. Later this rationale and holding would lead the Court to affirm that *Brown* mandated not only what most people at the time thought it required (no racial discrimination) but also something quite different (affirmative racial assignments to achieve more racial integration than could be achieved through racially neutral policies).

### **BROWN’S SHAKY SOCIAL SCIENCE**

Some of the NAACP’s lawyers had reservations about using evidence from social science,<sup>45</sup> but they knew that different minds might be persuaded by different arguments, and that therefore successful lawyers often presented all the arguments they could muster, neglecting none. Thus, at the behest of attorney Robert L. Carter, the NAACP got in touch with psychologist Kenneth B. Clark, who then prepared a statement that eventually was signed by thirty-two prominent anthropologists, psychologists, and sociologists—a statement which declared that black children were psychologically injured if they attended segregated schools. Regardless of the condition of the separate facilities, the social scientists said, segregation had a belittling effect upon the self-esteem of African-American students. According to the social science statement, segregated black students reacted with “feelings of inferiority” which led to “a generally defeatist attitude and a lowering of personal ambitions.” “In produc-

ing such effects," the statement said, "segregated schools impair[ed] the ability of the child to profit from the educational opportunities provided him." The statement further maintained, "under certain circumstances" (among them an absence of competition and special efforts to ensure that the academic status of the black and white students would be equal) "desegregation not only proceeds without major difficulties, but has been observed to lead to the emergence of more favorable attitudes and friendlier relations between races."<sup>46</sup>

The statement reflected a paradigm shift in social science. An earlier generation of scientists, influenced by a Darwinian belief that the races were at different stages of evolutionary development, tended to regard Negroes as innately inferior to Caucasians in terms of analytical intelligence. By the 1930s and 1940s, however, new theories were coming into vogue, and many social scientists believed that racial differences in intelligence test scores and societal achievements resulted from the accidents of history and the influence of culture rather than from any innate differences in mental abilities. To allay any fear that black students might jeopardize the education of whites, the NAACP's social science statement emphasized that "the available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences."<sup>47</sup>

In addition to suggesting that desegregation would boost the self-esteem and academic achievement of blacks, the NAACP's social scientists and lawyers also said that segregation gave whites a false sense of superiority and denied blacks the opportunity to learn the social skills needed for effective interaction with the dominant group. They said that segregation reinforced racial prejudice, increased mutual hostility and suspicion, and made outbreaks of racial violence more likely. With desegregation, they said, these problems would be ameliorated.

The NAACP's social science statement was consistent with much of the research of the 1930s and 1940s. The social scientists were not merely activists who were motivated by moral and political concerns rather than scientific data. Nevertheless, many of their assertions have since been discredited. Eventually, as historian John P. Jackson noted in 2001, "the psychologists involved in *Brown* [came to be] viewed as liberal reformers who cloaked their political wishes in the guise of social science." That their testimony was unfounded became "the dominant understanding of the case."<sup>48</sup>

Numerous post-*Brown* studies later established that black students do not suffer in terms of self-esteem. In fact, according to one review of the literature, "research is nearly unanimous in reporting either no racial differences in self-esteem or differences favoring blacks over whites."<sup>49</sup> Perhaps this is because most American youths consider academic achievement less important than street smarts, athletic prowess, and success with the opposite sex. Yet because blacks lag behind whites in average academic performance, the self-esteem

of blacks attending predominantly white high schools is substantially lower than the self-esteem of those who attend predominantly black schools. Contrary to the prediction of the NAACP's social science statement, "segregation protects self-esteem [of blacks], while the impact of desegregation is to lower self-esteem."<sup>50</sup>

Given the relatively low average socioeconomic status of blacks, it may seem surprising that blacks did not suffer from low self-esteem. But the subculture of blacks allowed most African Americans to buffer the negative evaluations of mainstream whites. In *An American Dilemma* (1944), Gunnar Myrdal noted that blacks tended to attribute their problems and low status not to any personal failings but to racism and the American system. In another classic work, *Equality of Educational Opportunity* (1966), James S. Coleman also reported that blacks had self-esteem levels at least equal to those of whites.<sup>51</sup> The self-esteem of blacks was probably enhanced further as the civil rights movement of the 1960s and 1970s placed increased emphasis on black pride and black power.

The NAACP's social scientists were mistaken when they informed the Supreme Court that blacks were suffering in terms of self-esteem; and they were naively optimistic when they told the Court that the conditions for successful desegregation could "generally be satisfied in...public schools."<sup>52</sup> Given the racial gap in average academic achievement, there was no likelihood that black and white students, on average, would be of equivalent academic status. Moreover, because competitiveness is deeply embedded in the American culture and because teachers are expected to give higher grades to better students, competition could not be eliminated from the classroom. There was no way to create the circumstances that the NAACP's social scientists themselves identified as essential for the success of desegregation.

Thus further research soon cast doubt on some (although not all) of the assertions of liberal social science. Critics took particular exception to the work of psychologist Kenneth B. Clark, whose testimony in the *Brown* case had been especially striking and influential. When the Supreme Court cited "modern authority" in social science, as it did in footnote 11 of the *Brown* opinion, the Court first mentioned the work of "K. B. Clark."<sup>53</sup> During the previous decade Clark had published articles that dealt with the effect of segregation on the self-esteem of black youths, and the NAACP's lawyers thought that the "general scientific findings would have more weight in a courtroom if it could be demonstrated that they also applied in the specific cases...before the court."<sup>54</sup> To that end, Clark showed black and white dolls to sixteen black children selected at random from segregated schools in Summerton, South Carolina, whose litigation had been consolidated with the *Brown* litigation from Topeka, Kansas. Clark then reported that nine of the sixteen children, when asked which was the "nice one," selected the white doll, and that only eleven said the black doll was the one that looked more like themselves.<sup>55</sup> From this

Clark inferred that segregation had a detrimental effect on the personalities of black children.

Certainly Clark's presentation was vulnerable, as several commentators soon noted. Richard Kluger, a celebrant of the *Brown* decision, conceded that "sixteen children were not very many to start with, and if even one or two of them had undergone atypical experiences or traumas in their young lives, the overall test results would have been thrown out of kilter."<sup>56</sup> Sociologist Ernest van den Haag scoffed that Clark's sample of students was not only too small for gauging any damage to the ego structure of blacks; "this number would be too small to test the reaction to a new soap."<sup>57</sup>

Others weighed in with more substantial criticisms. The legal scholar Edmond Cahn, a champion of the *Brown* decision (but not of the *Brown* opinion), noted that Clark's doll test did not purport to demonstrate "the effects of *school* segregation, which is what the court was being asked to enjoin. If it disclosed anything about the effects of segregation on the children, their experiences at school were not differentiated from other causes." Cahn thought it dangerous to base constitutional rights on social science as flimsy as that presented by Kenneth Clark.<sup>58</sup> Psychologist Bruno Bettelheim also wondered "how far a good cause can be served by unsubstantiated or even spurious arguments made in its favor." Bettelheim supported the civil rights movement but, as a Jew who had attended "non-segregated schools in Germany and Austria," took exception to Clark's "familiar presumption that meeting children of different races and religions in school leads to better racial and religious relations." According to Bettelheim, "the seeds of racism and ultra-nationalism" had taken "firm root" in Germany's integrated schools, "while most children who went to Catholic parochial schools turned out (even under the Nazis) to be much less prejudiced."<sup>59</sup> The educational success of Asian, Catholic, and Jewish students in the United States also cast doubt on the contention that racial or ethnic separation inevitably impaired educational development.

Thus the NAACP's social science statement, and especially Kenneth Clark's doll tests, were subjected to withering criticism. Nevertheless, perhaps because most scholars in the field sympathized with the purpose that animated this research and testimony, Clark's professional reputation was not damaged. Clark later enjoyed a lengthy career as a professor at the City University of New York, with stints teaching at Harvard, Columbia, and Berkeley. He became a member of the Board of Regents of New York State and a member of the Board of Directors of the Rand Corporation and of several foundations. He became a trustee of the University of Chicago and a consultant to the State Department. Eventually, Clark became the president of the American Psychological Association.

More immediately, Clark had the satisfaction of knowing that his doll test and social science statement made a crucial contribution to the NAACP's victory in *Brown*. The Supreme Court had found the NAACP's historical argument inconclusive, but it pricked up its ears when the NAACP's social scientists said



that segregation fostered feelings of inferiority that hampered the education of blacks. Historian Alfred Kelly conceded, "[Clark's] black and white dolls won the case, not the historians."<sup>60</sup> In tribute to the NAACP's premier psychologist and most influential witness, some social scientists referred to *Brown* as the "Ken Clark law."<sup>61</sup>

The lawyers for South Carolina probably would have confronted Clark had they known that the Supreme Court would later rely on his doll studies. But since the doll test involved so few children, attorney Robert McCormick Figg recalled, "I didn't press the matter. [Clark's] numbers were small and unimposing."<sup>62</sup> John W. Davis, the lead attorney for South Carolina, was especially skeptical of the social science evidence, confiding in one letter: "I think I have never read a drearier lot of testimony than that furnished by the so-called educational and psychological experts."<sup>63</sup> "I can only say that if that sort of 'fluff' can move any court, 'God save the state!'"<sup>64</sup> Instead of stressing social science, Davis made a legal argument. With citations to eighty years of precedents, Davis said that the right of a state to maintain segregated schools had been so frequently affirmed by the highest authorities, including the Supreme Court, that the matter should be considered settled.<sup>65</sup>

Despite his confidence in the legal precedents, Davis briefly took exception to the social science evidence in general and to Professor Clark's doll studies in particular. He noted that Clark's testimony was especially suspect because Clark had not told the courts that he had previously shown black and white dolls to 134 black children who attended segregated schools in Arkansas and to 119 black children who attended desegregated schools in Massachusetts. Nor had Clark informed the courts that the proportion of black students who preferred the white dolls was actually higher in the desegregated northern schools than in the segregated southern schools. Thus if the doll test was a valid means of indicating what sort of schooling enhanced black self-respect, the data tended to favor segregated schools.<sup>66</sup>

The result of Clark's South Carolina doll test also was at odds with results that Clark reported in *Belton v. Gebhart*, a desegregation case in Delaware. In Delaware, only 12 of 41 black children identified the black doll as "bad," while 25 refused to make any identification of a bad doll. But in contrast to the situation in South Carolina, where Clark inferred psychological damage if children said the black doll was bad, in Delaware Clark said that children who refused to pronounce a negative judgment were "seeking to avoid coming to grips with the personally disturbing problem of racial status."<sup>67</sup> Whatever choice a child made, Clark interpreted it as evidence of psychological damage.<sup>68</sup> "If Negro children say a *brown* doll is like themselves, he infers that segregation has made them conscious of race; yet if they say a *white* doll is like themselves, he infers that segregation has forced them to evade reality."<sup>69</sup>

The results of other tests were even more damaging to the NAACP's case. When Clark asked children to color the drawing of a boy or girl, "nearly 80

per cent of the southern Negro children [who had been educated in all-black, segregated schools] colored their preferences brown, whereas only 36 per cent of the northern Negro children did. Furthermore, over 20 per cent of the northern [black] children colored their preferences in a bizarre color, while only five per cent of the southern [black] children did."<sup>70</sup> Such results suggested that desegregation created more psychological problems than it solved. This led psychologist Bruno Bettelheim to conclude that the NAACP would have been wiser if it had steered clear of bogus science and had based its case on legal and ethical principles.<sup>71</sup>

The *Brown* Court nevertheless placed its imprimatur on the social science of the NAACP. The Court even listed Kenneth Clark as *primus inter pares* — the first among a group of scholars whom the Court cited as “modern authority” in social psychology. The headline in the *New York Times* called *Brown* “a sociological decision,” and the *Times*’s best-known columnist, James Reston, wrote that the “Court’s opinion read more like an expert paper on sociology than a Supreme Court opinion. It sustained the argument of experts in education, sociology, psychology, and anthropology....”<sup>72</sup>

### SCIENCE AGAINST *BROWN*

The Supreme Court’s opinion in *Brown* took segregationists by surprise, for they had not only considered the NAACP’s social science to be of slight consequence; they had also expected *Brown* to be decided on the basis of historical evidence and legal precedents. Yet when these expectations proved to be mistaken, segregationists enlisted social science in their own behalf and pointed to what John W. Davis once called “a large body of respectable expert opinion to the effect that separate schools, particularly in the South, are in the best interests of children of both races as well as of the community at large.”<sup>73</sup> “If the Court wanted scientific data,” historian William H. Tucker has written, “the segregationists would supply the data with a vengeance. Since the plaintiffs’ experts had testified that segregation was damaging to the personality and self-esteem of black children, the opposing scientists would marshal their own evidence to show that integration was even more harmful to the young black psyche.” In response to the NAACP’s argument that racial differences in scholastic performance were environmentally based and in reply to the implication that desegregation would lead to improvement in black educational achievement, segregationists would cite IQ studies that showed that the differences were intractable and other studies that suggested that the differences probably resulted from heredity. When the academic performance of black students either did not improve after desegregation, or improved very little, segregationists insisted that the *Brown* Court had been “hoodwinked by biased evidence.”<sup>74</sup>

Much of the evidence for segregation was presented in *Stell v. Savannah-Chatham Board of Education* (1963).<sup>75</sup> Segregationist lawyers carefully chose

Savannah because they knew that the presiding judge, Frank M. Scarlett, supported segregation. They therefore expected Judge Scarlett to allow them to introduce social science evidence over the objections of the NAACP, which now maintained that cases should be decided on the basis of legal precedents (that is, *Brown*), and that social science evidence was irrelevant and should be excluded.<sup>76</sup>

In *Stell* the segregationists began with Robert Osborne, a professor of psychology at the University of Georgia. Osborne gave testimony to the effect that whites in Savannah, on average, scored significantly higher than blacks on tests of reading and mathematics, with the differential increasing from less than two grade levels at age eleven to more than three grade levels at age seventeen.<sup>77</sup> Osborne said that "in regions ... where the Negro population is relatively small there may be no problem of balancing the schools in terms of race." But he predicted trouble ahead "if public schools are ordered to integrate *en masse*." If white schools in Savannah did not "lower the educational standards and level of instruction," there would be "a 40 to 60 percent Negro failure rate." The only alternatives would be to institute a system of grouping students by academic achievement, which would lead to "*de facto* segregation," or "to apply differential marking and evaluation systems to the two groups."<sup>78</sup>

The segregationists next presented their star psychologist, Henry E. Garrett, a former president of the American Psychological Association. Garrett was a man of patrician bearing who had taught at Columbia University for thirty years before moving to the University of Virginia. Summarizing the findings of several scholarly studies, Garrett told the court that on IQ tests American Negroes regularly scored from 15 to 20 points below the average for American whites; that only 25 percent of African Americans overlapped the average white on most mental tests; and that the difference was even greater on "tests of an abstract nature...involving reasoning, deduction, comprehension."<sup>79</sup> Garrett recognized that "inequality in social status" made it difficult to obtain a fair comparison of black and white Americans, but he reported that the gap in test scores did not disappear when black and white subjects were paired in terms of fourteen social and economic factors. The persistence of the gap, and the regularity of results from many studies, made it "extremely unlikely [in Garrett's opinion] that environmental opportunities can possibly explain *all* the differences."<sup>80</sup> According to Garrett, "the differences between the two racial groups in a variety of mental tests are so large, so regular and so persistent under all sorts of conditions that it is almost unthinkable to conclude that they are entirely a matter of environment."<sup>81</sup>

Garrett also mentioned additional points that would receive more emphasis in the years ahead. He said that massive integration would "pull achievement down" and "ruin the white schools." He opined that "neither group would be happy," since "one group would be challenged above its ability level and the other group would not be challenged enough." And he said that as a result of

"bringing the groups together...under classroom conditions" many African-American students would become frustrated, "and frustration leads to aggression and aggression leads to broken windows and muggings and crime."<sup>82</sup> In their legal briefs for *Stell v. Savannah*, segregationist lawyers Carter Pittman and George Leonard also warned that black students would bring with them "a severe increase in disciplinary problems resulting from the more prevalent use of violence, vile profanity, lascivious sexual behavior, thefts, vandalism...and other anti-social conduct." "<sup>83</sup>

In *Stell* the segregationists also maintained that differences in academic achievement resulted largely from differences in brain structure. Robert E. Kuttner, a professor of medicine at the Creighton University Medical School, gave testimony on this point. But the segregationists' star witness was Wesley Critz George, emeritus professor of anatomy at the University of North Carolina Medical School and the president of the North Carolina Academy of Science. After summarizing several scholarly studies on the relation of brain weight, body size, and intelligence throughout the animal kingdom, George informed the court that the average weight of the brains of Caucasians was about 1,380 grams, that of Negroes about 1,240 grams, with the difference especially pronounced in the prefrontal area where abstract thought occurred. George further stated that these differences were "no doubt...inherited," the result of evolutionary development in geographically distinct regions over periods of times best described in geological terms. According to George, schools could modify these differences only "to a minimal degree."<sup>84</sup>

Some segregationists considered the racial differences in anatomy to be especially important. Most people already knew that blacks lagged whites on academic tests, but the segregationists sensed that many observers attributed this to differences in environment and opportunity. Yet if blacks and whites differed in brain structure, the segregationists reasoned, more people would recognize that racial differences in IQ and academic achievement were "inherent and hereditary."<sup>85</sup>

Professor George's summary of the anatomical evidence was striking — so striking that it caused NAACP attorney Constance Motley to weep audibly in the courtroom.<sup>86</sup> But it was not conclusive with respect to school segregation, for even segregationists conceded that there was a considerable overlap in brain weight (as there was in IQ scores), with about 20 percent of African Americans exceeding the white average. Thus the NAACP could argue, as it had in *Brown*, that children in desegregated schools could be grouped by ability, regardless of race. "Put the dumb colored children in with the dumb white children," Thurgood Marshall had said to the Supreme Court in 1955, "and put the smart colored children with the smart white children."<sup>87</sup>

Segregationists therefore called on their own social scientists, who argued that racial segregation was psychologically beneficial to African-American school children, including those of superior intelligence. In *Stell v. Savan-*

nah their star witness on this point was Ernest van den Haag, a psychiatrist and professor of social philosophy at New York University. Van den Haag was also the author of one of the earliest articles that had criticized Kenneth Clark. Writing in the *Villanova Law Review* in 1960, van den Haag had noted that Clark himself, in articles written before *Brown*, had reported that black children in segregated schools were “less pronounced in their preference for the white doll” and more often thought of the colored dolls as “nice.” Van den Haag suspected that Clark had intentionally misled the courts and deliberately deceived the NAACP’s lawyers. “Else how could they present as an expert witness to demonstrate the damages of school segregation a man who has actually demonstrated only the damages of desegregation?” According to van den Haag, “The best conclusion that can be drawn is that [Clark] did not know what he was doing; and the worst, that he did.”<sup>88</sup>

In *Stell v. Savannah*, van den Haag essentially maintained that African-American children would be happier if they were educated in all-black schools. He granted that there was something to “the common sense view that Negroes are humiliated...by segregation,” but he thought it would be even worse to send black students to school with “hostile” whites who would “resent...the imposition.” Van den Haag said that “being resented and shunned personally and concretely by their white schoolmates throughout every day would [not] be less humiliating to Negro children than a general abstract knowledge that they are separately educated because of white prejudice.”<sup>89</sup> “If the gifted Negro child is transferred into a hostile white school environment, I doubt that there would be an educational advantage.”<sup>90</sup>

In making this argument, van den Haag harkened back to points that the black scholar and civil rights leader W. E. B. Du Bois had made in 1935. “The proper education of any people includes sympathetic touch between teacher and pupil,” Du Bois had written. But racial prejudice was so deeply entrenched that it was difficult to find white teachers who regarded blacks as their equal. Consequently, Du Bois wrote, black students in the desegregated North were often “admitted and tolerated,” but they were “not educated” because they did not receive “decent and sympathetic education in the white schools.” Indeed, “the treatment of Negro children in [desegregated] schools...is such that they ought to demand a thorough-going revolution in the official attitude toward Negro students, or absolute separation in educational facilities.” Du Bois complained that he had “repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their child to ‘fight’ this thing out,—but, dear God, at what cost!” Du Bois thought it would be better for the NAACP to seek equalization of funding and facilities instead of pressing for integration. He doubted the wisdom of trying to compel “a rich and powerful majority



of the citizens to do what they will not do." He conceded that mixed schools with good and sympathetic teachers and fellow students would be ideal. But "a mixed school with poor and unsympathetic teachers with hostile public opinion and no teaching of truth concerning black folk, is bad."<sup>91</sup>

Du Bois was not defending segregation. He was, rather, stressing that there was "no magic" in mixed schools and that black children would not benefit if they were placed in schools that did not treat them fairly.<sup>92</sup> Du Bois insisted that integration was not a panacea. He cast doubt on the value of educating black children in predominantly white schools.

Van den Haag argued in addition that because of deficiencies at home most poor black students needed a special curriculum that would provide elementary instruction on matters that most middle-class white children picked up automatically. He thought that "instruction in schools for Negroes should attempt to remedy the disadvantages suffered by students coming from a culturally deprived home environment." "At least for the time being, the needs of Negro children would be met best—i.e., to their advantage and without disadvantage to others—by separate education geared to meet the obstacles presented by lack of opportunity and unfavorable environment."<sup>93</sup> Such schools would also facilitate the cultivation and celebration of the African Americans' unique heritage.

Van den Haag also emphasized the importance of what he called "acceptable group identifications." He said that "the sense of achievement essential to a healthy personality in a superior pupil is caused by excelling in a group with which he has a strong identification"; that such sense would be "limited or destroyed" if students were placed "in a group with which such identification is lacking"; that a goal of education "should be to strengthen the degree to which Negroes identify with their own sub-group rather than with other groups." Van den Haag said that the integration of able black students would have especially unfortunate effects on the black rank and file. He predicted that, with integration, the best black students would move into predominantly white classes, and black children of ordinary aptitude "would be deprived of the natural leadership of their group, would lose a sense of group achievement, be subjected to a demoralizing sense of rejection and...would suffer feelings of inadequacy or inferiority."<sup>94</sup>

Once again, van den Haag was asserting views that in some ways were similar to opinions that W. E. B. Du Bois had expressed in the 1930s. Du Bois had then urged African Americans to "stop being stampeded by the word *segregation*." What they should be concerned about was *discrimination*; discrimination as practiced, for example, when public schools "refus[ed]...to spend the same amount of money on the black child as on the white child for its education." But Du Bois said that segregation and discrimination did "not necessarily go together," and he insisted that there should "never be an opposition to segregation pure and simple unless that segregation does involve discrimination."<sup>95</sup>

Du Bois urged blacks to continue to protest against official segregation. But he also urged them to "go to work" to make sure that black schools were as good as possible. If the Negro could not "educate his children in decent schools with other children, he must, nevertheless, educate his children in decent Negro schools and arrange and conduct and oversee such schools." Du Bois complained (with some exaggeration) that "the NAACP and other Negro organizations have spent thousands of dollars to prevent the establishment of segregated Negro schools, but scarcely a single cent to see that the division of funds between white and Negro schools, North and South, is carried out with some approximation of justice." For too many African-American leaders, Du Bois wrote, "the fight against segregation consists merely of one damned protest after another;...the technique is to protest and wail and protest again, and to keep this up until the...walls of segregation fall down."<sup>96</sup>

Du Bois also thought it was a mistake to emphasize *integration* as the best solution to America's racial problems. He was convinced that "not for a century and more probably not for ten centuries, will any such consummation be reached." "No person born will ever live to see...racial distinctions altogether abolished." Indeed, Du Bois dismissed integration as "the absurd Negro philosophy of Scatter...Escape." He insisted that "the problem of 12,000,000 Negro people, mostly poor, ignorant workers, is not going to be settled by having their more educated and wealthy classes gradually and continually escape from their race into the mass of the American people." To the extent that occurred, Du Bois predicted, the black masses would be left without leaders and would "sink, suffer and die."<sup>97</sup> Du Bois called on the black "talented tenth" to stay in their black communities and serve as role models and missionaries of culture. He urged "the better class of Negroes [to] recognize their duty toward the masses." "[T]heir chief excuse for being [is] the work they may do toward lifting the [masses]."<sup>98</sup>

Some of van den Haag's views were similar to those of Du Bois, although not identical, and both men had opinions that resembled those of sociologist A. James Gregor. Like van den Haag, Gregor rejected Kenneth Clark's assertion that "segregation has detrimental psychological effects." On the contrary, Gregor wrote, Clark's own evidence "tends to support racial separation in the schools." It showed that there were "more serious [psychological] impairments...in 'integrated' situations." "If the evidence available to the Court in *Brown v. Board of Educ.* demonstrates anything at all, it demonstrates that the personality impairment suffered by Negro children is less in a racially insulated environment than with congregation." Gregor warned that "a Negro child who systematically observes his group performing at a lower level...in integrated situations...can hardly avoid assessing [his group] as inferior in some significant sense. This leads to the characteristic negative evaluation of his own group on the part of the Negro child..."<sup>99</sup>

In addition, like Du Bois, who thought that most African Americans possessed an instinctive preference for one another, a consciousness of kind "which

they cannot escape because it is in the marrow of their bones,"<sup>100</sup> Gregor maintained that most whites also possessed a sense of racial identity. More than that, Gregor thought that mankind possessed an inherent drive to form in-groups and out-groups. He said there was "a generic tendency...to identify with those like themselves" and an instinctive "disposition to limit contact with outgroup members." Admittedly, this tendency could be influenced by "social and political circumstances." Sometimes group consciousness was focused on religious beliefs or class standing; but often it revolved around race. Indeed, Gregor said, throughout history there had been little mixing on terms of equality when people came into protracted contact with groups of markedly different "racial livery."<sup>101</sup> In making this argument, Gregor was squarely in the mainstream of social science. In *The Nature of Prejudice* (1954), the influential Harvard psychologist Gordon W. Allport had "argued along similar lines, entitling one chapter 'The Normality of Pre-judgment' and arguing that the formation of in-groups was a natural phenomenon and was often accompanied by the rejection of out-groups."<sup>102</sup>

Thus Gregor was not surprised when educators reported that "each racial group tended to go its own way with little social interaction" when schools were integrated, as many had been outside the South. Neither blacks nor whites could expect to find sympathetic, congenial support in schools that were dominated by members of the other race. Gregor maintained, in addition, that mixing was likely to produce separation if one of the groups, as seemed to be true of African Americans, possessed a "subculture" that was characterized by "minimal academic aspirations." Just as white homeowners fled residential integration at the first inkling of "sociological problems" in their neighborhoods, so white students would keep their distance from blacks. "The deterioration of the standards of local schools, the increased incidence of delinquency and crime...provide...sufficient rational motive for white flight."<sup>103</sup>

In *Stell v. Savannah*, the lawyers for the NAACP did not try to refute the segregationists' arguments. Constance Baker Motley briefly mentioned that many experts in anatomy, psychology, and sociology did not agree with the opinions expressed by the segregationists' scientists, but Motley did not call any witnesses. Instead, she objected to the use of scientific testimony. Her position resembled that taken by John W. Davis when *Brown* was being litigated: "that social science testimony was specious and irrelevant since the Supreme Court had already decided the constitutional issues involved in the case."<sup>104</sup> Motley said the law was settled because *Brown* had held "that segregation itself injures Negro children in the school system. That is what the Supreme Court's decision is all about, so we do not have to prove that."<sup>105</sup>

Judge Scarlett held otherwise. Ruling for the segregationists, Scarlett noted that the preponderance of testimony in his courtroom was to the effect that racial differences in academic achievement were of such magnitude as to make it difficult for most black children to be educated in predominantly white

classrooms. Scarlett wrote that he had heard “no evidence whatsoever...to show that racial integration of the schools could reduce these differences.” And he concluded that “superior” black students (those who admittedly could keep up with whites academically) would suffer psychologically if separated from their fellow African Americans. Scarlett acknowledged that his findings differed from those of the Supreme Court in *Brown*, but he nevertheless concluded that the segregationists had made a reasonable case for separating the races in school.

The Fifth Circuit Court of Appeals then reversed Judge Scarlett’s decision. Circuit Judge Griffin Bell explained that “no inferior federal court may refrain from acting as required...even if such a court should conclude that the Supreme Court erred.” Bell went on to say that there was “no constitutional prohibition against an assignment of individual students to particular schools on a basis of intelligence, achievement or other aptitudes,” but “race must not be a factor in making these assignments.” According to Bell, the problem with racial segregation was that

[M]any of the Negro pupils overlap many of the white pupils in achievement and aptitude but are nevertheless to be segregated on the basis of race. They are to be separated, regardless of how great their ability as individuals, into schools with members of their own race because of the differences in test averages as between the races. Therein is the discrimination. The individual Negro student is not to be treated as an individual and allowed to proceed along with other individuals on the basis of ability alone without regard to race.<sup>106</sup>

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## ENDNOTES

1. Mary L. Dudziak, “Desegregation As a Cold War Imperative,” *Stanford Law Review* 41 (November 1988): 61–120; and Dudziak, *Cold War and Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).
2. For discussion of polls conducted in 1942, 1956, and 1963 by the National Opinion Research Center, see Herbert H. Hyan and Paul B. Sheatsley, “Attitudes toward Desegregation,” *Scientific American* 211 (July 1964): 16–23; and Andrew M. Greeley and Paul B. Sheatsley, “Attitudes toward Racial Integration,” *Scientific American* 225 (December 1971): 13–19.
3. John Hope Franklin, “The Dilemma of the American Negro Scholar,” in Herbert Hill, ed., *Soon One Morning* (New York: Alfred A. Knopf, 1975), 74, 73. Horace Mann

Bond was another African-American historian who worked for the NAACP on this project.

4. Richard Kluger, *Simple Justice* (New York: Alfred A. Knopf, 1976), 788.
5. John Hope Franklin, "The Dilemma of the American Negro Scholar," 74.
6. C. Vann Woodward, "Postscript, 1968," to "Equality: The Deferred Commitment," in Woodward, *The Burden of Southern History*, revised edition (Baton Rouge: Louisiana State University Press, 1968). Also see Woodward, "Seeds of Failure in Radical Race Policy," *Proceedings of the American Philosophical Society* 110 (February 1966): 1-9; Woodward, "The Northern Crusade against Slavery" and "The National Decision against Equality," in Woodward, *American Counterpoint* (Boston: Little, Brown, 1971), 159 and 212-233.
7. C. Vann Woodward, *Thinking Back* (Baton Rouge: Louisiana State University Press, 1986), 96-97. On this point also see, Howard N. Rabinowitz, "More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow," *Journal of American History* 75 (December 1988): 842-856; and Rabinowitz, *Race Relations in the Urban South* (New York: Oxford University Press, 1978).
8. Alfred H. Kelly, "An Inside View of *Brown v. Board*," paper delivered to the American Historical Association, December 28, 1961, reprinted at the request of J. Strom Thurmond in *Congressional Record*, 87th Congress, 2d Session, September 11, 1962: 19023.
9. Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (November 1955): 59.
10. Kluger, *Simple Justice*, 895.
11. Kelly, "An Inside View of 'Brown v. Board,'" 19025.
12. *Ibid.*, 19024.
13. Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," *Supreme Court Review*, 1965, 144. Kelly further stated that "the brief submitted by the NAACP and its associated counsel, which purported to prove decisively that the authors of the Fourteenth Amendment had indeed intended to knock out state segregation laws, was a piece of highly selective and carefully prepared law-office history."
14. Kelly, "An Inside View of *Brown v. Board*, 19024. In *The Southern Case for School Segregation* (Crowell-Collier Press, 1962, pp. 133-134), James J. Kilpatrick offered this assessment of the work of the NAACP's historians: "They produced a 235-page brief. It must stand as a pathetic monument to what happens when historians cease to be historians and take up the unlicensed practice of the law. The conclusions there drawn, that the 'proponents of absolute equalitarianism emerged victorious in the Civil War and controlled the Congress that wrote the Fourteenth Amendment,' are a bitter travesty upon the actual course of events. For it is plain to any objective student . . . that no such thing occurred. The visible, palpable, unrelenting, unavoidable truth is that [Charles] Sumner and [Thad] Stevens and their fellow radicals did not control the Congress in 1866; they did not get what they wanted in the Fourteenth Amendment."
15. Kluger, *Simple Justice*, 827.
16. Hughes's statement was made in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934), 443; and Marshall's in *McCulloch v. Maryland*, 4 Wheat 316 (1819), 407. Expressing a contrary point of view, the constitutional scholar Charles Cooley observed: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation and that their practical construction is to be uni-



form. A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from a written Constitution would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion." Agreeing with Cooley, Chief Justice Roger B. Taney once stated: "Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day." Cooley and Taney's statements are quoted in James J. Kilpatrick, *The Southern Case for School Segregation*, 129–130 and 130–131.

17. *Brown v. Board of Education*, 347 U.S. 483 (1954), 489.

18. See Robert H. Bork, *The Tempting of America* (New York: The Free Press, 1990), 74–84. Charles L. Black, Jr. made a similar argument: "The Lawfulness of the Segregation Decisions," *Yale Law Journal* 69 (1959–1960): 421–430.

19. Michael W. McConnell, "Concurring in the Judgment," in Jack M. Balkin, ed., *What Brown v. Board of Education Should Have Said* (New York: New York University Press, 2001), 164.

20. *Brown v. Board of Education*, 347 U.S. 483 (1954), 492.

21. Michael J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1982); Grover Rees III, "Prophets without Portfolio," *National Review*, September 2, 1983, 1078–1082.

22. David Garrow, "From *Brown* to *Casey*" in Austin Sarat, ed., *Race, Law, and Culture* (New York: Oxford University Press, 1997), 74–84.

23. Thomas Sowell, "Where Rhetoric Beats Reasoning," *Wall Street Journal*, May 13, 2004.

24. George F. Will, "Good and Bad Things Came with *Brown v. Board of Education*," *Sacramento Bee*, May 16, 2004.

25. *Brown v. Board of Education*, 347 U.S. (1954), 495.

26. *Brown v. Board of Education*, 349 U.S. 294 (1955), 300.

27. *Brown v. Board of Education*, 347 U.S. (1954), 493, 494.

28. Gunnar Myrdal, *An American Dilemma* (New York: Harper & Brothers Publishers, 1944).

29. For a statement of this view, see the remarks of Louisiana Senator Allen Ellender, *Congressional Quarterly Almanac* 20 (1964): 372.

30. W. E. B. Du Bois, "The Conservation of Races" (1897), reprinted in Herbert Aptheker, ed., *Pamphlets and Leaflets by W. E. B. Du Bois* (White Plains, N.Y.: Kraus-Thomson Organization, 1986), 7.

31. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

32. *Florida ex rel Hawkins et al.*, 347 U.S. 971 (1954); Andrew Kull, *The Color-Blind Constitution* (Cambridge: Harvard University Press, 1992), 162.

33. *Brown v. Board of Education*, 349 U.S. 294 (1955), 299, 300.

34. *Cooper v. Aaron*, 358 U.S. 1 (1958), 17.

35. *Briggs v. Elliott*, 132 F. Supp. 776 (1955), 777.

36. Public Law 88-352 (1964), 246.

37. Derrick Bell "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review* 93 (1980): 518; Bell, *Silent Covenants* (New York: Oxford University Press, 2004), 58, 70.
38. Bell, "Brown v. Board of Education and the Interest Convergence Dilemma," at 495, 494.
39. For a discussion of the harm and benefit thesis, see David J. Armor, *Forced Justice* (New York: Oxford University Press, 1995), 59–116.
40. Leon Friedman, ed., *Argument: The Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952–1955* (New York: Chelsea, 1969), 38, 45.
41. Andrew Kull, *The Color-Blind Constitution*, 157; G. W. Foster, Jr., "The North and West Have Problems, Too," *Saturday Review*, April 20, 1963, 72.
42. Friedman, ed., *Argument*, 47, 375, 402.
43. *Bolling v. Sharpe*, 347 U.S. 497 (1954), 499.
44. See Raymond Wolters, *The Burden of Brown: Thirty Years of School Desegregation* (Knoxville: University of Tennessee Press, 1984); and Wolters, *Right Turn: William Bradford Reynolds, the Reagan Administration, and Black Civil Rights* (New Brunswick: Transaction Publishers, 1996).
45. See James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), 44: "Some of the people around [Thurgood] Marshall wondered about such research. Both [Jack] Greenberg and Spottswood Robinson were skeptical. Another top lawyer, William Coleman, pounded the table in opposition to using the research. He said later, 'Jesus Christ. Those damned dolls! I thought it was a joke.'"
46. "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," in Philip B. Kurland and Gerhard Casper, editors, *Landmark Briefs and Arguments of the Supreme Court of the United States* (Arlington, VA: University Publications of America, 1975), vol. 49, 4–5, 15–17.
47. "The Effects of Segregation and the Consequences of Desegregation," in Kurland and Casper, eds., *Landmark Briefs*, 52.
48. John P. Jackson, Jr., *Social Scientists for Social Justice* (New York: New York University Press, 2001), 2. Edmond Cahn, the author of an especially influential critique, said that the primary motive of the NAACP's social scientists was not "strict fidelity to objective truth." Kenneth B. Clark took strong exception to this "serious, grave, and shocking charge," insisting that the social scientists "presented testimony, opinions, and information consistent with the available empirical studies" and did so "with caution and restraint befitting their roles as trained and disciplined scientists." See Cahn, "Jurisprudence," *New York University Law Review* 30 (January 1955): 150–169; and Clark, "The Desegregation Cases: Criticism of the Social Scientist's Role," *Villanova Law Review* 5 (Winter 1959–60): 224–240.
49. Marylee C. Taylor and Edward J. Walsh, "Explanations of Black Self-Esteem," *Social Psychology Quarterly* 42 (1979): 242.
50. Edgar G. Epps, "The Impact of School Desegregation on Aspirations, Self-Concepts, and Other Aspects of Personality," *Law and Contemporary Problems* 39 (Spring 1975): 307.
51. Myrdal, *American Dilemma*; James S. Coleman et al., *Equality of Educational Opportunity* (Washington: U. S. Department of Health, Education, and Welfare, 1966).

52. "The Effects of Segregation and the Consequences of Desegregation," in Kurland and Casper, eds., *Landmark Briefs*, 59.
53. *Brown v. Board of Education*, 347 U.S. 483 (1954), 499 n. 11.
54. Clark, "The Desegregation Cases": 229.
55. Trial Transcript, *Briggs v. Elliott*, Civil Action 2657, U.S. District Court, Columbia, South Carolina.
56. Kluger, *Simple Justice*, 446.
57. Ernest van den Haag, quoted by Kenneth B. Clark, "The Desegregation Cases," 238.
58. Cahn, "Jurisprudence," 163–164.
59. Bruno Bettelheim, "Discrimination and Science," *Commentary* 21 (April 1956): 384–386.
60. Kelly, "An Inside View of *Brown v. Board*," 19026.
61. C. P. Armstrong, S. S. Crutchfield, W. E. Hoy, and R. K. Kuttner, "Legal Testimony and Scientific Evidence," *Mankind Quarterly* 4 (October–December 1963): 105. Of course *Brown* has been interpreted in many ways, and some able commentators have denied the social science provenience of the opinion. Edmond Cahn's already cited law review article, "Jurisprudence," is one example.
62. Kluger, *Simple Justice*, 446.
63. Kluger, *Simple Justice*, 687.
64. William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (New York: Oxford University Press, 1973), 498.
65. *Ibid.*, 499.
66. Argument of John W. Davis, in Kurland and Casper, *Landmark Briefs*, vol. 49, 336; Ernest van den Haag, "Social Science Testimony in the Desegregation Cases – A Reply to Professor Kenneth Clark," *Villanova Law Review* 6 (Fall 1960): 69, 71; Herbert Garfinkel, "Social Science Evidence and the School Segregation Cases," *Journal of Politics* 21 (1959): 37–59; Harbaugh, *Lawyer's Lawyer*, 500.
67. Trial testimony of Kenneth Clark, as quoted by Jackson, *Social Scientists for Social Justice*, 141.
68. *Ibid.*, 142.
69. Cahn, "Jurisprudence," 163.
70. Bettelheim, "Discrimination and Science," 386.
71. *Ibid.*, 384.
72. *New York Times*, 18 May 1954, page 1.
73. Kluger, *Simple Justice*, 690.
74. William H. Tucker, *The Science and Politics of Racial Research* (Urbana: University of Illinois Press, 1994), 150.
75. *Stell v. Savannah-Chatham Board of Education*, 220 F.Supp 676 (1963).
76. Carleton Putnam included lengthy excerpts from the *Transcript of Proceedings* in his book, *Race and Reality: A Search for Solutions* (Washington: Public Affairs Press, 1967), 76–85.
77. *Stell v. Savannah-Chatham*, 229 F. Supp 667 (1963) at 669–671.

78. R. Travis Osborne, "Racial Differences in Mental Growth and School Achievement," in Robert E. Kuttner, ed., *Race and Modern Science* (New York: Social Science Press, 1967), 405–406.
79. *Ibid.*, 672–673; Putnam, *Race and Reality*, 58–59.
80. Henry E. Garrett, "Negro-White Differences in Mental Ability in the United States," *Scientific Monthly* 65 (October 1947): 333; Frank C. J. McGurk, "A Scientist's Report on Race Differences," *U.S. News & World Report*, 21 September 1956, 95.
81. Henry E. Garrett, "Racial Mixing Could Be Catastrophic," *U.S. News & World Report*, 18 November 1963, 93.
82. Testimony of Henry E. Garrett, quoted in I. A. Newby, *Challenge to the Court: Social Scientists and the Defense of Segregation, 1954–1966* (Baton Rouge: Louisiana State University Press, 1967), 205.
83. *Ibid.*, 199.
84. *Stell v. Savannah-Chatham*, 229 F. Supp 667 (1963), 673; Carleton Putnam, *Race and Reality*, 84, 82–83; Wesley Critz George, *The Biology of the Race Problem* (New York: National Putnam Letters Committee, 1962).
85. John Jackson, *The Scientific Defense of Segregation* (New York: New York University Press, ms), 221–222.
86. Putnam, *Race and Reality*, 83.
87. Friedman, ed., *Argument*, 402. In their Social Science Statement, however, the NAACP stated a different view: "Actually, many educators have come to doubt the wisdom of class groupings made homogeneous solely on the basis of intelligence. Those who are opposed to such homogeneous grouping believe that this type of segregation, too, appears to create generalized feelings of inferiority in the child who attends a below average class, leads to undesirable emotional consequences in the education of the gifted child, and reduces learning opportunities which result from the interaction of individuals with varied gifts." Kurland and Casper, eds., *Landmark Briefs*, vol. 49, 55
88. Van den Haag, "Social Science Testimony in the Desegregation Cases – A Reply to Professor Kenneth Clark," 77, 79.
89. *Ibid.*, 69, 71.
90. Van den Haag, "Intelligence or Prejudice?" *National Review*, 1 December 1964, 1061.
91. Du Bois, "Does the Negro Need Separate Schools?" *Journal of Negro Education* 4 (July 1935), 328, 329, 330, 330–331, 329, 335.
92. Kluger, *Simple Justice*, 691.
93. Van den Haag, "Intelligence or Prejudice?" 1061.
94. *Stell v. Savannah-Chatham*, 220 F. Supp. 667 (1963), 674–675.
95. *Crisis* 41 (January 1934): 20, italics added.
96. *Crisis* 41 (June 1934): 183; Du Bois, "Does the Negro Need Separate Schools?" 332. In *From Brown to Bakke: The Supreme Court and School Integration: 1954–1978* (New York: Oxford University Press, 1978), 25, J. Harvie Wilkinson noted that Du Bois was not alone in making this point. "There had long been disagreement – even within the NAACP high command – about whether to argue an 'equalization' strategy within the confines of Plessy or to take the bolder and riskier course of asking the Court to overrule separate but equal altogether." Also see Richard Kluger, *Simple Justice*, 658–664, 677–680.

97. *Crisis* 41 (April 1934): 117; Du Bois, "A Negro Nation within the Nation," *Current History* 42 (June 1935): 269. For more on Du Bois and integration, see Raymond Wolters, *Du Bois and His Rivals* (Columbia: University of Missouri Press, 2002).
98. W. E. B. Du Bois, *The Philadelphia Negro* (1899; reprint, Millwood, New York: Kraus-Thomson Organization, 1973), 392, 393.
99. Kenneth B. Clark, as quoted by A. James Gregor, "The Law, Social Science, and School Segregation," *Western Reserve Law Review* 14 (1963): 626; *ibid.*, 632, 633.
100. W. E. B. Du Bois, "The Future and Function of the Private Negro College," *Crisis* 53 (August 1946): 235.
101. A. James Gregor, "The Law, Social Science, and School Segregation," 629, 630; Gregor, "On the Nature of Prejudice," *Eugenics Review* 52 (1961): 217–224.
102. Gordon W. Allport, *The Nature of Prejudice* (Reading: Addison Wesley, 1954), 17–28; John P. Jackson, Jr., "The Scientific Attack on *Brown v. Board of Education*, 1954–1964," *American Psychologist* 59 (September 2004): 533. However, according to Walter A. Jackson, "In contrast to some of the more pessimistic writers on the subject, Allport proclaimed himself an unabashed meliorist and insisted that it was possible to reduce discrimination by changing public policy and to lessen prejudice through a variety of educational strategies." *Gunnar Myrdal and America's Conscience* (Chapel Hill: University of North Carolina Press, 1990), 288–289.
103. A. James Gregor, "The Law, Social Science and School Segregation," 629–630; Gregor et al., "Interracial Housing and the Law: A Social Science Assessment," in Alfred Avins, ed., *Open Occupancy vs. Forced Housing under the Fourteenth Amendment* (New York: Bookmailer, 1963), 147; George A. Lundberg, *Selective Association of Ethnic Groups in a High School* (New York: International Association for the Advancement of Ethnology and Eugenics, 1965).
104. I. A. Newby, *Challenge to the Court*, 207.
105. *Stell v. Savannah*, 220 F. Supp.667 (1963), 676.
106. *Stell v. Savannah-Chatham*, 333 F.2d 55 (1964), 61, 62.