

A Constitution for Every Man

William Van Alstyne†

Everyman's Constitution. By Howard Jay Graham. *Madison: The State Historical Society of Wisconsin*, 1968. Pp. xiv, 631. \$12.95.

It may be exceptional to introduce a review of one man's book by beginning with a reference to a different author, but the unorthodoxy will save a great deal of time. Leonard Levy, professor of constitutional history at Brandeis University, has published several justly famous recent works including *The Legacy of Suppression* (an historical treatment of unfree speech), *Jefferson on Civil Liberties*, and *The Origin*

† Professor of Law, Duke University.

of the *Fifth Amendment*. The last, an unhurried review of the evolution of the privilege against self-incrimination, earned a Pulitzer prize last year. Levy's brand is skeptical and liberal, and just now he dominates the field of constitutional historians.

All the more reason, therefore, to pay attention to the Foreword to Howard Jay Graham's *Everyman's Constitution*, as it is written by Professor Levy and it assesses Graham's collected works in the following way:

The year 1968 marks the one hundredth anniversary of the ratification of the Fourteenth Amendment. A most fitting commemoration of that centennial is this collection of essays by Howard Jay Graham, who is surely the greatest authority on the history of the amendment. He is its Maitland, and perhaps our foremost living historian of American constitutional law as well.¹

.....
Howard Jay Graham has played an important part in the developing history of the Fourteenth Amendment. Even as he chronicled its origins and purposes, he influenced its interpretation. By no coincidence, substantive due process of law as the mainstay of decisions against the constitutionality of government regulation came to an end when Graham provided the scholarly proof that the amendment was not designed to benefit business enterprise. Similarly, when he showed that the amendment emerged from the efforts of its framers to ensure that Negroes should have the same rights as other citizens, he provided the historical basis for decisions, which rapidly followed, in support of equal rights regardless of race.²

And that, in brief, is a pretty fair review of *Everyman's Constitution*. The book assembles eleven articles previously published in various law reviews over a period of thirty years, adds two new chapters, and bridges the separations with editorial comment. The result is a smooth and comprehensive treatment of important fourteenth amendment history. Its concern is seemingly with two discrete subjects, but in fact it presents a conscientious historian's brief for one principal theme.

The early chapters revisit the conspiracy theory of the fourteenth amendment that corporations were intended to be protected by the due process clause—a theory most familiarly associated with Roscoe Conkling's argument in *San Mateo County v. Southern Pacific R.R.*,³ and enlarged upon by the books of Charles and Mary Beard who ad-

1. Levy, *Foreword* to H. GRAHAM, *EVERYMAN'S CONSTITUTION* at vii (1968).

2. *Id.* at vii-viii.

3. 116 U.S. 138 (1885). Conkling's argument is reproduced in full in *Appendix I* to H. GRAHAM, *supra* note 1, at 594-610.

vanced an even broader economic interpretation of the Constitution.⁴ The point of these early chapters, however, is not to analyze the narrow and currently uninteresting problem of whether corporations were in fact secretly intended to be included as persons entitled to substantive due process protection under the fourteenth amendment. It is, rather, to move from a careful examination of the evidence respecting that alleged secret understanding to the broader question of conspiracy: was the fourteenth amendment principally the product of selfish business interests? Was it designed to smuggle in a constitutional basis for protecting economic interests from social regulation by means of judicial review? Were abolitionist concerns, in fact, a mere front that provided the facade but not the real function of the fourteenth amendment?

Graham's powerful (and successful) effort to exorcise this demonic theory is reinforced and complemented by the succeeding chapters on his second subject—the impact of the abolitionists on the formation of the fourteenth amendment. Together with ten Broek's *The Antislavery Origins of the Fourteenth Amendment*,⁵ Graham's one hundred page chapter on the antislavery backgrounds of the fourteenth amendment (which originally appeared in 1950,⁶ a year earlier than ten Broek's work) effectively rehabilitates the humanity of the fourteenth amendment—the amendment was indeed a constitutional commitment to equal rights, precisely as the Supreme Court initially interpreted it before veering away in favor of business interests for the next half century.⁷

Beyond this, Graham's chapter titled *Our "Declaratory" Fourteenth Amendment* does much to aid our understanding of a continuing problem in the use of historical materials to interpret the amendment. Beginning with *Brown v. Board of Education*, the Supreme Court has appeared to encourage the use of historical research in aid of determining whether each alleged form of discrimination was or was not understood to be forbidden by the equal protection clause. In calling for reargument in 1953,⁸ the Court asked counsel to determine whether Congress and the state legislatures contemplated that the fourteenth amendment would abolish segregation in public schools. It also asked

4. See, e.g., 2 C. BEARD & M. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 111-14 (1928).

5. J. TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

6. Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pts. 1 & 2), 1950 *Wis L. Rev.* 479, 610.

7. See the emphatic dicta of Mr. Justice Strong in *Strauder v. West Virginia*, 100 U.S. 303 (1879) and *Ex Parte Virginia*, 100 U.S. 339 (1879).

8. 345 U.S. 972 (1953).

whether, assuming that the immediate abolition of segregation was not contemplated, the framers nevertheless understood that Congress or the Court would, under future conditions, have power to abolish segregation. Similar references to particular "understandings" were also diligently pursued in the reapportionment cases,⁹ the poll tax¹⁰ and literacy test¹¹ cases, and the antimiscegenation decision.¹² In each instance, the ensuing decision has been subject to considerable criticism—that whatever the liberal virtues of the results, they are insupportable in terms of the framers' original understanding. Mr. Justice Harlan's elaborate dissent in *Reynolds*¹³ is particularly caustic on this point, and the many articles by Alfred Avins¹⁴ carry the criticism forward on every other front.

Graham's writing on "Our 'Declaratory' Fourteenth Amendment," however, effectively supports the wisdom of the second of the two questions posed by the Court in the 1953 *Brown* decision: not the one respecting immediate changes that the framers understood must ensue at once from ratification of the fourteenth amendment, but the one respecting Congress's (and the Court's) prerogative, if any, to enlarge upon those changes under future conditions. In *Brown* itself, the Court concluded conservatively that the evidence on this matter was inconclusive, and so the case was resolved almost entirely on other bases. Graham's writing is more aggressive in this respect. He argues that, in keeping with the open texture of the amendment's language, the animating spirit of the amendment was thematic and ideological, rather than detailed and legislative. The amendment thus embraced a capacity for growth in the particular application of its broad norms, rather than seeking to settle for all time a fixed and legislated answer to each possible controversy in terms of the conditions, perceptions, and information of 1866. To a large extent, this position is shared by Professor Bickel,¹⁵ and by Professor Kelly.¹⁶ Understanding of this view makes less unnerving the statement by Mr. Justice Douglas in *Harper v. Virginia Board of Elections*, that: "Notions of what consti-

9. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

10. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

11. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

12. *Loving v. Virginia*, 388 U.S. 1 (1967).

13. 377 U.S. at 589.

14. See, e.g., Avins, *The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Understanding*, 15 U. OF KAN. L. REV. 287 (1967).

15. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 62 (1955).

16. See Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUPREME COURT REVIEW 119, 134 (1965); Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049, 1083-86 (1956).

tutes equal treatment for purposes of the Equal Protection Clause *do* change."¹⁷

Graham does not bemoan the activism of the Supreme Court in its aggressive use of the fourteenth amendment to protect economic concerns. Rather, his is a more measured observation of heavy irony—*viz.*, that the Court was most creative during the first half-century of the fourteenth amendment in areas of least importance to the amendment's origin and animating spirit, even while it was willfully uncreative in areas of the amendment's basic drive. Thus, his suggestion in the preface:

My thesis is simply that what the United States, under these guarantees, did for itself, and for corporations, in curbing manifest and latent hostility and antagonism to corporate enterprise, 1880-1940, the United States can and must do for itself, and for still disadvantaged minorities, using the same techniques and weapons, supplying similar, and, in this case, *intended* process and protection.¹⁸

The thought is not ill-considered as an historian's suggestion in righting history. Much of the Court's early development of substantive due process against local regulation of corporate interests was, after all, the product of Mr. Justice Field whose lack of interest in the amendment's abolitionist underpinnings may be partly understood from a segment of a letter he wrote to Professor Pomeroy, in 1882: "You know I belong to the class, who repudiate the doctrine that this country was made for the people of *all* races. On the contrary, I think it is for our race—the Caucasian race."¹⁹ Yet, far more of the actual formation of the fourteenth amendment was the product of men like Thaddeus Stephens who, dying just three weeks after the fourteenth amendment was proclaimed as ratified, was buried in a plain graveyard in Pennsylvania beneath this epitaph:

I repose in this quiet and secluded spot,
Not from any natural preference for solitude
But, finding other Cemeteries limited as to Race by Charter Rules,
I have chosen this that I might illustrate in my death
The principles which I advocated Through a long life:
EQUALITY OF MAN BEFORE HIS CREATOR.²⁰

Mr. Justice Field having exercised a constitutional compassion for interests of enterprise during the longest tenure of any man in the his-

17. 383 U.S. at 669.

18. H. GRAHAM, *supra* note 1, at ix.

19. H. GRAHAM, *supra* note 1, at 195.

20. F. BRODIE, THADDEUS STEVENS 366 (1959).

tory of the Court, it may not be amiss in the last half of this different century that the Court has also exercised a constitutional compassion of the sort reflected in Thaddeus Stephens' epitaph.

And this, of course, is the explanation of the title of Howard Jay Graham's book. It is not *Everyman's Constitution* in the sense of being a layman's guide through highlights of the Constitution. It is, rather, a more technical but highly readable review of the fourteenth amendment's origins in support of the thesis that the amendment is itself a Constitution meant for *everyone*.