IN THE

Supreme Court of the United States

October Term, 1953

No. 2

HARRY BRIGGS, JR., ET AL.,
Appellants,

vs.

R. W. ELLIOTT, ET AL.,
Appellees.

No. 4

DOROTHY E. DAVIS, ET AL.,
Appellants,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR APPELLANTS ON REARGUMENT

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This Reply Brief is a joint reply to the Briefs for Appellees on Reargument in No. 2 and No. 4.

In dealing wtih the Congressional debates on the Fourteenth Amendment appellees have made several errors in text and quotations. In order to conserve the time of the

Court we have corrected the more important of these errors in Appendix A to this brief. There is even more dispute between appellants and appellees in regard to the actions of the several states. In order to facilitate the Court's resolution of dispute of the states on the Fourteenth Amendment we have prepared charts which are set forth in Appendix B to this brief.

I

Appellees' mistaken approach to the history of the adoption of the Fourteenth Amendment.

We doubt that the decision in this case is to be controlled by any isolated statement in either the Congressional debates or statements of any individual legislator in the states. On the contrary, we believe that the determining factor must be the overall purpose and intent of the framers of the Fourteenth Amendment [1] plus the general understanding of this intent by the other members of Congress. On this phase of the case, appellees have uniformly disregarded the undisputed intent of the framers of the Fourteenth Amendment to remove by constitutional amendment all governmentally imposed racial classifications and caste legislation and to do this in the most general and comprehensive language as is customary in the wording of constitutional provisions.[2] Appellees have consistently ignored the admitted intention of the framers of the Fourteenth Amendment and the other Radical Republicans in the 39th Congress that the Fourteenth Amendment would destroy the validity of the Black Codes then in existence, those being adopted during the same period, and would deprive the states of power to adopt any similar racial classification statutes in the future.

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[1] See Shelley v. Kraemer, 334 U. S. 1, 23.

[2] Strauder v. West Virginia, 100 U. S. 303, 310.

On this point the United States in its Supplemental Brief on Reargument (p. 115) concluded:

> "In sum, while the legislative history does not conclusively establish that the Congress which proposed the Fourteenth Amendment specifically understood that it would abolish racial segregation in the public schools, there is ample evidence that it did understand that the Amendment established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color. Concerned as they were with securing to the Negro freedmen these fundamental rights of liberty and equality, the members of Congress did not pause to enumerate in detail all the specific applications of the basic principle which the Amendment incorporated into the Constitution. There is some evidence that this broad principle was understood to apply to racial discriminations in education, and that it might have the additional effect of invalidating state laws providing for racial segregation in the public schools." [3]

The historic role of this Court has always been to give specific content to constitutional guarantees of due process, equal protection, the Bill of Rights and affirmative grants of power in accordance with the fundamental and underlying intent of the framers. That the framers may have had or failed to have a specific problem in mind is after all beside the point. What must be determined is whether the particular problem is embraced within the broad scope of the constitutional provision. And the Court resolves this question.

Thus, this Court sustained the Legal Tender Acts, *Legal Tender Cases,* 12 Wall. 457, in the face of the fact that the

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[3] See also: Brief for the Committee of Law Teachers Against Segregation in Legal Education filed in the case of Sweatt v. Painter, No. 44, October Term, 1949, pp. 5-18.

Constitutional Convention, in voting to strike out a provision authorizing Congress to "emit bills of credit," clearly understood that the Federal government would thereby be deprived of this power. 5 *Elliot's Debates,* 435;[4] Thayer, "Legal Tender," 1 *Harv. L. R.* 73. Likewise, in upholding the establishment of the Bank of the United States in *M'Culloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall was not deterred by the fact that the Constitutional Convention had voted down a proposal to authorize the chartering of corporations. 5 *Elliott's Debates,* 543-4.

It should also be noted that the Sixth Amendment was adopted in the light of the English common law rule that one accused of a felony other than treason was denied the assistance of counsel. See *Powell* v. *Alabama,* 287 U. S. 45, 60-64; *Betts* v. *Brady,* 316 U. S. 455; *Adkins* v. *Sanford,* 120 F. 2d 471 (CA 5th 1941). From the date of the adoption of the Sixth Amendment until the decision of this Court in *Johnson* v. *Zerbst,* 304 U. S. 458, the right conferred was generally understood as meaning only that in the federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him. See *Bute* v. *Illinois,* 333 U. S. 640, 661, footnote 17. In *Johnson* v. *Zerbst* this Court departed from this concept and construed the Amendment as entitling a defendant to court-appointed counsel if unable to retain counsel of his own.

Moreover, from the time of the adoption of the Fourteenth Amendment until *Gitlow* v. *New York,* 268 U. S. 652, 666, the Fourteenth Amendment was not considered as a prohibition against state invasion of freedom of speech. The inclusion of this specific protection in the Fourteenth Amendment was impliedly rejected in *Hurtado* v. *California,* 110 U. S. 516, 534, on the ground that none of the constitutional provisions was superfluous. In *Patterson* v. *Colorado,*

[4] See particularly the speeches of Butler, Ellsworth, Reed and Mason.

205 U. S. 454, the question was left open. In *Gilbert* v. *Minnesota,* 254 U. S. 325, the Court refused to decide the question, and in *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 543, it was expressly stated that the free speech guaranty was not a part of the Fourteenth Amendment. In the *Gitlow* case, the Court assumed the Fourteenth Amendment protected this right, and in *Stromberg* v. *California,* 283 U. S. 359, a state statute restricting the exercise of free speech was struck down for the first time as violative of the Fourteenth Amendment.

Whatever may be one's views as to the propriety of this judicial function, it is a fact of our constitutional system, and explains why for over 150 years, in spite of revolutionary social, economic and political changes, only eleven constitutional amendments have been necessary, aside from the first ten amendments which were almost contemporaneous to the adoption of the Constitution itself.

The significance of the legislative history of the Fourteenth Amendment is that there can be no doubt that the framers were seeking to secure and to protect the Negro as a full and equal citizen subject only to the same legal disabilities and penalties as the white man. The Court decisions in aid of this fundamental purpose, we submit, compel the conclusion that school segregation, pursuant to state law, is at war with the Amendment's intent. It is too late to say this is a question of local rather than national interest. "In every phase of living the United States must demonstrate that the American way of life exemplifies true democracy by eliminating majority-minority division and distinctions, thus having the same citizenship privileges and obligations for all." [5]

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[5] Special Groups, Special Monograph #10, Selective Service System (page 192), (1953).

II

Appellees' mistaken concept of the decisions of this Court.

In arguing that it is not within the judicial power of this Court to construe the Fourteenth Amendment as abolishing public school segregation, appellees in No. 2 (Br. 56-80), while recognizing that "the function of the Court is to interpret the language under scrutiny in accordance with the understanding of the framers," follow this with the assertion that "the Fourteenth Amendment should be interpreted so as not to include those subjects, and specifically the issue of segregation in public schools, which the framers clearly did not intend the language of the Amendment to embrace." (See also Appellees' Brief in No. 4, pp. 42-46.) Such an argument is no more valid as respects elementary and high school segregation than it was for graduate school segregation.

Appellees in No. 2 apparently recognize this dilemma and seek to escape the obvious by combining *Sweatt* v. *Painter,* 339 U. S. 629 and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 and asserting that neither case disturbed the separate but equal doctrine "for in each case the Court expressly found that the facilities offered to the Negro student was unequal" (Br. p. 65). Similar contention is made by appellees in No. 4 (Br. 58-62). In the *McLaurin* case racial segregation in and of itself and without more was found a denial of equal protection.[6]

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[6] In the McLaurin case the single issue involved, i.e., the validity of state-imposed racial segregation in graduate education; the underlying rationale of the decision, i.e., state-imposed segregation destroys equality of educational benefits; and the unmistakable language of the opinion is more pertinent to the issue in these cases than quotations of statements of general principles of constitutional construction in habeas corpus and tax cases.

In an effort to distinguish the *McLaurin* case, appellees in No. 2 rely on statements in the majority opinion of the Court below to the effect that education at the common school level is compulsory and that the state must therefore take account of the wishes of the parent (Br. 67-68). Compulsory public school education, rather than being a distinguishing factor validating segregation, in fact highlights the unconstitutionality of the laws in question. Here the state requires the Negro parent solely because of his race to subject his children to all of the known harmful incidents of racial segregation under threat of imprisonment.

Appellees in No. 4 seem to rely upon a statement by Senator Trumbull that the right to go to public schools was not considered a civil right at that time (Br. 29, 65, 126). But the *Gaines, Sipuel, McLaurin* and *Sweatt* cases have rendered the significance of this statement meaningless with respect to public education as it exists today.

III

Appellees' Classification Argument

Appellees in No. 2 argue that the laws here involved are not unconstitutional classifications within the rules established by this Court. "Fundamental is the proposition that the legislature may classify the subjects of legislation and treat different classes differently provided there is a real and substantial, as distinguished from a fanciful or arbitrary, basis for the classification and difference in treatment. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389 (1928)" (Br. pp. 70-71).

Both of the cases cited by appellees in fact destroy any basis which they might have had for urging that statutes

of the type here involved are reasonable classifications within the meaning of the Fourteenth Amendment.

> "And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 374.

> "In effect § 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation." *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 402.

This Court in 1916 in deciding another question involving the power of a state to classify stated:

> ". . . Red things may be associated by reason of their redness, with disregard of all other resemblances or

> of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation." *Tanner* v. *Little,* 240 U. S. 369, 382.

Appellees also rely on the cases restricting the right of aliens to hunt and to operate poolrooms (Br. 73-74) in support of the proposition that the racial distinctions in public education are therefore valid. But *Patsone* v. *Pennsylvania,* 232 U. S. 138 and *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392, distinguish themselves. See *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410. Certainly, it is not a valid argument that because a state law prohibiting aliens from operating poolrooms has been held reasonable, that a state may, therefore, impose racial distinctions on American citizens with respect to its public school systems.

Appellees additional argument in No. 2 as to reasonableness of school segregation laws (Br. 75-78) is merely one of custom and tradition (Br. 75-78). This has been dealt with in our brief-in-chief (pp. 42-43).

Appellees seek to justify compulsory racial segregation on the grounds that "segregation is the result of racial feeling" and cannot be legislated out of existence" (Br. 75); that such an "experiment" of non-segregation will not work because the fear of mixed schools hampered the development of public education in the last century (Br. 76); that prohibition of segregation would "work an abolition of virtually the entire school system" and would therefore be "absurd" (Br. 77); and that the people of South Carolina did not want to abandon segregation.

Not only have these arguments been consistently and unsuccessfully urged upon this Court in similar cases in

the past[7] but in the *Sweatt* case respondents in addition relied on testimony and the results of a Statewide Survey of Public Opinion that 76% of the people polled were opposed to "Negroes and whites going to the same universities."[8]

Appellees in No. 4 assert (Br. 66-75) the "reasonableness" of the segregation requirement. They have reviewed the testimony of their witnesses (Br. 69-73) in an effort to support this contention. But we do not find in this testimony the elements which the general classification test under equal protection clause demands of all state legislative and constitutional enactments.

All items of this testimony fall within one of two categories:[9] (1) those referring to long-standing "customs" and "traditions" of Virginians, a consideration already treated by appellants (Br. 42-43), and (2) opinions as to the effects of school desegregation, both generally and upon Negro students particularly.

As to the latter, there is substantial evidence to the contrary.[10] But more fundamentally, the considerations urged cannot resolve the issue. So far as appellees' position is predicated upon the assumption of an adverse community reaction, it is a declaration that constitutional rights characterized by this Court as personal and present can be postponed until the community desires to honor them. Clearly, the Constitution forbids such a subversion of fundamental individual rights to inconsistent local policy.

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[7] Brief for Respondents in Sweatt v. Painter, No. 44, October Term, 1949, pp. 92-98; see also Brief for Attorneys General of Several Southern States filed in the same case.

[8] *Id.* at 231.

[9] The testimony of appellees' witnesses in this connection is summarized in appellants' opening brief upon the original argument (pp. 22-25).

[10] Summarized in appellants' opening brief upon the original argument (pp. 18-22).

And so far as appellees' position is based upon the assumption that desegregation will not benefit Negro students—because, it is said, discriminations will be imposed by individual white students—it fails to distinguish between constitutionally permissible individual activity and constitutionally proscribed governmental activity. See *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 641-642; *Shelley* v. *Kraemer,* 334 U. S. 1, 13, 14.

Nor may it be assumed, as appellees seem to assume, that the state may undertake to determine that appellants' best interest is served by continued school segregation. That suggestion was made in *McKissick* v. *Carmichael,* 187 F. 2d 949 (CA 4th 1951), *cert. denied,* 341 U. S. 951. There the Court of Appeals said at pages 953-954:

> "... the defense seeks in part to avoid the charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the federal courts, however, is clear. We must give first place to the rights of the individual citizens, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies."

The evidence does not establish, nor does it elsewhere appear, that there are any differences between the races of educational significance or that educational segregation subserves any valid educational objective. This is the minimum standard which the equal protection clause prescribes for all legislation (Appellants' Br. 45-47), and the segregation laws involved here fail to meet this test.

IV

Appellees have an erroneous conception of state understanding and contemplation concerning the effect of the 14th Amendment with respect to segregated schools.

1. Appellees in No. 2, motivated by a desire to avert any misleading of this Court by appellants, "have found a considerable number of errors—errors of omission and of commission—in appellants' account of state action regarding the Amendment and segregated schools" (App. B at 4). Appellees in No. 4 have not been less diligent in their editorial efforts. While there are a few paginal errors in our citations which we will amend at the outset, we were unable to discover any errors of substance in our interpretation.

Appellees point out that they are unable to find support for a statement made regarding the education article of the Arkansas Constitution of 1868 in the treatise cited by us as authority (Br. No. 2, App. B at 6-7; Br. No. 4 at 158). Appellants admit that the task of appellees would have been made less onerous had the correct page references been given: it is at pages 245, 250 of the cited treatise. Similarly, appellees unearthed an incorrect paginal reference in appellants' documentation of the North Carolina action (Br. No. 2, App. B at 39; Br. No. 4 at 191-192). The reference in the cited treatise should be to pages 312-313.

2. Much importance is attached by appellees to their conclusion that we have charged the late Confederate states with having "perpetrated a gigantic fraud on the United States" (Br. No. 4 at 154. See Br. No. 2, App. B at 2). Their design is obviously to detract from the significance of the events which transpired in these states. Appellants reply that history undeniably records the events. We

have attempted to dispassionately present the significant action taken in these states, and respectfully submit that the conclusion above is appellees' own.

Appellees in these cases seem to contend that an answer to the Court's inquiry with respect to what the ratifying states understood or contemplated the effect of the Fourteenth Amendment to be rests primarily upon an examination of the action or lack of action which the state legislatures and conventions took to conform their school laws to the new constitutional mandate (Br. No. 2, App. B at 2; Br. No. 4 at 18, 150, 151). We concur in this, but seriously disagree with appellees' conclusion, predicated upon such evidence, that no legislature which ratified the Amendment contemplated or understood that it would prohibit segregation in public schools (Br. No. 2 at 48; Br. No. 4 at 26, 209-210). To us, such a conclusion is on its face absurd. And, to create support for this conclusion, appellees have substituted as bases therefor accounts of the action of state legislative bodies which are deceptive in stress and content.

3a. First, appellees charge that we have mistakenly characterized the education article of the Alabama Constitution of 1867 as an "anti-segregation article" (Br. No. 2, App. B at 5). Appellants submit that the Alabama education article was borrowed from the Iowa education article. Compare Ala. Const., Art. XI (1867) with Iowa Const., Art. IX (1857). And compare particularly Ala. Const., Art. XI § 6 (1867) with Iowa Const., Art. IX § 12 (1857). In 1857, the Iowa Supreme Court struck down a statute which irrecusably compelled segregated schools on the ground that Article IX, section 12 of the Constitution prohibited any distinction being made between white and colored children. *District Township* v. *City of Dubuque,* 7 Iowa 262 (1858). When legislation is adopted from another state the construction placed upon such legislation by the highest court of the state from which it was taken is treated as

incorporated therein so as to govern its interpretation. *Marlin* v. *Lewallen*, 276 U. S. 58, 62 and the cases there cited. See *Walden* v. *Gratz*, 1 Wheat. 292; *Blair* v. *Cantey*, 29 S. C. L. (2 Spears) 34; *Doswell* v. *Buchanan*, 3 Leigh (Va.) 365. Thus, appellants deemed "anti-segregation article" an appropriate characterization of Article XI, section 6 of the Alabama Constitution of 1867.

b. Appellees imply that during the time of reconstruction Florida did not provide for a free public school system for white students although public funds had been appropriated for the education of Negroes (Br. No. 2, App. B at 11; Br. No. 4 at 162, 163). There are two mis-statements here. Florida did maintain a system of public schools for white students at the time;[11] and Negroes, already taxed for the support of these schools, had an additional tax imposed upon them for the specific support of their own schools.[12] Furthermore, appellees' assertion that Florida enforced segregated schools during the period when state law omitted any sanction for segregated schools (1868-1872) and when such schools were expressly forbidden (1873-1887) is unsupported except by what appears to be an unofficial statement of the Attorney General of Florida (Br. No. 4 at 163-164).

c. Again, speaking of the development of public education under the provisions of the Louisiana Constitution of 1868 which forbade segregated schools, appellees state that no effective school system was established while this constitution was in effect (Br. No. 2, App. B at 23; Br. No. 4 at 174). Appellants submit that authorities equally as

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[11] Fla. Laws 1866, c. 1486. Observe this was the same legislature which provided for colored schools. See fn. 4, *infra*.

[12] Fla. Laws 1866, c. 1475. See CONG. GLOBE, 39th Cong., 1st Sess., App. 217 (1866). (Remarks of Senator Howe)

reliable as those cited by appellees positively contradict this statement.[13]

d. Appellees' treatment of Nebraska's understanding (Br. No. 2, App. B at 32-33; Br. No. 4 at 182-183), ignores the fact that Nebraska entered the Union pursuant to the "fundamental and perpetual condition" maintained in the Enabling Act of February of 1867 that there shall be no abridgement or denial of the exercise of the elective franchise, *or any other right,* to any person by reason of race or color. . . ." (emphasis supplied). 14 Stat. 377. Pursuant to this requirement, Nebraska effectively repealed the laws which formerly had apparently excluded Negroes from public schools and neither by statute nor in practice sanctioned racial segregation in public schools subsequent to its ratification of the Amendment. The legal significance of this flows from Nebraska's apparent understanding that any restriction upon Negroes' full enjoyment of a public education, i.e., by exclusion or mandatory segregation or permissive segregation, would be a denial of a right by reason of race or color and violative of the Fourteenth Amendment which they ratified in conformity with the fundamental condition. Furthermore, the imposition of this condition did not exceed congressional authority. *Bolln* v. *Nebraska,* 176 U. S. 83, 87. It was apparently justified as a requirement which would put Nebraska on an equal footing with the original states and cannot be viewed as solely referrable to Nebraska. See *Coyle* v. *Smith,* 221 U. S. 569; *Permoli* v. *New Orleans,* 3 How. 589.

e. To imply that the North Carolina Constitution of 1868 provided for segregation in public schools, as appellees do (Br. No. 2, App. B at 39; Br. No. 4 at 188) is a misleading half-truth. The education articles specifically

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[13] 2 CONG. REC., App. 478 (1874). (Statement of Rep. Darrall of Louisiana). See remarks of Sen. Harris of Louisiana. CONG. GLOBE, 41st Cong., 3rd Sess. 1055.

refrained from any intimation of a racial distinction in the establishment of public schools and contains no authorization therefor.[14] Appellees similarly report only part of the story when they asert that, within two weeks of the legislature's ratification of the Amendment, both houses adopted a resolution which directed the joint assembly to provide a system of free schools "but that the races should be segregated" (Br. No. 2, App. B at 40; Br. No. 4 at 189). Diligent research by a well known authority on public schools in the state reveals that such a resolution was adopted in the lower chamber but that the upper chamber deleted the segregation proviso and concurred only in so much of the resolution as instructed the board of education to prepare and report a plan for the organization and maintenance of public schools.[15]

f. In Pennsylvania, appellees report that subsequent to the state's ratification of the Fourteenth Amendment, segregation was upheld when attacked on constitutional grounds in 1873 (Br. No. 2, App. B at 44-45; Br. No. 4 at 194). Appellees' authority for this statement is *Commonwealth* v. *Williamson,* 30 Leg. Int. 406 (1873). It is our understanding that this case arose when the school directors of Wilkes-Barre united two districts, each having less than twenty Negro children, and established a single school for Negroes. The Court held that this was a violation of the law of 1854 which required separate schools only where twenty or more colored pupils were available in a school district.

g. Appellees admit that the South Carolina legislature extended the prohibition against segregation in public schools to preclude segregation in the University of South

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[14] See N. C. CONST., Art. IX, §§ 1-17 (1868).

[15] NOBLE, A HISTORY OF THE PUBLIC SCHOOLS IN NORTH CAROLINA 312-313 (1930).

Carolina[16] and that the state superintendent of schools sought to enforce total non-segregation at the State Institution for the Deaf, Dumb and Blind.[17] Whether these actions contradicted appellees' conclusion that there was "no real effort to require amalgamated schools" (Br. No. 4 at 199; Br. No. 2, App. C *passim*) may not be decisive. But one cannot review the debates of the Constitutional Convention of 1868 and concur in appellees' conclusion that the framers of that instrument did not think that the Fourteenth Amendment prohibited mandatory segregated schools.[18] Apposite to appellees' inference that racially integrated schools were the exception in South Carolina, appellants here take the position that voluntary segregation on the part of Negro pupils is not inconsistent with absolute prohibition of any compulsory racial separation in public schools.

h. Finally, appellees so present their evidence with respect to California (Br. No. 2, App. B at 7-9; Br. No. 4 at 159-160), Illinois (Br. No. 2, App. B at 15-16; Br. No. 4 at 165-167), Indiana (Br. No. 2, App. B at 16-19; Br. No. 4 at 167-170), Ohio (Br. No. 2, App. B at 41-42; Br. No. 4 at 190-192) and Pennsylvania (Br. No. 2, App. B at 43-45; Br. No. 4 at 192-194) that they obscure the fact that the post Amendment development of legislation in these states unequivocally demonstrates a trend away from racial exclusion and separation by force of law. It is submitted that this conclusion is inevitable when comparison is made with appellants' effort to more fully present in chronologi-

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[16] S. C. Laws No. 125 (1869); S. C. Acts & Res. 1868-69, pp. 203-204.

[17] Fifth Annual Rep. State Supt. Educ.—1873, p. 15. See Simpkins and Woody, South Carolina During Reconstruction 439-440 (1932).

[18] Proceedings of the Constitutional Convention, etc. 100-101, 264-272, 654-656, 685-708, 899-901.

cal sequence all the school legislation enacted in these states during the pertinent period.

4. In sum, we submit that appellees' treatment of the state ratification aspect of Question One contains serious omissions and unfortunate distortions of subject matter. In contrast we invite the Court's attention to the treatment of this question in the brief of the United States as *Amicus Curiae* on reargument.

For the convenience of the Court we have set forth in Appendix B, a graphic summary highlighting all the materials we could find. We submit that the available evidence amply supports our original conclusion that the states which ratified the Fourteenth Amendment understood and contemplated that it prohibited segregated schools.

V

Local customs, mores and prejudices cannot prevail against the Constitution of the United States.

Despite the technical argument of appellees on the intent of the framers of the Fourteenth Amendment, of the 39th Congress and the state legislatures, the burden of their argument begins and ends with the proposition that their police power, their mores and customs, and alleged racial prejudices are so paramount as to suspend any necessity for application of the general test of reasonableness to their school segregation laws and to justify non-compliance with the admitted intent and purpose of the Fourteenth Amendment—to destroy all state imposed class distinctions. The truth of the matter is that this is an attempt to place local mores and customs above the high equalitarian principles of our Government as set forth in our Constitution and particularly the Fourteenth Amendment.

This entire contention is tantamount to saying that the vindication and enjoyment of constitutional rights recognized by this Court as present and personal can be postponed whenever such postponement is claimed to be socially desirable. We need go no further than *McLaurin* v. *Oklahoma State Regents, supra,* to learn that this exaltation of local policy over fundamental individual rights declared in the Federal Constitution is not tolerable in the United States.

And there are striking and persuasive analogies in other situations where local policy has been urged to minimize or override individual constitutional rights. More than a hundred years ago South Carolina attempted to prevent the free movement of Negro seamen into and about its seaport cities on the ground that domestic order and tranquility required their exclusion. Justice Johnson,[19] sitting on Circuit in South Carolina in 1823 did not hesitate to overrule this defense and condemn the restriction as unconstitutional. *Elkinson* v. *Delisseline,* 8 Fed. Cas. 493 (C. C. S. C. 1823). He disposed of this argument at page 496 as follows:

> "But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the federal Constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand. . . ."

The present apprehensions of South Carolina and Virginia have no better standing to impede appellants' enjoyment of their constitutional right to be relieved of the educational

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[19] See: Mr. Justice William Johnson and the Constitution, 57 Harv. L. Rev. 328, 338.

disadvantages which those states have imposed upon them solely because of their color.

The realistic answer to the contentions of appellees is that, despite the dire predictions of the attorney generals of 12 southern states in the *Sweatt* case, in less than two years after this Court decision in the *Sweatt* and *McLaurin* cases over 1500 Negro students had been enrolled in formerly all white state, graduate and professional schools in twelve of the southern states.[20] It is perhaps more significant that "[p]rivate institutions in eight states (Georgia, Kentucky, Louisiana, Texas, Maryland, West Virginia, Virginia and Missouri) and the District of Columbia have revised their admission policies and admitted Negro students. In an institution in one state there were 251 Negro students registered and five Negro teachers on the faculty. "Editorial Comment: The Courts and Racial Integration in Education," 21 J. Negro Ed. 3 (1952).

Even closer is the fact that in the companion case of *Gebhart* v. *Belton,* No. 10, Negro students have been admitted to heretofore all white schools without untoward incident. A recent survey by one of the witnesses for respondents in the *Gebhart* case reveals that:[21]

> "Summarizing these observations, one can say that the abolition of segregation removes a handicap that interferes with the self-realization and social adjustment of the child. The much-predicted ill effects of such a step did not eventuate. As one parent put it: 'If they'd leave it to the children themselves it would be alright. It is really only what the older people say that makes it harder for children to get along with other children.' "

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[20] 21 J. Negro Educ. 321 (1952).

[21] WERTHAM, *Psychiatric Observations on Abolition of School Segregation,* 26 J. Ed. Soc. 336 (1953).

Local mores and customs and local political expediencies not only should not prevail but cannot exist in the presence of the overriding national and international need for the fullest reserve of manpower in time of war. A recent report issued this year by the Selective Service System points up in much detail the experience of our Government in trying to overcome the handicap to our national war effort as a result of segregation and other modes of discrimination in public education in the South.

On the question of education, this report finds that:

> "The question as to whether or not one community, county or State provides adequate educational opportunities is a matter of concern for all of the citizens in all of the States. Communities, counties and States with high educational standards are compelled to absorb the manpower procurement deficiencies of States with poor educational programs. In the final analysis, the former actually pay in lives for the educational deficiencies of the latter. The safety of the Nation depends in a large measure upon citizens in every State and section having a reasonable minimum of education.
>
> "In consequence, the following statement has significance for the extent to which low educational standards are a national liability in time of war:
>
> Educational deficiency, or failure to pass Army intelligence tests primarily because of educational deficiency, has deprived our armed forces of more physically fit men than have the operations of the enemy. Total American war casualties as of the last official announcement were 201,454; total rejected for failure to pass Army intelligence tests primarily because of educational deficiency who have no other disqualifying defect have been about 240,000." [22]

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[22] Special Groups, Special Monograph No. 10, Selective Service System, p. 166 (1953).

This report recognizes as one of the involved problems standing between our Government and full and complete mobolization in the time of future emergency.

> "Educational levels and backgrounds of minority registrants plagued Selective Service, the armed forces and industry alike, with no adequate solution resulting. Modern mechanized civilization requires a minimum basic educational level which often had not been attained by the racial minority registrant.
>
> Here again his cultural background contributed heavily. Substandard schools, equally poor physical facilities, teachers with inadequate preparation and a lower per capita expenditure of school funds, all common throughout the South, were foremost among the factors creating this condition.
>
> When these are coupled with morale factors, which are the inescapable concomitants of racial discrimination and segregation, the obvious result placed the Negro registrant at a marked disadvantage even before his preinduction examination. He was discriminated against in the civilian life he was soon to leave, and according to reports of prior inductees, he was to meet new and greater problems in the armed forces. Furthermore, industry presented the same 'closed door, no opportunity' problem to both those with skills and those with aptitudes qualifying them for apprentice training in essential war work." [23]

The same monograph includes among its recommendations the following:

> "In the event of war or otherwise, all American citizens must be treated alike in the operation of Selective Service regardless of national origin.
>
> It ought to be stressed that the maximum use of manpower in a national emergency can best be obtained through integration. A method which requires the use of men on the basis of racial separa-

[23] *Id.* at page 189.

> tion tends to defeat its own purposes and racial quotas in industry, agriculture and the armed forces are difficult of justification.
>
> "There needs to be greater recognition of the 'physical, educational and social' problems encountered during the operation of the 1940 Act with reference to registrants of minority racial groups and the development of a long-range planning program that will ultimately resolve these ills and assist such minorities to have the same opportunities as other citizens. Remedial measures properly applied without delay should show benefits in the increased size of the total manpower pool and net additional manpower which may be badly needed in the event of another major war." [24]

The gravamen of appellees' argument is that as a matter of policy, legislative or otherwise, the people of South Carolina and Virginia desire that all Negroes be excluded from the white schools and *vice versa*. They also assert that the removal of racial segregation in public education will not be acceptable to the people of South Carolina and Virginia. The individual rights of the appellants herein cannot be made dependent upon this reasoning. This Court stated in the *McLaurin* case:

> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference —a Constitutional difference— between the restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley* v. *Kraemer*, 334 U. S. 1, 13, 14, 92 L. ed. 1161, 1180, 1181, 68 S. Ct. 836, 3 ALR 2d 441 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the

[24] *Id.* at 191.

opportunity to secure acceptance by his fellow students on his own merits."

It bears repeating that appellants in these cases are only seeking to remove the barrier of state-imposed racial segregation in the educational opportunities and benefits offered by these states.

CONCLUSION

We respectfully submit that, for the reasons stated herein and in appellants' other briefs, the decrees of the District Courts should be reversed.

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Appendix A

Appellees put great stress on the action of the 39th Congress in regard to schools in the District of Columbia: "The Establishment of Separate Schools for Negroes in the District of Columbia Before the End of the Civil War" (Br. No. 2, App. A, at 2, 3); "Attempts to Require Mixed Schools in the District of Columbia" (Br. No. 2, 52-55); "The Early District of Columbia Schools" (Br. No. 4, 86-87). The action of Congress in regard to schools in the District of Columbia is not material to a determination of the intent of Congress as regards the Fourteenth Amendment. The 39th Congress considered the District of Columbia school situation perfunctorily, as routine business, with little debate and practically no discussion of note.[1] There is nothing in any of the debates on these measures to indicate that Congress contemplated or understood that the Fourteenth Amendment did not prohibit segregated schools.[2]

Appellees argue that the debates on the Freedmen's Bureau Bill do not support a conclusion that the civil rights referred to in the Bill included the right to attend segregated schools (Br. No. 2, App. A, at 3-11; Br. No. 4, 87-90).

It is clear that several members of the Congress opposing the Freedmen's Bureau thought that the bill would be used to promote mixed schools and that the Bureau was already doing this. Representative John L. Dawson of Pennsylvania, one of the opponents to the bill, made this clear in his statement on January 31, 1866: ". . . They [the Radicals] hug to their bosoms the phantom of Negro

[1] See also CONG. GLOBE, 37th Cong., 2d Sess. 1544, 2037, 2157 (1862); CONG. GLOBE, 38th Cong., 1st Sess. 2814, 3126 (1864).

[2] For a complete discussion of this point see Brief for Petitioners in Bolling v. Sharpe, et al., #8, pp. 23-46.

equality. . . . They hold that the black and white races are equal. This they maintain involves and demands . . . that Negroes should be received on an equality in white families . . . their children are to attend the same schools with white children, and to sit side by side with them. . . .'' [3]

Appellees in No. 4 (Br. 91) make the assertion that Senator Trumbull of Illinois pointed out that the Civil Rights Act of 1866 included only these civil rights specifically enumerated. To the contrary, Senator Trumbull said about the bill: ''Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.'' [4]

Appellees in No. 4 (Br. 92) seek to limit the scope of the Civil Rights Act of 1866 (both the bill as introduced and the bill as amended). Then they argue that the scope of the Fourteenth was limited by the alleged scope of the Civil Rights Act. They are wrong on both points. As to the Civil Rights Bill they ignore the following:

The comments of Senator Johnson as to the effect of the bill on miscegenation: [5]

> ''. . . What is to be its application? There is not a State in which these Negroes are to be found where slavery existed until recently, and I am not sure that there is not the same legislation in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; and they do it not for the purpose of denying any right to the black man or to the white man, but for the purpose of preserving the harmony and peace

[3] CONG. GLOBE, 39th Cong., 1st Sess. 541 (1866).

[4] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

[5] *Id.* at 505.

> of society . . . Do you not repeal all that legislation by this bill? . . . Is it not clear that all such legislation will be repealed?''
>
> * * *
>
> [Johnson then illustrates this conflict in the anti-miscegenation law of Maryland and the Federal law and how the state is denied its rights.]
>
> ''. . . White and black are considered together, put in a mass, and the one is entitled to enter into every contract that the other is entitled to enter into.''

The comments of Senator Davis with respect to the criminal codes: [6]

> ''. . . Here the honorable Senator in one short bill breaks down all the domestic systems of law that prevail in all the States. . . . To the extent that a negro is by them subjected to a severer punishment than a white man, this short bill repeals all the penal laws of the States. . . .''

Senator Hendricks of Indiana on the effects of the bill on the entrance of free Negroes: [7]

> ''. . . In the State of Indiana we do not recognize the civil equality of the races. . . . The policy of the State was to prevent the further immigration of colored people into the State after 1852, and as a means of preventing that we denied to colored people who might come into the State after that date the right to acquire real estate. . . . Is this law to have the force of vesting in the colored people who came into that State since 1852 a good sufficient title to land when the constitution and the law of the State denied that right?''

Senator Morrill's comment on the revolutionary character of the Civil Rights Bill: [8]

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[6] *Id.* at 598.

[7] *Id.* at 602.

[8] *Id.* at 570, 571.

". . . this amendment to which I address myself is important in another respect. It marks an epoch in the history of this country, and from this time forward the legislation takes a fresh and a new departure. . . . I hail it, therefore, as a declaration which typifies a grand fundamental change in the politics of the country, and which change justifies the declaration now.

". . . That the measure [S. 61] is not ordinary is most clear. There is no parallel . . . for it in the history of this country; there is no parallel for it in the history of any country. No nation from the foundation of government has ever undertaken to make a legislative declaration so broad. Why? Because no nation hitherto has ever cherished a liberty so universal. The ancient republics were all exceptional in their liberty; they all had excepted classes, subjected classes, which were not the subject of government; and therefore they could not so legislate. That it is extraordinary and without a parallel in the history of this Government or of any other does not affect the character of the declaration itself.

"The Senator from Kentucky tells us that the proposition is revolutionary, and he thinks that is an objection. I freely concede that it is revolutionary. I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grand results of four years of war? Are we not in the midst of a civil and political revolution which has changed the fundamental principles of our Government in some respects?

* * *

". . . I deny that [our] Government was organized in the interest of any race or color, and there is neither 'race' nor 'color' in our history politically or civilly. Is there any 'color' or 'race' in the Declaration of Independence, allow me to ask? 'All men are created equal' excludes the idea of race or color or caste. There never was in the history of this country

> any other distinction than that of condition, and it was all founded on condition."

* * *

The sweeping character of the bill was made eminently clear by Senator Trumbull when he stated: ". . . The very object of the bill is to break down all discrimination between black men and white men. . . ."[9]

Senator Cowan, in commenting upon the earlier remarks by Senator Hendricks of Indiana, said:[10]

* * *

> "But this is not a bill simply for the abolition of slave codes. This is a bill for the abolition of all laws in the States which create distinctions between black men and white ones.
>
> * * *
>
> "This is a proposition to repeal by act of Congress all State laws, all State legislation, which in any way create distinctions between black men and white man insofar as their civil rights and immunities extend. It is not to repeal legislation in regard to slaves. . . . I hold—educated in the school in which I have been educated, and it was not that of the strictest constructionists, nor was it in that latitudinarian school which can extract anything from . . . the Constitution, but it was in the fair construction school. . . . This bill pretends to repeal those laws, to set them at naught; and it pretends moreover to go further, and to make the State officers who attempt to execute those laws criminals. . . ."

* * *

Senator Trumbull again rose to speak upon the bill and made it plain that its object was to repeal all state legisla-

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[9] CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

[10] *Id.* at 603.

tion which created any distinction between black men and white men as to their civil rights and immunities.[11]

> ". . . [The Senator from Kentucky] says that when slavery was abolished the slave codes in connection with it were abolished, and that he will advise the people of Kentucky to extend the same civil rights to the black population that the white population have. He believes that they are entitled to them. Now, sir, that is all that is provided for by the first section of this bill. . . .
>
> "Then what is our duty? Agreeing as I do with him that all slave codes fall with slavery, that it is the duty of the States to wipe out all those laws which discriminate against persons who have been slaves, yet if they will not do it, and Congress has authority to do it under the constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution? That is all we propose to do.
>
> ". . . There is a positive duty upon us to pass such a law if we find discriminations still adhered to in the States where slavery has recently existed."

* * *

Indeed, it is important to remember that if the purpose of the Civil Rights Act was, as Trumbull indicated, to destroy the Black Codes, then it follows necessarily that this Act included more than those rights expressly enumerated.

Appellees in No. 4 cannot gain any support from Senator Wilson's statement, as to the scope of the bill on the basis of the fact that he was speaking as Chairman of the Judiciary Committee and the floor leader (Br. 92, 93). The bill was recommitted against Wilson's wishes.[12]

It was amended because, as Wilson said, the original version had been taken by some as warranting "a latitudi-

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[11] *Id.* at 605.

[12] *Id.* at 1296.

narian construction not intended" (Congressional Globe, 39th Cong., 1st Session, p. 1366).

Appellees in No. 2 (Br. 13) attack the statement in our brief-in-chief that the Civil Rights Act as originally drafted was so broad in scope that it was believed to have the effect of destroying entirely all state legislation which distinguished or classified on account of race, including school segregation laws. But Senator Garrett Davis, speaking at the time of the Johnson veto, made the following statement:[13]

> "In many if not most of the States, there are discriminations in relation to some of those important concerns against the negro race, made by their constitutions and statutes; and this act abrogates not only those constitutions and laws to that extent, but makes their execution by the State officers appointed for that purpose, a high misdemeanor, and punishes them heavily by fine and imprisonment."
>
> * * *
>
> "But this measure proscribes all discrimination against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation or custom,' as well as by 'law or statute'. . . .
>
> "But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes [on ships, steamboats, in hotels, churches, railroads, streetcars.]. . . . All these discriminations in the entire society of the United States are established by ordinances, regulation and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction, and bring the two races upon the same great plane of equality. . . ."

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[13] *Id.*, App. 182, 183.

Attention is also directed to Senator Davis' further remarks on March 15, 1866, on the completed bill:[14]

> "... We have laws in the State of Kentucky that discriminate between the punishment of the whites and blacks. Those laws we expect to continue in operation, and we expect to execute them in the future. What power has Congress to pass a law to harmonize the criminal and penal law of the State of Kentucky, and command and coerce that the same punishments which are inflicted upon her white citizens, and none other, shall be administered to her negro population? What authority has Congress to command the government and the people of Kentucky, or any State to confer on the negro portion of its population the same civil rights with which the laws invest white citizens? ... It [this bill] assumes the principle, the general power that would as well enable Congress to occupy both of those vast fields of State and domestic legislation which regulate the civil rights, and the pains, penalties, and punishments inflicted upon the people of the respective States which were not delegated to the Government of the United States, but were reserved to the States respectively and to the people, as to them the most important and interesting portion of their original sovereignty."

Appellees in No. 4 criticize the use of a speech by Mr. Bingham of Ohio as "an example of the misleading character of the apparent scholarship of appellants" (Br. 99). Our "implication" that Bingham approved of state constitutions banning segregated schools is criticized as "erroneous" and "the impression left" is characterized as "materially misleading" (*Ibid.*).

If the context of Mr. Bingham's speech is examined, the original statement objected to by appellees will be found to be amply supported by the debates in Congress. On

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[14] *Id.* at 1415.

May 13, 1868, Mr. Beck of Kentucky, speaking against H. R. 1058, a bill to readmit five southern states, objected to the new Constitution of South Carolina in particular which provided, he said "that the white race shall never have any public school exclusively for themselves. . . ." [15] The following day, Mr. Pruyor of New York reminded the House of Beck's speech regarding "several most objectionable provisions [in the new state constitutions], especially as to the compulsory education of whites and blacks together." [16] Mr. Bingham, speaking after him, defended the same state constitutions in a ringing declaration that they: [17]

> ". . . in accordance with the spirit and letter of the Constitution of the United States as it stands amended . . . secure equal political and civil rights and equal privileges to all citizens of the United States. . . . Time was in this Republic when that was Democracy."

Appellees in No. 4 refer to Bingham's answer to Hale's opposition to the proposed Amendment as an "elaborate speech . . . but no great meaning can be derived from it." And refer to Bingham's reply to Hale as a modification of his original answer (Br. 101). No such implication is warranted, as can be seen from the colloquy referred to below: [18]

Bingham

> ". . . They [the Southern people] will, I trust, though it may not be without additional sacrifice, correct all errors, perfect their Constitutions enforce by just and equal laws all its provisions, and so fortify and strengthen the Republic that it will stand unmoved until empires and nations perish. . . ."

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[15] CONG. GLOBE, 40th Cong., 2d Sess. 2447 (1868).

[16] *Id.* at 2461.

[17] *Id.* at 2462.

[18] CONG. GLOBE, 39th Cong., 1st Sess. 1094 *et seq.*

"I urge the amendment for the enforcement of these essential provisions of your Constitution, divine in their justice, sublime in their humanity, which declare that all men are equal in the rights of life and liberty before the Majesty of American law. . . . Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand in his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant shall be deprived of life or liberty or property without due process of law—law in the highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right. . . ."

Hale

". . . My question was whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty and personal property."

Bingham

"It certainly does this; it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons."

Hotchkiss

". . . As I understand it, his [Bingham's] object in offering this resolution and proposing that this amendment is to provide that no State shall discriminate between its citizens and give a class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it today; but as I do not regard it as permanently securing those rights, I shall vote to postpone its consideration until there can be a further conference between the friends of the measure, and we can devise some means whereby we shall secure those rights beyond a question. . . ."

* * *

> "Now, if the gentleman's object is, as I have no doubt it is, to provide against discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, the right should be incorporated into the Constitution. It should be a constitutional right that cannot be wrested from any class of citizens or from the citizens of any State by mere legislation. But this amendment offers to leave it to the caprice of Congress. . . . I want them [the privileges] secured by a constitutional amendment that legislatures cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him. . . ."
>
> * * *
>
> "His amendment is not as strong as the Constitution now is. . . . The Constitution now gives equal rights to a certain extent to all citizens. This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens, and let that amendment stand as an organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here today, and the next Congress may wipe them out. What is your guarantee then?"

Appellees in No. 4 (Br. 102-103) state that in April 21, 1866, a "new plan" came before the Committee. This would seem to imply that H. R. 63, the original Bingham version of Section 1, had no relation to that finally adopted. Actually, H. R. 63 contained two of the three phrases contained in the final version ("privileges and immunities" and "equal protection"). It differed from the final Section 1 in three particulars: The negative form of the statement (which precluded the necessity for congressional action) [19] the "due process" clause, and the addition of the first

[19] Rep. Hotchkiss had pointed out to Bingham the danger of leaving constitutional rights at the mercy of "mere legislation." CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

sentence defining citizenship. The Owen version was amended out of existence in favor of Bingham's proposals, which consistently built upon the foundation of H. R. 63.[20]

Appellees refer to the report made by the Joint Committee on Reconstruction. Their treatment of this report leaves the impression it was made during the interval between the time the proposed amendment was recommitted to the Joint Committee and the introduction of the amendment in final form to Congress on April 30, 1866. The implication that the report was made to Congress between these two events is misleading (Br. No. 4 at 103-104). The report cited by appellees was submitted on June 20, 1866 and did not comprise a careful explanation of the proposed amendment by the Committee; on the contrary, it was a general statement of the Committee's views on the problem of readmission and only obliquely made any statement which could be interpreted as referring to the proposed Constitutional amendment. Schools were "mentioned in neither", appellees assert, overlooking the fact that among other matters not mentioned were: the right to contract; the right to sue, be parties, and give evidence; the right to inherit, purchase, lease, sell, hold and convey real and personal property—in fact, virtually all the rights listed in the Civil Rights Act of 1866, despite Appellees' assertion that "The majority were concerned primarily in securing civil rights for the Negroes, apparently the civil rights supposedly protected in the Civil Rights Act" (Br. No. 4 at 103).

The only reports of the Committee explanatory of the final draft of the Amendment are found in the speeches which Senator Howard [21] and Rep. Stevens [22] made when they introduced this draft in their respective chambers.

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[20] KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 85-107, passim.

[21] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

[22] *Id.* at 2459.

Representative Stevens made it clear that the proposed amendment was broad enough to declare that "Whatever law protects the white man shall afford 'equal protection' to the black man" and that the amendment was made necessary by the "oppressive codes" (Black Codes) and that "Unless the Constitution should restrain them, these states will all keep up this discrimination and crush to death the hated freedmen." [23]

In a further effort to limit the scope of the Fourteenth Amendment appellees cite a portion of one of Senator Howard's statements (Br. No. 4 at 109). It is understandable why appellees neglected to include the first part of the sentence they quote. The completed sentence with the deleted portion in italics, follows: [24]

> "*This* [the last two clauses of Section 1 of the Fourteenth Amendment] *abolishes all class legislation in the States and* does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."

Appellees in No. 4 confuse suffrage and nonsegregated schools, erroneously suggesting that since Negro suffrage was not made mandatory, school segregation was not touched by the 14th Amendment (Br. 104). This obvious *non sequitur* is even more difficult to understand in view of Senator Howard's speech distinguishing political from civil rights. It is made clear from this speech that the right to vote was not looked upon as relevant to the full and complete enjoyment of civil rights.[25]

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[23] *Ibid.*

[24] *Id.* at 2766.

[25] *Id.* at 2765.

Referring to appellees' effort in case No. 4 (Br. 104) to show that Stevens regarded the Fourteenth Amendment as a mere incorporation of the Civil Rights Act, attention is directed to Mr. Stevens' statement: [26]

> "I can hardly believe that any person can be found who will not admit that every one of these provisions [in the first section] is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal protection' to the black man."

It is true that most thought that the main purpose of Section 1 was to put the Civil Rights Bill in the Constitution and beyond the reach of future hostile Congresses. But some felt as did Raymond that the Amendment "secures an equality of rights among all the citizens of the United States." [27] And see Rogers' charge as to the sweeping character of the Bill.[28]

> "What are the privileges and immunities? Why sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever

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[26] *Id.* at 2459.

[27] *Id.* at 2502.

[28] *Id.* at 2538.

> becomes a part of the fundamental law of the land it will prevent any state from refusing to allow anything to anybody embraced under the term of privileges and immunities. If a negro is refused the right to be a juror, that will take away from him his privileges and immunities as a citizen of the United States, and the Federal government will step in and interfere. . . . It will result in a revolution worse than that through which we have just passed."

It is clear why appellees in No. 4 seek to disparage Senator Bingham's speech (Br. 107). It is because he makes clear the broad meaning of the Fourteenth Amendment in no uncertain terms.[29]

> "The necessity for the first section of this amendment to the constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution, to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge

[29] *Id.* at 2542.

> the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."

The quote of Senator Howard which appellees in No. 4 utilize is most misleading (Br. 109). Howard was there attempting to distinguish the right to vote as the sole class of rights not conferred by the Fourteenth Amendment.[30] It is true that he did not speak specifically of schools since he was dealing with constitutional amendments and guarantees and spoke in general terms.

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[30] *Id.* at 2764.

STATUTES AND PRACTICES RELATING TO THE EDUCATION OF THE RACES PRECEDIN(

CALIFORNIA, CONNECTICUT, DELAWARE A

State	State Policy as of June 16, 1866	State Policy as of July 28, 1868	State Policy Effective Immediately Follo Adoption of the 14th Amendment
CALIFORNIA Statutes	Whites admitted to all schools; non-whites only by majority vote of trustees and parents; separate schools for non-whites possible by request (1).	No change in provisions with respect to the education of the races.	Whites admitted to all schools; Negro and Indian vided for in separate schools upon request; Mo cluded (6).
Practices	Prior to 1860 non-whites generally denied access to public schools (2); though excluded neither by constitution nor early school laws (3); state responsibility for education of non-whites recognized by 1860 (4).	One-third of Negro student population admitted into schools with whites; popular opinion still supported segregation (5).	No material change in practices.
CONNECTICUT Statutes	System of public schools established; no reference to race (1).	No change in provisions with respect to the education of the races.	No person to be denied admittance to or instruction school on account of race or color (4). [N. B. Amen of 1868 re "separate but equal" schools lost in legislat
Practices	Public schools never restricted; teacher discrimination in classrooms resulted in establishment of segregated schools by request of Negro parents (2).	No material change in general state practice; Hartford's separate school for Negroes recognized by ordinance in 1867 (3).	Desegregation of schools.
DELAWARE Statutes	District schools free to white children provided; Negroes not taxed for support of these schools (1).	No change in provisions with respect to the races.	No change in provisions with respect to the races.
Practices	A few Negro schools established through private effort (2).	Delaware Ass'n for the Moral Improvement and Education of the Colored People established in 1867; received interracial support for the maintenance of schools for Negro children of the state (3).	No material change in practices.
ILLINOIS Statutes	Public school system provided; white children enumerated; Negro school tax refunded (1).	No change in provisions with respect to the education of the races.	General Assembly to provide free schools for all child vious school laws repealed; free schools for all child legislature imposed no restrictions on Negro students Constitutional convention tabled resolutions and amen re separate schools (6).]
Practices	Negro children generally denied education except in cities and large towns; integration in Chicago schools reported to work successfully (2).	State responsibility for education of Negroes not recognized; State Teachers' Ass'n appealed for repeal of discriminatory laws; state superintendent appealed for state-supported education for Negroes (3).	State superintendent reports segregation, exclusion, trary to law in many instances (7).

RELATING TO THE EDUCATION OF THE RACES PRECEDING AND FOLLOWING ADOPTION OF THE 14TH AMENDMENT

CALIFORNIA, CONNECTICUT, DELAWARE AND ILLINOIS

Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment	Subsequent Educational Developments to 1885	References
ıs with respect to the education of the races.	Whites admitted to all schools; Negro and Indian children provided for in separate schools upon request; Mongolians excluded (6).	Compulsory attendance in schools required (7); Negroes admitted to white schools where no separate schools provided (8); segregation of Negroes prohibited in 1880 (9).	1. Stats. 1866, p. 363. 2. Cloud, Education in California 44 (1952). 3. Const., Art. IX (1849); Stats. 1851, c. 126; Stats. 1852, c. LIII: Stats. 1855, c. CLXXXV.
tudent population admitted into schools with ı still supported segregation (5).	No material change in practices.	Governor (1871) appealed for abolition of segregated schools, relating issue to 14th Amendment (10); segregation in schools abolished in 1880 (11).	4. Stats. 1860, c. CCCXXIX, § 8. 5. 2 App. Journals of Senate and Assembly, 17th Sess., pp. 9, 22 [Second Biennial Rep. Supt. Pub. Instr. (1866-67).] 6. Stats. 1869-70, c. DLVI, § 52, 56, 57. 7. Stats. 1873-74, c. DXVI, § 1. 8. Acts Amend. 1873-74 § 26, p. 97. 9. Acts Amend. 1880, c. 44, § 62 [Cal. Pol. Code, § 1662 (Deering, 1885)]. 10. Governor Newton Booth, Inaugural Address 10-11 (1871). 11. See n. 9 *supra*.
ıs with respect to the education of the races.	No person to be denied admittance to or instruction in any public school on account of race or color (4). [N. B. Amendments to law of 1868 re "separate but equal" schools lost in legislature (5).]	Compulsory attendance required in schools in 1872; no reference to race (6).	1. Acts 1866, c. CII, § 1. 2. U. S. Dept. Educ., Special Rep. Commr., 1871, p. 328; Warner, New Haven Negroes 34, 71-72 (1940); Morse, A Neglected Period of Connecticut's History 144-92 (1933).
general state practice; Hartford's separate ognized by ordinance in 1867 (3).	Desegregation of schools.	Segregated schools abolished except two or three existing by mutual consent of both races; New Haven (1874) abolished segregated schools for Negroes (7).	3. U. S. Dept. Educ., *op. cit. supra* n. 2; Warner, *op. cit. supra* n. 2. 4. Acts 1868, c. CVIII, § 1. 5. Sen. J. 247-248 (1868); House J. 595-599, 622 (1868). 6. Acts 1872, c. LXXVII, c. I, § 1. 7. Warner, *op. cit. supra* n. 2, 119, 174.
s with respect to the races.	No change in provisions with respect to the races.	Negroes taxed for support of schools operated by the Del. Ass'n for the Education of Colored People (4); state funds to augment support first provided in 1881 (5). [N. B. Increased to $6000 by 1887 (6).]	1. Rev. Stats. 1852, tit. Sixth, c. 42 §§ 11-12; Rep. U. S. Commr. Educ., 1869-70, pp. 103-104. 2. 2 Reed, Delaware, A History of the First State, c. 30, p. 586 (1947); Powell, A History of Delaware 262 (1928).
e Moral Improvement and Education of the hed in 1867; received interracial support for ools for Negro children of the state (3).	No material change in practices.	Del. Ass'n for Educ. of Colored People, assisted by Freedman's Bureau and in Wilmington by Board of Education, extended network of schools for Negroes (7); funds supplemented by tax on Negroes in 1875; bill to give Negroes proportionate share of state school fund defeated in 1873 (8).	3. Rep. U. S. Commr. Educ., 1872, pp. 55-56; Rep. of the Del. Assn. For the Moral Improvement and Education of the Colored People of the State (February, 1868) N. Y. Pub. Lib. Doc. No. P. 50318. 4. 15 Laws, c. 48 (March 24, 1875). 5. Laws 1881, c. 362, p. 385. 6. Laws 1883, c. 48, pp. 81-83; Laws 1887, c. 91, pp. 147-148. 7. Rep. U. S. Commr. Educ., 1871, pp. 10, 115-116; Rep. U. S. Commr. Educ., 1873, p. 49. 8. Rep. U. S. Commr. Educ. *supra* n. 3.
ıs with respect to the education of the races.	General Assembly to provide free schools for all children (4); previous school laws repealed; free schools for all children provided; legislature imposed no restrictions on Negro students (5). [N. B. Constitutional convention tabled resolutions and amendatory motion re separate schools (6).]	Law of 1871 amended to include penaltics for exclusion, intimidation because of race (8); compulsory attendance in schools required, 1883 (9).	1. Stats. c. XXII, §§ 79-80 (Treat *et al.* 1858); Laws 1865, p. 113, § 4. 2. Sixth Biennial Rep. Supt. Pub. Instr., 1865-1866, pp. 27-29; U. S. Dept. Educ., Special Rep. Commr. Educ., 1868, p. 343.
ır education of Negroes not recognized; appealed for repeal of discriminatory laws; ppealed for state-supported education for	State superintendent reports segregation, exclusion, practiced contrary to law in many instances (7).	Courts refused to give sanction to separate schools after 1874 (10); majority of counties reported integration in process or achieved (11).	3. *Ibid.*; Seventh Biennial Rep. Supt. Pub. Instr., 1867-68, pp. 18-21. 4. Const., Art. VIII, § 1 (1870). 5. Laws 1871, § 48. 6. Jour. Const. Conv. 234, 430-431, 860-861 (1870). 7. Ninth Biennial Rep. Supt. Pub. Instr., 1871-1872, p. 116; Rep. U. S. Commr. Educ., 1873, pp. 79-80. 8. Rev. Stats. 1874, c. 122 §§ 100-102. 9. Laws 1883, § 1, p. 167. 10. *Chase* v. *Stephenson*, 71 Ill. 383 (1874); *People ex rel. Longress* v. *Board of Education*, 101 Ill. 308 (1882); *People ex rel. Peair* v. *Board of Education*, 127 Ill. 613 (1889). 11. Biennial Rep. Supt. Ill. Pub. Instr., 1873-1874, pp. 43-50, 259-353; Rep. U. S. Commr. Educ., 1874, p. 82.

STATUTES AND PRACTICES RELATING TO THE EDUCATION OF THE RACES PRECEDING AN

INDIANA, IOWA, KANSAS, KENTUCKY AND M

State	State Policy as of June 16, 1866	State Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment
INDIANA Statutes	Public school system provided; white children enumerated; Negroes exempted from school tax levy (1).	No change in provisions with respect to education of the races.	Segregated schools established; Negroes permitted to attend schools where separate schools could not be maintained (4).
Practices	Negro children not admitted to white schools; state responsibility for education of Negro children not recognized (2).	No material change in practices. Negroes taxed to support white schools and forced to tax themselves to build and maintain schools for their children (3).	Segregated schools established; Negro children in under-popu areas deprived of educational advantages (5).
IOWA Statutes	Public school system provided; no reference to race (1).	No change in general provisions.	Same.
Practices	Early statutes required separate schools unless parents of white children gave unanimous consent (2); Iowa courts ruled restrictive provisions unconstitutional (2); schools of Iowa City opened to Negroes after 1855 (4).	Iowa schools, with few exceptions (5), opened to all youth without regard to race or color (6).	Courts denied right of school boards to discriminate (7). sundry amendments to [the] State constitution adopted on the 3rd of November, 1868, a man's rights and privi are no longer determined by the color of his skin. Colored cit . . . are entitled to the benefits of our public school system o same footing with white citizens." (8)
KANSAS Statutes	Series of statutes provided permissive segregation for urban and non-urban areas (1). [N. B. Compulsory segregation laws of 1862, 1863, replaced by statute permitting but not requiring segregation (2).]	Exclusion of any children from common schools prohibited (3); permissive segregation statutes reenacted (4).	Compulsory school attendance required (6); civil rights act ba distinction because of race, color, in any public schools (7); la 1876 prohibited segregation in cities of the second class and au authorization of segregation for cities of the first class (8).
Practices	Negroes attended segregated schools.	Permissive segregation; state superintendent reported that highest institutions of state were open to Negroes and appealed for complete integration in common schools (5).	No material change in practices.
KENTUCKY Statutes	Taxes collected from Negroes to be set apart as a fund for their use; one-half, if necessary, for support of Negro paupers, the remainder for the education of Negro children (1).	Provisions with respect to taxes from Negroes reenacted (2).	No change in provisions with respect to education of the races
Practices	Education of Negroes privately supported (2).	No change in practices.	Negroes requested law to tax themselves to provide children schools (3). "The law which merely provides that colored ch may be taught is generally ignored and money collected colored people for school purposes applied to the support paupers. . . ." (4).
MAINE Statutes	System of public schools established; no reference to race (1).	No change in provisions with respect to education of the races.	No change in provisions with respect to education of the races.
Practices	No racial segregation in schools prior to the adoption of 14th Amendment (2).	No change in practices.	". . . the common school is open to all children for which it established." (3)

ES RELATING TO THE EDUCATION OF THE RACES PRECEDING AND FOLLOWING ADOPTION OF THE 14TH AMENDMENT

INDIANA, IOWA, KANSAS, KENTUCKY AND MAINE

ate Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment	Subsequent Educational Developments to 1885	References
sions with respect to education of the races.	Segregated schools established; Negroes permitted to attend white schools where separate schools could not be maintained (4).	Segregated schools authorized; admission of Negroes to primary and secondary schools for whites required where separate facilities did not exist (6).	1. Laws 1865, Act of March 6, 1865. 2. Rep. Supt. Pub. Instr. State of Indiana, 1866, pp. 49-51; U. S. Dept. Educ., Special Rep. Commr. Educ., 1868, pp. 344-345. 3. Rep. U. S. Commr. Educ., 1870, p. 123. 4. Laws 1869, p. 41. 5. Rep. U. S. Commr. Educ., 1871, p. 151. 6. Laws 1877, p. 124. 7. Rep. U. S. Commr. Educ., 1872, p. 109. 8. Rep. U. S. Commr. Educ., 1873, p. 100. 9. *Cory* v. *Carter*, 48 Ind. 327 (1874). 10. *State* v. *Grubbs*, 85 Ind. 213 (1883).
e in practices. Negroes taxed to support white to tax themselves to build and maintain schools 3).	Segregated schools established; Negro children in under-populated areas deprived of educational advantages (5).	State superintendent appealed for abolition of discriminatory school laws (7); Negroes integrated into schools for whites in many instances by common consent (8); judicial support of compulsory segregation (9) emasculated by legislature, 1877. Court ruled segregated schools not mandatory, 1883 (10).	
ral provisions.	Same.	Same.	1. Acts 1866, c. 143, § 3. 2. Laws 1858, c. 52, § 30(4). 3. *Dist. Township of the City of Dubuque* v. *City of Dubuque*, 7 Iowa 262 (1858). 4. Iowa City Republican, Sept. 18, 1867, p. 2. 5. Des Moines Iowa State Register, Jan. 29, 1868, p. 1; *ibid.*, Feb. 19, 1868, p. 1. 6. Oskaloosa Herald, Jan. 23, 1868, p. 1. 7. *Clark* v. *Board of Directors*, 24 Iowa 26 (1868). 8. U. S. Dept. Educ., Special Rep. Commr. Educ., 1871, p. 345. 9. *Smith* v. *Dir. of Ind. School Dist. of Keokuk*, 40 Iowa 518 (1875); *Dove* v. *Ind. School Dist. of Keokuk*, 41 Iowa 689 (1875).
few exceptions (5), opened to all youth without olor (6).	Courts denied right of school boards to discriminate (7). "By sundry amendments to [the] State constitution . . . adopted . . . on the 3rd of November, 1868, . . . a man's rights and privileges are no longer determined by the color of his skin. Colored citizens . . . are entitled to the benefits of our public school system on the same footing with white citizens." (8)	No change in practices (9).	
children from common schools prohibited (3); tion statutes reenacted (4).	Compulsory school attendance required (6); civil rights act banned distinction because of race, color, in any public schools (7); laws of 1876 prohibited segregation in cities of the second class and omitted authorization of segregation for cities of the first class (8).	Segregation in schools reenacted for cities of the first class, recognized as discrimination (9).	1. Gen. Stats. 1868, c. 92, § 19; Laws 1865, c. 46. 2. Gen. Laws 1862, c. 46, Art. 4 §§ 18-19; Gen. Laws 1863, c. 56, § 5. 3. Laws 1867, c. 125, § 1. 4. Gen. Stats. 1868, c. 18, Art. 5, § 75; c. 19, Art. 5, § 58. 5. Sixth Ann. Rep. Supt. Pub. Instr., 1868, pp. 3-4. 6. Laws 1874, c. CXXIII, p. 194. 7. Laws 1874, c. XLIX, p. 82. 8. Laws 1876, c. CXXII, Art. XI, § 2. 9. Laws 1879, c. LXXXI, § 1. 10. *Knox* v. *Bd. of Educ. of Independence*, 45 Kan. 152 (1891); *Bd. of Educ.* v. *Tinnon*, 26 Kan. 1 (1881).
tion; state superintendent reported that highest e were open to Negroes and appealed for com- common schools (5).	No material change in practices.	Instances of attempts to segregate without authorization by law known after 1880 but courts refused to sanction these acts (10).	
espect to taxes from Negroes reenacted (2).	No change in provisions with respect to education of the races.	Schools for Negroes to be established from sundry taxes imposed upon them (5). Discriminatory features of separate tax levies acknowledged, unified school fund decreed from which pupils of both races would draw proportionate shares (6).	1. Laws 1866, c. 636, p. 51. 2. Laws 1867, c. 1913 (March 9, 1867). 3. Rep. U. S. Commr. Educ., 1870, p. 147. 4. *Ibid.* 5. Laws 1873-74, c. 521, §§ 1-3. 6. Laws 1881-82, c. 1421 (April 24, 1882). 7. Rep. U. S. Commr. Educ., 1871, pp. 12, 185. 8. Rep. U. S. Commr. Educ., 1872, p. 126; 1873, p. 125. 9. Dabney, Universal Education in the South 278-79 (1936).
tices.	Negroes requested law to tax themselves to provide children with schools (3). "The law which merely provides that colored schools may be taught is generally ignored and money collected of colored people for school purposes applied to the support of paupers. . . ." (4).	Legislative sentiment adverse to policy of educating Negro citizens (7). Attitude of state superintendent, an opponent of use of "white" funds for Negro schools (8) reflected in Act of 1874. Influence of successor reflected in law of 1882 (9).	
visions with respect to education of the races.	No change in provisions with respect to education of the races.	Compulsory school attendance required (4).	1. Acts & Res. 1865, c. 304, § 1. 2. Chadbourne, A History of Education in Maine (1936). 3. U. S. Dept. Educ., Special Rep. Commr. Educ., 1868, p. 353. 4. Laws 1875, c. 24, § 1.
ctices.	" . . . the common school is open to all children for which it was established." (3)	No change in practices.	

STATUTES AND PRACTICES RELATING TO THE EDUCATION OF THE RACES PRECEDING AND

MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSC

State	State Policy as of June 16, 1866	State Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment
MARYLAND Statutes	White children provided free instruction in any public school; Negro school taxes to be set aside for purpose of establishing Negro schools (1).	No change in provisions with respect to education of the races.	No change in provisions with respect to education of the races.
Practices	Endeavors of interracial cooperation, benevolent organizations, resulted in establishment of 73 schools for Negro children throughout state despite lack of state support (2).	No material change in practices.	No change in practices. State made no effective provision f education of Negro citizens; schools outside of Baltimore deper ent on private efforts (3).
MASSACHUSETTS Statutes	Compulsory school attendance required, 1852. Public schools opened to all without discrimination because of race, color, religion; violators punished, 1855; reenacted, 1860 (1).	No change in provisions with respect to education of the races.	Same.
Practices	Segregated schools existed in state in isolated instances prior to 1850; court decision upholding separate but equal schools (2) resulted in legislation outlawing discrimination in schools (3).	No material change in practices.	No change in practices.
MICHIGAN Statutes	Graded and high schools established, 1859 (1).	All residents given equal right to attend any school in district (5).	Compulsory school attendance required (8); all residents giv equal right to attend any school in district and no separate scho could be kept on account of race or color (9).
Practices	Most Michigan public schools integrated by 1850 (2), though segregated schools did exist before Civil War (3); those in Detroit and Jackson the result of special statutes granting large cities discretionary power to regulate distribution of children (4).	Law of 1867 held to repeal statute which might previously have been construed to authorize Detroit school board to segregate (6); segregation in Detroit schools abolished (7).	No material change in practices.
MINNESOTA Statutes	Expulsion from schools by reason of race, caste, nationality, prohibited, 1862; violators fined, 1864 (1).	No change with respect to provisions for education of the races.	No change in provisions with respect to education of the races.
Practices	Apparently no separation in the public schools.	No material change in practices.	No material change in practices.
MISSOURI Statutes	Exclusionary statutes repealed and separate schools ordered for the education of the races in district schools (1); constitution authorized establishment of separate schools (2).	School boards required to provide separate schools where Negro students number 15 or more. Fewer to be educated as the boards decreed; where local boards failed, state superintendent authorized to provide schools for Negroes (4).	Consolidation of two school districts permitted to provide f education of Negroes where Negro population remained sparse (6
Practices	Negroes excluded from public schools prior to Civil War (3).	Foundation laid for segregated school system (5).	Opposition to education of Negroes less pronounced than fo merly (7).
NEVADA Statutes	Negroes, Mongolians, Indians expressly barred from public schools; trustees empowered to establish separate schools for non-whites (1).	Punitive features of law of 1865 for school directors failing to comply withdrawn (2).	No change in provisions with respect to education of the races.
Practices	Negroes generally excluded from the public schools.	Separate school for Negroes discontinued after six months; policy of exclusion continued (3).	No material change in practices. "As few of the colored race a able to afford private tuition, we have growing up among juvenile pariahs, condemned by our State to ignorance and i attendant vices." (4)

RELATING TO THE EDUCATION OF THE RACES PRECEDING AND FOLLOWING ADOPTION OF THE 14TH AMENDMENT

MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI AND NEVADA

Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment	Subsequent Educational Developments to 1885	References
ns with respect to education of the races.	No change in provisions with respect to education of the races.	Provisions for the establishment of free schools for Negroes in every election district, to be run and governed in the same manner as schools for white children, 1872 (4); substantially unchanged, 1878 (5).	1. Laws 1865, c. 160, tit. misc., c. 1, § 1. 2. Rep. U. S. Commr. Educ., 1870, p. 157. 3. Rep. U. S. Commr. Educ., 1871, p. 10. 4. Laws 1872, c. 377, c. XVIII, § 1. 5. Rev. Code 1878, Art. 27, §§ 95-98. 6. Rep. U. S. Commr. Educ., 1872, p. 150.
practices.	No change in practices. State made no effective provision for education of Negro citizens; schools outside of Baltimore dependent on private efforts (3).	Efforts to supplement money raised for support of Negro schools with state funds ineffective. Local boards appropriated money for needs of white schools; Negro children received meagre education (6).	
ns with respect to education of the races.	Same.	Same.	1. Gen. Stats. 1860, c. 41, § 1; Acts and Resolves 1854-55, c. 256, §§ 1, 2. 2. *Roberts* v. *City of Boston*, 5 Cush. 198 (Mass. 1849). 3. Acts & Res. 1854-55, *supra* n. 1.
practices.	No change in practices.	No change in practices.	
al right to attend any school in district (5).	Compulsory school attendance required (8); all residents given equal right to attend any school in district and no separate schools could be kept on account of race or color (9).	Ban on segregated schools strengthened, 1881 (10).	1. Laws 1859, No. 161, pp. 446-48. 2. Woodson, Education of the Negro Prior to 1861 335 (1915). 3. Laws 1850, Act No. 197, p. 201. 4. See *People ex rel. Workman* v. *Bd. of Educ.*, 18 Mich. 400 (1869). 5. 1 Laws 1867, No. 34, § 28. 6. *People ex rel. Workman, supra* n. 4. 7. Rep. U. S. Commr. Educ., 1870, p. 188. 8. 1 Gen. Acts 1871, No. 165, § 1. 9. 1 Laws 1871, No. 170, § 28. 10. Acts 1881, No. 164, c. III, § 18.
repeal statute which might previously have orize Detroit school board to segregate (6); schools abolished (7).	No material change in practices.	No known instances of segregated schools.	
t to provisions for education of the races.	No change in provisions with respect to education of the races.	Separate classification in schools or departments of schools on account of race or color prohibited (2); compulsory school attendance required, 1885 (3).	1. Laws 1862, c. 1, § 33; Gen. Stats. 1866, c. XXXVI, § 33. 2. Laws 1873, c. 1, § 47. 3. Laws 1885, c. 197, § 1.
practices.	No material change in practices.	No material change in practices.	
d to provide separate schools where Negro more. Fewer to be educated as the boards boards failed, state superintendent authorized Negroes (4).	Consolidation of two school districts permitted to provide for education of Negroes where Negro population remained sparse (6).	Separate schools for Negroes, originally provided for in constitution of 1865, required, 1875 (8).	1. Laws 1864, § 2, p. 126. 2. Const., 1865, Art. IX, §§ 1, 2, 7. 3. Rev. Stats. 1856, p. 1100. 4. Laws 1868, §§ 24-25, p. 170. 5. Rep. U. S. Commr. Educ., 1867-68, p. 108; Rep. Missouri Public Schools, 1865-68, pp. 10-11. 6. Laws 1869, p. 86. 7. Rep. U. S. Commr. Educ., 1870, p. 202. 8. Const., 1875, Art. XI, §§ 1, 3. 9. Rep. U. S. Commr. Educ., 1872, p. 207. 10. Rep. U. S. Commr. Educ., 1873, p. 222; Rep. U. S. Commr. Educ., 1874, p. 238.
gregated school system (5).	Opposition to education of Negroes less pronounced than formerly (7).	Boards failed to provide for the education of Negroes in many localities (9); state superintendent forced to establish schools in many areas; some Negroes completely denied educational opportunities (10).	
law of 1865 for school directors failing to).	No change in provisions with respect to education of the races.	Compulsory school attendance required (5); exclusionary features of former laws omitted (6).	1. Laws 1864-65, c. CXLV, §§ 27, 50. 2. Laws 1867, c. LII, §§ 15, 21. 3. Fourth Ann. Rep. Supt. Pub. Instr., 1868, p. 16. 4. Rep. U. S. Commr. Educ., 1870, p. 212. 5. Gen. Stats. 1861-85, § 1369, p. 392 (Baily and Hammond). 6. 2 Comp. Laws 1873, c. CXII, § 3369, p. 267; Rep. U. S. Commr. Educ., 1885-86, pp. 124-125. 7. *State* v. *Duffy*, 7 Nev. 342 (1872). 8. Rep. U. S. Commr. Educ., 1873, p. 245.
Negroes discontinued after six months; policy l (3).	No material change in practices. "As few of the colored race are able to afford private tuition, we have growing up among us juvenile pariahs, condemned by our State to ignorance and its attendant vices." (4)	Statutory exclusion of Negroes declared unconstitutional (7); Negroes admitted into the public schools. ". . . the children of all citizens are now free to attend our public schools. . . ." (8).	

STATUTES AND PRACTICES RELATING TO THE EDUCATION OF THE RACES PRECEDING AND

NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OREGON AN

State	State Policy as of June 16, 1866	State Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment
NEW HAMPSHIRE Statutes	System of public schools established; no reference to race (1).	No change in provisions with respect to education of the races.	Same.
Practices	No apparent history of segregated schools.	No change in practices.	No change in practices.
NEW JERSEY Statutes	Public schools established (1); special law authorized separate schools in Morris County (2).	No change in provisions with respect to the education of the races.	Same.
Practices	State superintendent construed existing laws as allowing communities the option of segregating Negro students (3).	Separate schools maintained in some communities; mixed schools the general rule (4).	No material change in practices.
NEW YORK Statutes	City and incorporated village school authorities granted option of establishing separate schools (1).	No change in provisions with respect to the education of the races.	Same.
Practices	Few communities exercised option to segregate Negro students (2).	No material change in practices.	No material change in practices.
OHIO Statutes	Segregated schools required in districts where Negro students numbered 20 or more (1).	No change in provisions with respect to education of the races.	Same.
Practices	Though not so entitled, Negroes often admitted to white schools (2).	Negroes generally admitted to white schools in many parts of the state (3).	No apparent change in practices (4).
OREGON Statutes	Public schools free to all persons in school district (1).	No change in provisions with respect to education of the races.	Same.
Practices	Negroes admitted to public schools except in Portland.	Separate school for Negroes in Portland (2).	Portland separate school abolished, 1871 (3).
PENNSYLVANIA Statutes	Segregated schools required where number of Negro students was 20 or more; Negroes could not apply to white schools if separate one was maintained 4 months in year (1).	No change in provisions with respect to education of the races.	Same.
Practices	Separate schools established in many areas.	Negro pupils admitted to white schools when separate ones were not provided (2).	No material change in practices.

RELATING TO THE EDUCATION OF THE RACES PRECEDING AND FOLLOWING ADOPTION OF THE 14TH AMENDMENT

NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OREGON AND PENNSYLVANIA

olicy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment	Subsequent Educational Developments to 1885	References
with respect to education of the races.	Same.	Compulsory school attendance required, 1871 (2).	1. Laws 1866, c. 4255, p. 3275. 2. Laws 1871, c. II, p. 511.
	No change in practices.	No change in practices.	
with respect to the education of the races.	Same.	Compulsory school attendance required, 1874 (5); no child to be excluded from any public school on account of religion, nationality or color; violators punished (6).	1. Rev. Stats. 1847, tit. XII, c. 3. 2. Laws 1850, p. 63. 3. Annual Rep. Supt. Pub. Schools, 1863, pp. 41-42. 4. *Ibid.* 5. Laws 1874, c. DXXIII. 6. Laws 1881, c. CXLIX (March 23, 1881). 7. *Pierce* v. *Union Dist. School Trustees,* 46 N. J. L. 76 (1884).
ined in some communities; mixed schools	No material change in practices.	Ban on segregation in the schools supported by courts (7); effectiveness of statute weakened in areas where Negroes accepted separation; integrated schools elsewhere.	
with respect to the education of the races.	Same.	Exclusion by reason of race, color, on part of teachers and other officers of common schools and public institutions of learning, prohibited (3); compulsory school attendance required (4).	1. Laws 1864, c. 555, titl. X, § 1. 2. Ann. Rep. State Supt. Pub. Instr., 1866, pp. 131-323 *passim.* 3. Laws 1873, c. 186. 4. Laws 1874, c. 421, § 1. 5. Rep. U. S. Commr. Educ., 1873, p. 280. 6. *People ex rel. King* v. *Gallagher,* 92 N. Y. 438 (1883).
ractices.	No material change in practices.	Buffalo city charter amended (1873) and schools integrated (5); maintenance of segregated schools upheld under laws of 1873 (6).	
with respect to education of the races.	Same.	Compulsory school attendance required, 1877 (5); segregation in schools made permissive by statute, 1878 (6). [N.B. Ohio abolished segregated schools in 1887 (7).]	1. 61 Laws 1864, pp. 32-33. 2. Rep. Ohio Dept. Educ., 1865, pp. 529-533. 3. Rep. U. S. Commr. Educ., 1871, p. 370. 4. Rep. Ohio Dept. Educ., 1871, pp. 663-64; Ohio School Rep. 1875, pp. 26-28. 5. Gen. Laws 1877, § 1, pp. 57-58. 6. Laws 1878, p. 513. 7. Laws 1887, p. 34. 8. *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198 (1871). 9. *State ex rel. Gibson* v. *Bd. of Educ.,* 2 Ohio Cir. Ct. Rep. 557 (1887).
ted to white schools in many parts of the	No apparent change in practices (4).	Segregated schools, where maintained, held not to violate law (8). [N.B. Courts upheld prohibition of segregation in public schools (9).]	
with respect to education of the races.	Same.	Same.	1. Laws 1845-64, c. 5, tit. IV, § 46, p. 511. 2. Reynolds, *Portland Public Schools,* 33 Ore. Hist. Q. 344 (1932). 3. *Ibid.*
groes in Portland (2).	Portland separate school abolished, 1871 (3).	No material change in practices.	
with respect to education of the races.	Same.	Pittsburgh's authority to segregate Negroes rescinded, 1871 (3); constitution provided for education of all children, imposing no restrictions (4); no distinction made in attendance or admission to any public school because of race or color (5).	1. Laws 1854, No. 610, §§ 23, 24. 2. Rep. Indiana Dept. Pub. Instr., 1867-68, pp. 23-28. 3. Laws 1872, No. 999, p. 1048. 4. Const., Art. X, § 1 (1874). 5. Laws 1881, No. 83, p. 76. 6. *Kaine* v. *Commonwealth,* 101 Pa. 490 (1882).
to white schools when separate ones were	No material change in practices.	Statute judicially declared harmonious with spirit and object of 14th Amendment (6).	

STATUTES AND PRACTICES RELATING TO THE EDUCATION OF THE RACES PRECEDING AND

RHODE ISLAND, VERMONT, WEST VIRGINIA AND WI

State	State Policy as of June 16, 1866	State Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment
RHODE ISLAND Statutes	No distinction made in applicants to public schools on account of race or color (1).	No change in provisions with respect to education of the races.	Same.
Practices	Some major cities established separate schools in early 1830's (2); constitutional provision (1842) assumed to permit segregation (3); integration achieved (1866), terminating legislative differences of several years.	No segregated schools.	No change in practices.
VERMONT Statutes	School clerk required to list children resident in his district; no mention of race (1).	Compulsory school attendance required (3).	No change in provisions with respect to education of the races.
Practices	No distinctions based on race or color (2).	No change in practices.	No change in practices.
WEST VIRGINIA Statutes	Integration prohibited; separate schools where districts had 30 or more Negro students in order to provide Negroes with educational opportunities "as far as practicable." (1)	No change in provisions with respect to education of the races.	Same.
Practices	[Status of education for Negroes apparently unrecorded.]	[Status of education for Negroes apparently unrecorded.]	[Status of education for Negroes apparently unrecorded.]
WISCONSIN Statutes	System of public schools established; no reference to race (1). [N.B. Effort to discriminate defeated in legislature (1863) (2).]	No change in provisions with respect to education of the races.	No material change in laws.
Practices	No separation in public schools.	"Neither the Constitution nor the Statutes make any difference between white and colored children. I do not know of a separate school for the latter . . . [nor] one from which they are excluded anywhere in this state." (3)	No material change in practices.

RELATING TO THE EDUCATION OF THE RACES PRECEDING AND FOLLOWING ADOPTION OF THE 14TH AMENDMENT

RHODE ISLAND, VERMONT, WEST VIRGINIA AND WISCONSIN

Policy as of July 28, 1868	State Policy Effective Immediately Following Adoption of the 14th Amendment	Subsequent Educational Developments to 1885	References
ıs with respect to education of the races.	Same.	Provisions of law of 1866 expanded (4); compulsory attendance required, 1883 (5).	1. Acts 1800, c. 609, p. 225. 2. CARROLL, PUBLIC EDUCATION IN RHODE ISLAND 157-8 (1918). 3. *Ammons* v. *School District No. 5*, 7 R. I. 596 (1864). 4. Gen. Stats. 1872, c. 58, § 1. 5. Laws 1882-1885, c. 363, § 1. 6. REP. INDIANA DEPT. PUB. INSTR., 1867-68, pp. 23-28.
	No change in practices.	"The colored child is admitted free . . . into all our public schools of every grade in accordance with justice and an enlightened public sentiment." (6)	
ndance required (3).	No change in provisions with respect to education of the races.	Same.	1. Gen. Stats. 1862 (App. to 1870), p. 883. 2. REP. INDIANA DEPT. PUB. INSTR., 1867-68, pp. 23-28. 3. Laws 1867, No. 35, p. 47.
	No change in practices.	No change in practices.	
ıs with respect to education of the races.	Same.	Education laws reenacted with substantially identical provisions (2); constitution altered to require segregation in public schools (3); subsequent legislatures attempted to reduce unequal provisions for education of Negroes by reducing numbers requisite for establishment of separate schools (4).	1. Laws 1866, c. 74, § 26. 2. Acts 1871, c. 152, p. 206. 3. CONST. 1872, Art. XII, §§ 1, 8. 4. Laws 1872, c. 123, p. 391; Acts 1881, c. 15, § 17, p. 176. 5. REP. U. S. COMMR. EDUC., 1874, pp. 439-40.
or Negroes apparently unrecorded.]	[Status of education for Negroes apparently unrecorded.]	State superintendent reported that Negroes in other than urban districts received little or no education (5).	
ıs with respect to education of the races.	No material change in laws.	Compulsory attendance required, 1879 (4).	1. Laws 1863, c. 155. 2. Ass. J. 618 (1863). 3. REP. INDIANA DEPT. PUB. INSTR., 1867-68, pp. 23-28. 4. Laws 1879, c. 121, p. 155.
tion nor the Statutes make any difference ored children. I do not know of a separate . . [nor] one from which they are excluded ' (3)	No material change in practices.	No material change in practices.	