Supreme Court of the United States

OCTOBER TERM, 1953

No. 2

HARRY BRIGGS, JR., *et al.*,

Appellants,

—against—

R. W. ELLIOTT, CHAIRMAN, J. D. CARSON, *et al.*, MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C., *et al.*,

Appellees.

BRIEF FOR APPELLEES ON REARGUMENT

ROBERT McC. FIGG, JR.,
S. E. ROGERS,
Counsel for Appellees.

T. C. CALLISON,
Attorney General of South Carolina

JOHN W. DAVIS,
WILLIAM R. MEAGHER,
TAGGART WHIPPLE,
Of Counsel.

November 30, 1953.

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INTRODUCTION

On the former hearing of this case counsel for appellees submitted a brief directed to three propositions. These were:

I. That the State of South Carolina and these appellees as its agents had proceeded to remove all inequalities between its white and colored schools.

This had been affirmatively found by the District Court to be true. Therefore the question whether the District Court should or should not have afforded opportunity for such equalization had become moot.

II. That the Constitution of South Carolina, Art. XI, § 7, and its statute (Code of 1942, § 5377) do not violate

the Fourteenth Amendment to the Constitution of the United States.

The right to establish separate schools for white and colored pupils under the separate but equal doctrine has been so repeatedly approved by this Court, by lower federal courts and by the courts of last resort of many States, and has been so continuously exercised by Congressional and state legislation, that it should be regarded as a subject no longer open to debate.

III. That such conflicts of opinion as may exist regarding the effects of segregation or of its abolition present questions of State legislative policy and not of constitutional right.

The opinions of sundry academic persons presented by appellants as adverse to segregation form no sufficient basis for any conclusions on the subject, least of all for a judicial finding.

On these propositions we stand. We regard them as sufficient to warrant affirmance of the decision of the District Court. It is not our present purpose to burden the Court by repeating the arguments advanced in their support. We invite, however, renewed consideration of the contents of our former brief.

For the present we devote ourselves to replying *seriatim* to the questions presented for reargument by the Court's order of June 8, 1953. These questions chiefly involve Sections 1 and 5 of the Fourteenth Amendment, which read:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

SUMMARY OF ARGUMENT

Answering the First Question: The overwhelming preponderance of the evidence demonstrates that the Congress which submitted and the State legislatures which ratified the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools.

Answering the Second Question: It was not the understanding of the framers of the Amendment that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish segregation in public schools; nor was it the understanding of the framers of the Amendment that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing segregation in public schools of its own force.

Answering the Third Question: It is not within the judicial power to construe the Fourteenth Amendment adversely to the understanding of its framers, as abolishing segregation in the public schools. Moreover, if, in construing the Amendment, the principle of stare decisis is applied, controlling precedents preclude a construction which would

abolish or forbid segregation in the public schools. Even if the principle of stare decisis and the controlling precedents be abandoned, and the effect of the Amendment upon public school segregation be examined *de novo,* under established standards of equal protection the Amendment may not be construed to abolish or forbid segregation as a matter of law and *a priori* in all cases. Rather, each case of such segregation must be decided upon the facts presented in the record of that case; and unless the record establishes by clear and convincing evidence that school segregation could not conceivably be warranted by local conditions in the particular case, the Fourteenth Amendment may not be construed to abolish segregation in that case.

Answering the Fourth Question: Assuming that it is decided—improperly, as we contend—that segregation in public schools violates the Fourteenth Amendment, a decree would not necessarily follow providing that, within the limits set by normal geographical school districting, Negro children should forthwith be admitted to schools of their own choice. This Court, in the exercise of its equity powers, may permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions.

Answering the Fifth Question: Again assuming it is decided—improperly, as we contend—that segregation in public schools violates the Fourteenth Amendment, this Court should not, and indeed could not, formulate a detailed decree in this case; nor should this Court appoint a special master to hear evidence with a view to recommending specific terms for such a decree. Rather, this Court should remand the question to the District Court for further proceedings in conformity with this Court's opinion.

The answers to these questions in appellants' brief rest on certain fundamental fallacies. These are:

First, the fallacy that the antislavery crusade was directed against segregation in schools, whereas the fact is that its thrust was against the institution of slavery. By elaborating the philosophical background of the antislavery movement, and repeatedly referring to its broad general purposes, appellants seek to create the impression that segregation in schools was totally at variance with the purposes of that movement. But no amount of argument on a general plane, and no invocation of "ethico-moral-religious-natural rights" (Br. 205) or "Judeo-Christian ethic" (Br. 204) can obscure the fundamental fact that the crusade was directed to the abolition of slavery and not to the objective of setting up mixed schools for white and colored children or enforced commingling of any other kind. The problem before this Court is not the legal or moral justification for slavery; rather, the issue to be resolved is whether the people of the State of South Carolina may, in the exercise of their judgment based on first-hand knowledge of local conditions, decide that the state objective of free public education is best served by a system consisting of separate schools for white and colored children. That question is to be answered in the light of well-settled principles governing the application of the Fourteenth Amendment, and not by general theoretical notions put forward during the antislavery crusade.

Nor is the issue to be resolved on the basis of general statements plucked from their contexts in the debates of Congress or the opinions of this Court. In short, one of the principal fallacies of appellants' brief lies in the fact that it seeks to solve the specific issue of school segregation by

addressing itself not to the constitutionality of the practice itself, but rather to broad generalizations.

Another fundamental fallacy in appellants' brief is the assumption that, in the years following the Civil War, the Radical Republicans spoke for Congress as a whole. Nothing could be more misleading. The attitude of Congress towards school segregation during these years must be derived from the action which the Congress as a whole actually took, not only at the time when it proposed the Fourteenth Amendment in 1866, but during the surrounding years. That is the only reliable standard by which to evaluate the opinion of Congress, and the application of that standard shows beyond all peradventure that segregated schooling was not intended to be within the reach of the Fourteenth Amendment—either by the Congress which proposed the Amendment to the States, or by succeeding Congresses.

If we were to adopt the views of the Radical Republicans as representing the views of Congress as a whole, history would have to be rewritten. Surely Congress as a whole did not endorse the vituperative views of Thaddeus Stevens who characterized President Johnson as an "alien enemy, a citizen of a foreign state", or of Charles Sumner who called him "an insolent drunken brute in comparison with which Caligula's horse was respectable". Morison and Commager, 2 *The Growth of the American Republic* 39 (1950).

Still another fundamental fallacy in appellants' argument is the notion that all racial distinctions are "an irrational basis for government action" (Br. 22). The fallacy here has two prongs, the first of which is an apparent effort to smother the fundamental constitutional question by

repeated references to "abhorrence of race as a premise for governmental action", "racism", "a state scheme of racism" and the like (Br. 25, 30, 31). This tyranny of words in no way advances resolution of the issue, but rather appears to be an attempt to divert attention from the fundamental constitutional problem at hand, which is to be judged by the application of well-settled principles governing the effect of the Constitution on the police power of the State of South Carolina.

The second prong of this fallacy is appellants' theory that the separate but equal doctrine, as enunciated in *Plessy* v. *Ferguson,* is an aberration inconsistent with the main stream of cases adjudicated before and since that decision. It is true that *Plessy* v. *Ferguson* was a case of first impression for the Supreme Court of the United States, so far as the enunciation of the separate but equal doctrine was concerned. But other courts, both State and Federal, had already approved that doctrine long before the *Plessy* case was decided. The leading decisions on the question had been handed down by the courts of New York, Ohio, Indiana, California and Massachusetts.

We shall more fully explore each of these fallacies and others in appellants' position in answer to the specific questions of the Court.

ARGUMENT

I

FIRST QUESTION

What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

ANSWER

The overwhelming preponderance of the evidence demonstrates that the Congress which submitted and the State legislatures which ratified the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools.[1]

A. The Congress

The detailed history of Congressional action upon the question of separate schools and the Fourteenth Amendment is set forth in Appendix A of this brief. That history supplies evidence of the most persuasive character that neither the Congress which submitted the Fourteenth Amendment, nor succeeding Congresses, contemplated that the Amendment would of its own force abolish segregation in public schools.

The position of Congress with regard to the question of separate public schools, as set forth in Appendix A, is

[1]The Fourteenth Amendment was not submitted to any State convention but in each case to the State legislature.

derived not only from Congress' view of the Amendment itself, but also from measures considered by Congress immediately before, concurrently with, and immediately following its consideration of the Amendment. The evolution of that position may be traced in summary form as follows:

(1) The establishment of separate schools for Negroes in the District of Columbia before the end of the Civil War.[2]

Within one month after slavery had been abolished in the District of Columbia, Congress authorized the establishment of Negro schools within the District, to be supported at first by a tax on Negro property and later by a portion of general school funds to be set aside for Negro schools in the proportion that the number of Negro children bore to the number of white children. This legislation was enacted during the period 1862 to 1864.

(2) The First Supplemental Freedmen's Bureau Bill.[3]

In March 1865 the Freedmen's Bureau was established by law and given general powers of relief and guardianship over Negroes and refugees and the administration of abandoned lands. On January 5, 1866 Senator Trumbull of Illinois introduced a bill to enlarge the powers of the Freedmen's Bureau, referred to herein as the First Supplemental Freedmen's Bureau Bill. Section 6 of the Bill would have empowered commissioners to purchase sites and buildings for schools for the freedmen and refugees. While there is nothing in the Bill or in the debates to indicate whether these schools were intended to be segregated or mixed, the Freedmen's Bureau in fact operated separate schools.

Section 7, which was to be operative only in the Rebel States, provided in part that if, because of State or local

[2]App. A at 2-3.
[3]*Id.* at 3-11.

law, custom or prejudice, "any of the civil rights or immunities belonging to white persons", including specifically certain enumerated rights but without mention of schools, were "refused or denied to negroes * * * on account of race * * * it shall be the duty of the President of the United States * * * to extend military protection over all cases affecting such persons so discriminated against".

During the House and Senate debates on the Bill, no member of either body suggested that the foregoing provisions should be construed to require mixed schools. While there was criticism on the one hand of the fact that in some States, such as Tennessee, Negroes were excluded from the free public schools without any provision for their education at all, on the other hand there was complaint from another quarter that in Charleston, South Carolina, the Freedmen's Bureau had taken over the public schools for the exclusive benefit of the Negroes. But there is no indication that these views would not have found reconciliation in the establishment of separate schools for each race.

In the course of the debate upon the First Supplemental Freedmen's Bureau Bill, Representative Moulton of Illinois referred proudly to the fact that at the "last session" of his State's legislature "they swept from our statute-books all those odious black laws making discrimination between the whites and the blacks". That very legislature, however, had re-enacted legislation excluding Negroes from white schools; and segregated schools were not abolished in Illinois until 1874. Evidently Congressman Moulton did not regard segregated schools as a form of odious racial discrimination.

The First Supplemental Freedmen's Bureau Bill passed both Houses of Congress only to be vetoed by the President.

Although the veto was sustained, a similar bill was enacted over the President's veto later in the same session.

We emphasize the First Supplemental Freedmen's Bureau Bill because of its close relationship to the Civil Rights Act of 1866. Indeed, the civil rights enumerated in the two were identical, the chief distinction between the measures being that, whereas the First Supplemental Freedmen's Bureau Bill was to be operative only in the Rebel States as a temporary measure, the Civil Rights Act was to extend permanently to all sections of the country.

(3) The Civil Rights Act of 1866.[4]

The Civil Rights Bill of 1866 was introduced in the Senate by Senator Trumbull on the same day that he introduced the First Supplemental Freedmen's Bureau Bill.

As originally introduced the first section of the Civil Rights Bill provided:

> "* * * there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; * * *."

That section then went on to specify certain civil rights intended to be protected, but it made no mention of schools. The section provoked considerable discussion in the Congress, particularly with regard to the scope of the introductory words "civil rights or immunities".

Senator Trumbull himself implied that he did not view such a question as the establishment of mixed schools as one of the requirements of the Bill. Senator Cowan, Pennsylvania Republican, and the only member of the Senate

[4]App. A at 11-19.

who introduced the subject of mixed schools into the debate on the Bill, at first thought it might be construed to require mixed schools. But no other Senator expressed that view. And Cowan's subsequent statements, made after the Bill was amended as hereinafter related, indicate that he no longer gave it so broad a construction.

In the House, Representative Wilson of Iowa, Chairman of the Judiciary Committee to which the Bill had been committed, declared in leading the debate that the provisions of the first section did not mean that white and Negro children "shall attend the same schools".

Repeated assurances were given by other supporters of the measure that it was not intended to encompass any rights other than those specifically enumerated, nor to affect social relationships. Nevertheless several members of the House expressed concern with regard to the broad language of Section 1, and Representative Rogers of New Jersey showed particular concern that the language might be construed to prohibit segregated schools.

Subsequently the Judiciary Committee struck out the general terms of the first section "to obviate * * * the difficulty growing out of any other construction beyond the specific rights named in the section". This was done, it is to be noted, at the suggestion of Republican Representative Bingham, who was then on his way to becoming the author of Section 1 of the Fourteenth Amendment.

The Bill was passed over Presidential veto and became law on April 9, 1866. As enacted the Bill prohibited discrimination in respect of the following rights specifically enumerated, and none other:

> "* * * the * * * right * * * to make and enforce contracts, to sue, be parties, and give evidence, to inherit,

> purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and [to] be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

From this it will be seen that there is no evidence whatsoever to support appellants' assertion that "[a]s originally drafted, the Act * * * was so broad in scope that most Senators and Representatives believed that it would have the effect of destroying entirely all state legislation which distinguished or classified in any manner on the basis of race * * * [including] [s]chool segregation laws" (Br. 90-91). Nor is it correct to say, as do appellants, that "there is no evidence that even after the modification of the bill, the enumeration in the bill was considered to exclude rights not mentioned. Kerr, Rogers, Cowan, Grimes and other conservatives still insisted that the bill, even in its final form, banned segregation laws" (Br. 92). Irrefutable evidence establishing that the amended Bill was intended to be limited in scope to the enumerated rights is adduced in detail in our Appendix A at 15-19. Neither Kerr nor Rogers made any speeches whatsoever after the Bill was amended. As already shown, Cowan's subsequent statement indicated that he then thought of the Bill only in terms of the enumerated rights. And Grimes did not speak at all during the entire debate. Although we appreciate the difficulties inherent in researching a question so complex as this, we feel obliged to expose these and other unsupported "generalizations" which appellants make with regard to this Bill (Br. 90-92).

The debates and the action taken by the Congress in respect of the Civil Rights Act of 1866 show, we believe, a considered purpose (1) not to affect such matters as segregated school systems and (2) to avoid the enactment of any measure which might possibly be construed as having that effect. This is of vital significance because, in the debates upon the Fourteenth Amendment, the Civil Rights Act was often to be linked to the Amendment itself.

(4) The Fourteenth Amendment.[5]

Before the resolution which later became the Fourteenth Amendment was reported out of Committee, Senator Sumner of Massachusetts presented to the Senate a resolution which would have included among conditions for reinstatement of the seceded States one requiring the "organization of an educational system for the equal benefit of all without distinction of color or race". This resolution was never acted upon by either House.

When on February 10, 1866 the resolution which became the Fourteenth Amendment was first adopted for report by the Joint Committee of Fifteen on Reconstruction, it read:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property."

In both Houses of Congress the supporters of the resolution gave assurances that it merely granted Congress the

[5]App. A at 20-34.

power to enforce within the States existing constitutional and statutory provisions. But its opponents insisted that the grant of legislative power was too broad. One especially outraged conservative, Representative Rogers of New Jersey, stated that the proposed Amendment would give Congress the power to require the States to provide mixed schools. This view was not expressed by any other Congressman.

In the debate which followed, the chief opposition to the resolution in its original form developed around the central contention that it would empower Congress to legislate upon matters theretofore reserved to the States. The opposition proved so strong that it forced modification of the resolution, which was ultimately redrafted by the Joint Committee to read:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This provision was reported to Congress as Section 1 of the proposed Fourteenth Amendment. The majority and minority reports of the Joint Committee make no reference to schools, nor does the Journal of the Committee contain any suggestion that the resolution was intended to compel mixed schools.

In the debates upon the revised resolution in the Senate and House, only one member, Republican Senator Howe of Wisconsin, mentioned schools. In discussing certain discriminations which the proposed Amendment would for-

bid, he referred to a Florida statute which taxed both Negroes and whites to support the white schools but taxed Negroes alone to support the Negro schools. Howe's attack, however, was directed at the discriminatory taxation involved—not at the segregated school system of Florida.

The debates on the proposed Amendment in both Houses, as well as extracameral statements of members of the Congress, show that the great weight of Congressional opinion was that Section 1 of the Amendment embodied the rights and privileges protected by the Civil Rights Bill. Both Stevens, who introduced the resolution in the House, and Howard, who sponsored it in the Senate, expressly acknowledged the identity of the two measures. Appellants assert that both Howard and Stevens "made it definitely clear that the scope of the rights guaranteed by the amendment was much greater than that embraced in the Civil Rights Act" (Br. 118). Stevens' statements upon the measure are clearly subject to no such construction. And Howard, although he acclaimed the measure as applying to the States the prohibitions of the first eight Amendments to the Constitution, expressly limited its scope to "the fundamental rights lying at the basis of society and without which a people cannot exist except as slaves".

Thus Section 1 was regarded by its proponents as accomplishing a twofold purpose: first, to remove all doubt as to the constitutionality of the Civil Rights Bill; and second, to imbed the Civil Rights Bill in the fundamental law of the land and thus prevent its repeal in the event control of Congress should later fall into Democratic hands.

It will be remembered that Senator Trumbull, who introduced the Civil Rights Bill in the Senate, implied, and Representative Wilson, who introduced the Bill in the House,

unequivocally stated that it did not affect the question of separate schools. And this view was established as the sense of the Congress by an amendment designed to limit the Bill's protection to the rights specifically enumerated. When, therefore, the resolution proposing the Fourteenth Amendment was adopted by Congress, it was intended simply to protect and to perpetuate the protection of those rights enumerated in the Civil Rights Bill.

Appellants make much of the fact that a number of the members of the Joint Committee on Reconstruction "had definite antislavery backgrounds" (Br. 74). In fact, they have gone to some lengths in attempting to associate the present campaign for mixed schools with the antislavery movement of the middle 1800's (Br. 50-53, 199-235). We believe it impossible to draw from such considerations any significant conclusions with respect to a particular individual's views toward segregated education. No doubt such men as Fessenden of Maine, Trumbull of Illinois and Grimes of Iowa opposed slavery. But neither Fessenden nor Trumbull thought the Civil Rights Act of 1866, even before it was amended, would affect antimiscegenation legislation. Trumbull later opposed mixed schools in no uncertain terms. And Grimes saw nothing unequal in segregated transportation. The only members of the Joint Committee whom appellants have clearly shown as having in terms objected to school segregation are Boutwell, Conkling and Justin Morrill of Vermont; and their positions on this question are entirely deduced from post-1866 statements or votes (Br. 99-101).[6]

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[6]Although Sumner would have welcomed an opportunity to serve as Chairman of the Joint Committee, his radical views on Reconstruction were thought to disqualify him, and the moderate Fessenden was appointed to that office. FESSENDEN, 2 LIFE AND PUBLIC SERVICE OF WILLIAM PITT FESSENDEN 20 (1931).

Moreover, even if it were true that a majority of the Committee opposed school segregation—a conclusion which, for lack of evidence, it is impossible to draw—it is highly significant that both Stevens and Howard expressed their regret that Section 1 of the Amendment did not go so far as they should have wished. Other members of Congress made similar statements. It will not do to dismiss these statements as mere references to a failure to include the right of franchise, especially in the teeth of repeated assurances by the Republican majority that Section 1 merely embodied the Civil Rights Act of 1866.

In any event, we do not believe that this Court will subscribe to a "conspiracy theory" of the Fourteenth Amendment. The Amendment was not adopted by members of the Joint Committee, but by the 39th Congress which proposed it and the sovereign States which ratified it. It is their understanding and theirs alone which is determinative.

(5) Contemporary legislation relating to separate schools in the District of Columbia.[7]

In 1866, at the very time that the proposed Fourteenth Amendment was under debate, Congress directed its attention to the existing segregated school system in the District of Columbia. It enacted legislation dedicating certain real estate in the city of Washington to the establishment of Negro schools in the District and amended earlier enactments to insure that the trustees of colored schools in the cities of Washington and Georgetown should receive a proportionate share of the school fund. And in 1868, just after the Fourteenth Amendment had been ratified by the

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[7]App. A at 34-35.

requisite number of States, Congress passed a bill transferring the duties of Negro trustees of the Negro schools in the District to white trustees of the public schools.

Thus the same Congress which, in proposing the Fourteenth Amendment sought to protect the Negro in the enjoyment of his civil rights within his State, did not consider attendance at non-segregated schools a civil right to which the Negro was entitled in the District of Columbia.

Could there be a more striking manifestation of the view of Congress that the Amendment had no effect upon segregated schooling? If no obligation rested on Congress, can it be seriously argued that the Amendment has a greater compulsion on the sovereign and independent States? There is no room for dispute here; perhaps that is why appellants' brief nowhere mentions this history so damaging to their position.

(6) Bills for reinstatement of seceded States.[8]

In the decade that followed the adoption of the Fourteenth Amendment, the actions of subsequent Congresses confirm the conclusion that the Amendment was not intended to abolish segregation in the public schools. Time and again measures designed to destroy the separate school system were defeated.

For example, the 40th Congress, in considering and adopting legislation to reinstate the Confederate States, was most careful not to enact provisions which might be construed as prohibiting separate schools in those States as a condition to their reinstatement. In the Reconstruction Act of March 2, 1867, (14 Stat. 428, § 5) Congress laid down the conditions upon which the Rebel States might be

[8]App. A at 35-37.

declared entitled to representation in Congress. These conditions were as follows:

1. That a constitution of government be formed "in conformity with the Constitution of the United States in all respects".

2. That this constitution be framed by a convention of delegates elected by the male citizens of the State twenty-one years old and upward, of whatever race, color, or previous condition, who had been resident in the State for one year previous to the day of such election, except such as might be disfranchised for participation in the rebellion or for felony at common law.

3. That such constitution provide that the elective franchise be enjoyed by all such persons as have the qualifications stated for electors of delegates.

4. That such constitution be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates.

5. That such constitution be submitted to Congress for examination and approval and that Congress should have approved the same.

6. That the State, by a vote of its legislature elected under such constitution, should have adopted the Fourteenth Amendment to the Constitution and that the Fourteenth Amendment should have become a part of the Constitution of the United States.

It is to be noted that no reference to the subject of education formed any part of these conditions, not even, as we maintain, by implication.

In view of this convincing proof of the attitude of the 40th Congress towards separate schools in the Reconstructed States, it is difficult to lend credence to appellants' unsubstantiated implication that certain of those States deceived Congress by waiting until they had been readmitted to the Union to establish segregated school systems (Br. 143).

(7) The Supplemental Civil Rights Bill as an amendment to the General Amnesty Bills.[9]

In 1870 Senator Sumner introduced a Supplemental Civil Rights Bill designed to abolish segregation in a number of public institutions, including common schools. In 1870 and 1871, Sumner made repeated attempts to bring this Bill to the Senate floor, but on each occasion the Bill was reported adversely by the Judiciary Committee.

In December 1871 Sumner offered his Supplemental Civil Rights Bill as an amendment to the General Amnesty Bill. In an early test of Senate sentiment, the Committee of the Whole defeated the Sumner amendment, 29 to 30.

Sumner then renewed his amendment and the Senate debate which followed produced expressions of serious doubt as to its constitutionality, primarily upon the grounds that the rights sought to be protected by the Bill were not of the nature contemplated by the Fourteenth Amendment, and that Congress by the measure would usurp powers reserved to the States over matters of State concern. Significantly, of those who argued either in favor of or against the policy of the measure, not one expressed the opinion that the Fourteenth Amendment had been intended or was effective of its own force to accomplish the results envisaged by Sumner's amendment.

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[9]App. A at 38-52.

The vote on the Sumner amendment to the General Amnesty Bill was tied 28 to 28 and the Vice President cast the deciding vote in its favor. But the Amnesty Bill as thus amended failed to pass.

In May 1872 Sumner again proposed his Supplemental Civil Rights Bill as an amendment to another General Amnesty Bill which had passed the House. It is noteworthy that in the ensuing debate Senator Sherman, who had been a member of the 39th Congress which adopted the resolution proposing the Fourteenth Amendment, although speaking in favor of the amendment, nevertheless approved as "right" a recent decision of the Supreme Court of Ohio upholding as constitutional under the Fourteenth Amendment the segregated school system of that State. Thus unquestionably it was not Sherman's understanding that the Fourteenth Amendment had of its own force outlawed separate schools. And Senator Trumbull, who had introduced the Civil Rights Bill of 1866, in opposing the Sumner amendment declared flatly that the "right to go to school is not a civil right and never was".

Others opposed the Sumner amendment on grounds of policy and expressed the view that separate schools were advisable if maintained on an equal basis and that to prohibit them would result in the destruction of the public school systems in certain States. Those who argued either for or against the measure on grounds of policy certainly could not consistently have believed that the Fourteenth Amendment had precluded Congress or the States from making a choice between mixed and segregated schools.

In the voting which followed the debate, the Sumner amendment experienced alternate failure and success. It was at first defeated 27 to 28, but later carried 29 to 28,

the Vice President again casting the decisive favorable vote. But once again the General Amnesty Bill, to which Sumner's amendment was appended, failed of passage.

Shortly thereafter, the Senate considered the Supplemental Civil Rights Bill as a separate measure apart from the General Amnesty Bill, and after deleting all references to *schools,* churches, cemeteries and juries, passed the measure, 28 to 14. The General Amnesty Bill was then carried 38 to 2. The Supplemental Civil Rights Bill thus passed by the Senate was never considered by the House.

The realists in the Senate constantly reminded their colleagues that the Amnesty Bills could not conceivably pass so long as the Supplemental Civil Rights Bill was appended to them. And it is of particular significance that, when considered on its own merits as a separate measure, the Supplemental Civil Rights Bill did not win majority support until the provision pertaining to common schools, among others, had been deleted.

The whole course of the debates and voting upon the Supplemental Civil Rights Bill points inexorably to the conclusion that Congress did not understand that the Fourteenth Amendment of its own force prohibited segregated school systems in the States. Those who opposed the Sumner measure as unconstitutional clearly did not believe that the Fourteenth Amendment had empowered the Congress to abolish separate schools within the States. Those who favored or opposed the measure on grounds of policy surely did not believe that the Fourteenth Amendment had prohibited school segregation as a matter of law, thus precluding any legislative discretion in the matter. Although State courts had already held that the Fourteenth Amendment did not prohibit separate schools, none who spoke in

favor of the Sumner measure complained that those courts had improperly construed the Amendment.

(8) Attempts to require mixed schools in the District of Columbia.[10]

Not only did Sumner attempt to destroy segregated schools in the States; he endeavored to persuade both the 41st and 42nd Congresses to prohibit separate schools in the District of Columbia. Because of a complete lack of sympathy for the project, the effort failed and the schools of the District remain separate to this day.

(9) The Federal Aid to Education Bill.[11]

In 1872 the House had before it a bill to subsidize education in the States by receipts from sales of public lands. When the fear was expressed that the measure might be construed to require mixed schools, an amendment was adopted in the House providing that the subsidies should not be withheld from any State "for the reason that the laws thereof provide for separate schools for white and black children or refuse to organize a system of mixed schools". Although this measure was never considered by the Senate, it is indicative that the House did not regard separate schools as forbidden by the Fourteenth Amendment.

(10) The Civil Rights Act of 1875.[12]

In 1873 a bill which later became the Civil Rights Act of 1875 was introduced in the House of the 43rd Congress by Butler of Massachusetts. Sumner introduced a similar

[10]App. A at 52-56.
[11]*Id.* at 56.
[12]*Id.* at 56-70.

measure in the Senate the following year. As originally proposed, both Bills contained provisions which would have required mixed schools. Constitutional authority for the proposed legislation was sought in the privileges and immunities and equal protection clauses of the Fourteenth Amendment and in the provisions of Section 5 empowering Congress to implement the Amendment.

There was strong opposition to the Bills, especially to those provisions affecting separate schools. Butler himself expressed doubt as to the wisdom of requiring mixed schools, and undoubtedly did not believe that the Fourteenth Amendment had prohibited separate schools, since he was willing to let considerations of policy control.

In the Senate, where Sumner's Supplemental Civil Rights Bill had been so amended in Committee that some senators thought it would permit separate but equal accommodations, the constitutional basis for the Bill was found by its proponents in the Thirteenth, Fourteenth and Fifteenth Amendments, particularly the privileges and immunities and equal protection clauses of the Fourteenth Amendment. Those opposing the Bill as unconstitutional referred to the then recent decision of this Court in the *Slaughter House Cases,* 16 Wall. 36 (U. S. 1872). Others considered the measure solely on a policy basis. After barely defeating an amendment which would have made it clear that the Bill would permit separate schools, the Senate passed the Bill. But it was never acted upon in the House.

At the Second Session of the 43rd Congress, the House resumed consideration of Butler's Bill. The debate upon the measure followed the same general lines marked out in the earlier discussions of the measure, but it is to be noted that Representative Cain of South Carolina, a Negro, when

asked if the Negroes of his State wanted mixed schools, replied:

> "So far as my experience is concerned, I do not believe they do. In South Carolina, where we control the whole school system we have not a mixed school except the State college."

Cain evidently considered the question of school segregation a political and not a constitutional one.

After protracted debate an amendment to strike from the Bill all reference to schools was approved by a vote of 128 to 48. Representative Kellogg of Connecticut proposed the amendment, as he said, because he believed that to prohibit school segregation would result in the complete destruction of the public school systems in many States; and further that the subject of schools was one for State, rather than Congressional, legislation. Upon adoption of the Kellogg amendment, the Bill was passed in the House, 162 to 99. It later passed the Senate, after a brief debate, and was signed by President Grant on March 1, 1875.

Conclusion

The debates of the 39th Congress on the First Supplemental Freedmen's Bureau Bill, the Civil Rights Act of 1866 and the Fourteenth Amendment contain no evidence of any intention on the part of Congress to forbid school segregation. During this period Congress was certainly not unmindful of the existence of separate schools in the States. Not only was the policy of segregation in the schools referred to in debates on measures affecting the States, but Congress itself was concerned at that time with legislation for separate schools in the District of Columbia.

In fact, the sponsors of the Civil Rights Act of 1866 in both Houses actually disclaimed, expressly in one case and impliedly in the other, any intention to condemn separate schools.

In their debates on the resolution which became the Fourteenth Amendment, the great majority of those who spoke in support of the resolution expressed the view that it "incorporated", "embodied" or "reaffirmed" the Civil Rights Act of 1866. If, as the great weight of the evidence demonstrates, such expressions are interpreted to mean that the Amendment was intended to be no broader than the Civil Rights Act, then it is clear from the debates on the Act itself that mixed schools were not contemplated as a requisite to "equal protection". And even if the Amendment embodied more than the Act, the debates throughout the period leading up to the adoption of the Amendment illustrate that, at least with respect to schools, Congress as a whole had no objection to the policy of separate schools. Moreover, the conclusion that separate schools were not intended to be abolished by the Amendment is further supported by the similarity of the "equal protection" clause to the "equal benefit" clause of the Civil Rights Act of 1866, which was clearly not intended to preclude separate schools. Thus, whatever else the phrase "equal protection of the laws" may have contemplated, it did not require mixed schools.

In the decade that followed, the actions of subsequent Congresses, still close to the scene of the adoption of the Fourteenth Amendment, confirm this conclusion. Time and again measures purporting to expunge separate schools were defeated. Occasionally Sumner and his crusading associates in the Senate were successful in winning a limited engagement only to lose the ensuing battle.

There is, then, no evidence that either the Congress which submitted the Fourteenth Amendment or succeeding Congresses contemplated that the Amendment would of its own force abolish segregation in the public schools. In fact, the overwhelming preponderance of the evidence is quite to the contrary.

B. The States

The history of the proceedings in the legislatures of the several States to which the Fourteenth Amendment was submitted for ratification is set forth in detail in Appendix B of this brief.

In Appendix B we have also endeavored to expose many of the errors which we have found in appellants' review of State action regarding the Fourteenth Amendment and segregation in the public schools. These errors have misled appellants to the wholly mistaken conclusion "that three-fourths of the states understood and contemplated the Amendment to forbid legislation compelling the assignment of white and Negro youth to separate schools" (Br. 140). There is no factual basis whatever for that conclusion. On the contrary, of the 37 States to which the Amendment was submitted, only five abolished or prohibited segregation in their schools when they ratified the Amendment; and there is no evidence that they did so because they thought the Amendment required such action rather than as a matter of local educational policy. Of these five, three later established segregated school systems after the Fourteenth Amendment had become a part of the Constitution of the United States.

We believe a correct view of the historical facts justifies the following classifications of the States and requires the

conclusion that their legislatures did not conceive that the Amendment would abolish or prohibit school segregation.

(1) The nine States not having segregated schools when the Fourteenth Amendment was submitted to them.

We may at once exclude from consideration, as without probative significance to the question at hand, the proceedings in the legislatures of those States which did not have racially segregated public school systems at the time the Fourteenth Amendment was submitted to and ratified by them.

The States of Maine,[13] New Hampshire,[14] Vermont[15] and Wisconsin[16] had never had segregated public school systems.

Massachusetts[17] had abolished segregation in its public school system in 1855, Minnesota[18] in 1864, and Rhode Island[19] in January 1866 before the resolution which became the Fourteenth Amendment was reported to Congress by the Joint Committee of Fifteen on Reconstruction.

Nebraska[20] was not admitted to the Union until 1867. Significantly, while the bill for Nebraska's admission was pending in Congress, a bill which would have removed all distinctions on account of color in the schools of Nebraska passed the Nebraska legislature but failed to become law because of the governor's refusal to sign it. Nevertheless

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[13]App. B at 24.
[14]*Id.* at 35.
[15]*Id.* at 51.
[16]*Id.* at 54-5.
[17]*Id.* at 26-27.
[18]*Id.* at 28-29.
[19]*Id.* at 45-46.
[20]*Id.* at 32-33.

Nebraska was admitted to the Union. Upon admission Nebraska ratified the Fourteenth Amendment and simultaneously enacted its first school law as a State. The statute did not touch upon the subject of segregation.

Since segregation did not in fact exist in the public school systems of these eight States, they were naturally not concerned, except perhaps academically, with the question of whether or not the Fourteenth Amendment would abolish segregation in public schools.

Iowa[21] might also properly be included in this category. The Amendment was ratified in the Iowa House and Senate in April, 1868. The Iowa constitution, adopted in 1857, declared that provision should be made "for the education of all the youths of the state through a system of common schools". A statute enacted by the legislature in 1858, which required school authorities to provide separate schools for Negro children unless all parents agreed to amalgamation, had been declared void under the State constitution by the Supreme Court of Iowa in 1858. Therefore, when the Fourteenth Amendment was submitted to the legislature of Iowa in 1868, segregated schools had already been outlawed by the State constitution.

Furthermore, while the Amendment was before the legislature there was pending for decision in the Supreme Court of Iowa a case involving the effect of the same constitutional provision upon an asserted discretion in local district school authorities to establish separate schools for white and Negro children. On April 14, 1868 the court held that under the constitution of 1857 no such discretion existed. Since this decision came down several months before the Fourteenth Amendment was proclaimed as rati-

[21] *Id.* at 19-20.

fied on July 28, 1868, the Amendment clearly was not the basis of the decision.

The legislature which ratified the Amendment took no action regarding school segregation, undoubtedly because of the prohibition against segregation already contained in the State constitution. It seems likely, therefore, that the possible effect of the Amendment upon the public school system of Iowa did not enter into the deliberations of its legislature in ratifying the Amendment.

(2) The five States having segregated schools before the Fourteenth Amendment was submitted to them but contemporaneously outlawing or discontinuing them upon ratifying the Amendment.

Among the States which ratified the Fourteenth Amendment, five—Connecticut, Michigan, Louisiana, Florida and South Carolina—enacted contemporaneous legislation either prohibiting or making no provision for segregation in their public school systems. Although such action, unexplained, would appear to leave these States in an ambiguous position upon the question at issue here, the evidence indicates that their action did not result from any understanding that the Amendment outlawed school segregation, but rather from a decision to abolish such segregation as a matter of local policy.

Connecticut[22] outlawed segregated schools on August 1, 1868. Yet, although it had ratified the Fourteenth Amendment in June of 1866, in 1867 segregated schools were required by local ordinance in Hartford and also existed in New Haven. Therefore, although Connecticut did in fact

[22]App. B at 9-10.

abolish school segregation at the time when the Fourteenth Amendment became a part of the Federal Constitution, it apparently did so as a matter of policy rather than under any supposed compulsion of the Amendment itself.

In Michigan,[23] the same legislature which ratified the Fourteenth Amendment enacted a statute providing that "all residents of any district shall have an equal right to attend any school therein". This enactment was held by the Michigan Supreme Court in 1869 to require the admission of Negro children into the public schools of Detroit, where separate schools for Negroes had been established and maintained since 1839. Significantly, however, Chief Justice Cooley did not rest his decision on the Fourteenth Amendment or indeed even refer to it in his opinion, but arrived at his conclusion solely on the basis of the Michigan statute.

There is evidence that in Louisiana[24] the Fourteenth Amendment was not understood as requiring the abolition of segregation in the public schools of that State. When the Amendment was first submitted to the legislature in 1867 the governor, a Union man, recommended its ratification, but in the same address urged the legislature to provide separate schools for Negro children. After the Amendment had been rejected by the 1867 legislature, a new legislature was convened in 1868 by the provisional governor under the Reconstruction Acts. This body, composed mainly of Negroes, ratified the Amendment. In the same year a new State constitution was adopted. One of its provisions prohibited segregation in the public schools.

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[23]App. B at 27-28.
[24]*Id.* at 22-24.

Although the members of the convention were quite vocal in expressing their support of the new constitution, not one of them cited the Fourteenth Amendment as justifying or requiring the clause abolishing segregation in the public schools.

As a result of this provision in the State constitution, however, there was riotous confusion and no effective public school system was established in Louisiana for as long as it remained in effect. The requirement of mixed schools was eliminated by the Louisiana constitution adopted in 1879, indicating that the people of the State at that time did not understand that the Fourteenth Amendment had abolished segregation. Racial segregation in the public schools of Louisiana has existed ever since.

Florida[25] apparently had no general public school system when the Reconstructionist legislature ratified the Fourteenth Amendment on June 9, 1868. Free day and night schools were provided for Negroes at public expense, but no free schools were provided for white children. The same legislature which ratified the Fourteenth Amendment had before it a bill designed to establish a uniform public school system. The bill passed the House without provision for segregated schools but was amended in the Senate to require segregation. However, the measure as amended did not pass either branch of the legislature. Although in 1869 a general school law was enacted which contained no provision with respect to separate or mixed schools, separate schools were eventually required by the constitution of 1887—indicative of the fact that segregation was not then regarded by the people of Florida as violative of the Fourteenth Amendment. There is no evidence that the

[25]App. B at 11-12.

failure to require school segregation before 1887 was due to any belief that the Fourteenth Amendment forbade it.

The situation in South Carolina is presented fully in Appendix C of this brief and, in the interest of brevity, will not be redescribed here. Suffice it to say that in 1868 at a convention in which almost two-thirds of the delegates were Negroes, South Carolina adopted a new State constitution directing the establishment of a system of public schools which should "be free and open to all children and youths in the State, without regard to race or color". However, this provision was never construed as requiring the abolition of school segregation.

There is no evidence that the South Carolina legislature in ratifying the Fourteenth Amendment understood or contemplated that the Amendment would abolish segregation in the public schools of the State. On the contrary, two governors, by their messages, the General Assemblies, by their legislation, and the school authorities, by their administrative recommendations and practices, demonstrated their belief that the question was an open one for legislative determination by the State, under both the State and Federal Constitutions. Segregation was made mandatory in the public schools of South Carolina in 1895, an indication that nothing had occurred during the intervening years to change the view that the Fourteenth Amendment did not prohibit segregation in the public schools.

Thus it would seem that the five States which abolished or made no provision for school segregation at or about the time they ratified the Fourteenth Amendment did so as a matter of local policy rather than because they considered the question foreclosed by the Fourteenth Amendment. And three of the five later enacted legislation reviving their segregated school systems.

(3) The four States having segregated schools and refusing to ratify the Fourteenth Amendment.

Three States—California, Kentucky and Maryland—never ratified the Fourteenth Amendment. However, their failure to ratify is no evidence, and there is no other evidence, that they contemplated or understood that the Fourteenth Amendment would abolish segregation in their public schools. In fact, contemporaneous action by the legislatures of these States in establishing separate schools indicates a contrary view.

In California[26] the House received a report recommending rejection, while the Senate received a report recommending ratification. The two Houses remained deadlocked and the Amendment was never rejected or ratified. Neither of the two reports on the Fourteenth Amendment made any mention of its possible effect upon California's segregated school system. The fact that California, after the Fourteenth Amendment had been proclaimed as ratified, reenacted legislation requiring separate public schools for Negro and white children, demonstrates that the legislature did not understand that the Fourteenth Amendment abolished segregation in the public schools of that State.

Although the Kentucky[27] legislature voted rejection of the Amendment pursuant to recommendation of the governor, his message did not discuss its merits. There is nothing in the legislative proceedings to indicate that, in rejecting the Amendment, the legislature even considered its possible effect upon the segregated public school system

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[26]App. B at 7-9.
[27]*Id.* at 21-22.

of Kentucky, much less that it rejected the Amendment because it contemplated or understood that the Amendment would abolish segregation in the public schools of the State. Indeed, the understanding seems to have been directly to the contrary. Apparently, prior to 1867 Kentucky had made no provision for the free education of Negroes. The same legislature which rejected the Fourteenth Amendment established schools for Negroes to be supported by taxes collected from Negroes, thus effectually establishing a separate school system. No real system of Negro education seems to have been established in Kentucky prior to 1882. The public schools have been segregated in practice ever since and the State constitution of 1891 made segregation mandatory in the public schools. It is clear that the convention which adopted this constitution understood that the Fourteenth Amendment, which had then been in force for over two decades, did not prohibit racial segregation in the public schools.

The Maryland[28] legislature voted to reject the Fourteenth Amendment only after it had considered an extensive report of the Joint Committee on Federal Relations to which the Amendment had been referred. It is of particular significance that in this report there is no reference whatever to the possible effect of the Fourteenth Amendment upon the public schools of the State.

Maryland, like Kentucky, had made no provision for the free education of Negroes before 1867 when the Fourteenth Amendment was submitted to the legislature. The first comprehensive school system was established by law effective April 1, 1868, just four months before the Fourteenth

[28]App. B at 24-26.

Amendment was proclaimed as ratified. The statute provided for the maintenance of separate schools for colored children by taxes paid by the colored people of the county. A segregated public school system has existed in Maryland ever since. The continuance of this system by legislation, repeatedly re-enacted by succeeding legislatures, is itself evidence that the Amendment was not understood as abolishing or requiring the prohibition of segregation in the public schools of Maryland.

For all intents and purposes, Delaware[29] may be considered under this heading, since it did not ratify the Fourteenth Amendment until early in the twentieth century. The Delaware legislature rejected the Fourteenth Amendment in 1867. Although the governor in his inaugural address of January 15, 1867 expressed the view that the Amendment was a dangerous encroachment on State rights, he made no reference to the possible effect of the Amendment upon the school system then existing in Delaware. At that time no free schools for Negroes were provided by the State. Such Negro schools as existed were supported by voluntary contributions made by Negroes.

Delaware did not ratify the Fourteenth Amendment until 1901. The constitution of 1897, in effect at that time, provided for the maintenance of separate schools. Clearly then the Delaware legislature, when it ratified the Amendment, did not understand it to require the abolition of segregation in the public schools.

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[29]App. B at 10-11.

(4) The two Border States having segregated schools and continuing them after ratifying the Fourteenth Amendment.

The Border States of Missouri and West Virginia both had segregated public school systems at the time they ratified the Fourteenth Amendment and both have maintained them to the present day.

The Missouri[30] constitution of 1865 specifically permitted the establishment of separate schools for Negroes. Statutes implementing this permissive segregation and providing separate schools for Negroes were enacted in 1865, two years before the Fourteenth Amendment was ratified by Missouri, and thereafter in 1868, 1869 and 1874. The Missouri Constitution of 1875 made segregated schools compulsory and implementing statutes were enacted in 1879, 1887 and 1889.

The West Virginia[31] legislature of 1863, in establishing a free school system, had required segregation of the races. This legislation was in effect when West Virginia ratified the Fourteenth Amendment on January 16, 1867. On February 27, 1867 the same legislature enacted a statute providing that "white and colored persons shall not be taught in the same schools". The West Virginia Constitution adopted in 1872 incorporated this requirement of school segregation into the basic law of the State where it remains to this day.

Patently, the legislatures of Missouri and West Virginia did not, when they ratified the Fourteenth Amendment, understand or contemplate that it would prohibit school segregation or require its abolition.

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[30]App. B at 31-32.
[31]*Id.* at 53-54.

(5) The nine Northern States continuing to operate or immediately establishing segregated schools after ratifying the Fourteenth Amendment.

Persuasive evidence that the State legislatures which ratified the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools is supplied by those Northern States, which although ratifying the Fourteenth Amendment, nevertheless either contemporaneously established separate public schools or continued to operate existing segregated public school systems. These nine States are Illinois, Indiana, Kansas, Nevada, New Jersey, New York, Ohio, Oregon and Pennsylvania.

At the time it ratified the Fourteenth Amendment in 1867, Illinois[32] did not provide free schools for Negro children because the law did not contemplate their co-attendance with white children in the free public schools. The superintendent of public instruction in his 1867-1868 report stated that the question of maintaining separate schools for the two races might safely be left to the respective school districts to determine. A similar statement was made by the governor in his message to the legislature in 1871. Illinois did not end its separate school system until 1874.

Similarly, when the Fourteenth Amendment was submitted to the Indiana[33] legislature in 1867, that State excluded colored children from its common schools and made no provision whatever for their education. Governor Oliver P. Morton, afterwards United States Senator, in his message to the legislature recommending ratification of the Fourteenth Amendment, referred to this fact and suggested

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[32]App. B at 14-16.
[33]*Id.* at 16-19.

the establishment of a school fund in proportion to the number of colored children in the State to be applied to their education by the establishment of separate schools. This recommendation was not adopted by the 1867 legislature. In 1869, however, taxation for common school purposes was made uniform and the education of Negro children was provided for in separate schools.

Indiana is one of only two States which have available today a record of the legislative debates concerning the proposed adoption of the Fourteenth Amendment. While it is true that one bitter opponent of the Amendment stated that as a result of its ratification Negroes "would sit with us in the jury box and with our children in the common schools", the legislature of 1869 evidently did not agree with his views when it provided separate schools for Negro children.

The legislative debates on the measure making provision for separate schools are also extant. The record does not indicate that the Fourteenth Amendment at any time entered into the discussions of the legislators. Some opposed educating the Negro at all. Others favored separate schools in the belief that the Indiana constitution required education for the Negro. Still others favored mixed schools on the theory that they were required by the Indiana constitution. None indicated a belief that segregated schools, if established, would violate the Fourteenth Amendment.

This record, coupled with the fact that Indiana established separate schools within a year after it had ratified the Fourteenth Amendment, is persuasive evidence that the Indiana legislature did not understand that the Fourteenth Amendment prohibited segregation or required its abolition.

Kansas[34] ratified the Amendment in 1867. The very next year its legislature gave to boards of education in cities of the first and second class the right "to organize and maintain separate schools for the education of white and colored children". This permissive segregation has continued ever since, except for the three year period 1876-1879. Obviously Kansas did not understand that the Fourteenth Amendment would abolish segregation in the public schools.

Nevada,[35] when the Fourteenth Amendment was submitted to it in 1867, made no provision for the free education of Negro children. In his message to the legislature recommending ratification of the Fourteenth Amendment the governor expressed the view that failure to provide education for the Negroes violated the Nevada constitution. He did not, however, link the Fourteenth Amendment with the subject. The same legislature which ratified the Fourteenth Amendment enacted legislation providing:

> "Negroes, Mongolians and Indians shall not be admitted into the public schools, but the Board of Trustees may establish a separate school for their education, and use the Public School funds for the support of the same."

This is compelling evidence that the Nevada legislature which ratified the Fourteenth Amendment did not understand that it would abolish segregation in the public schools. Although in 1872 the Nevada Supreme Court held by a divided court that the statutory requirement of separate schools violated the State constitution, the judges were unanimously of the view that the contention that the statute

[34]App. B at 20-21.
[35]*Id.* at 33-34.

violated the Fourteenth Amendment was "utterly untenable".

New Jersey[36] had permitted segregation in public schools on a local option basis for many years before the Fourteenth Amendment was submitted to it. The New Jersey legislature ratified the Amendment in 1866. The legislature of 1868 adopted a resolution rescinding the ratification of the Fourteenth Amendment and setting forth a number of objections to the Amendment. It is important to note that the possible effect of the Amendment upon the segregated school system of the State was not among the objections contained in the resolution. School segregation was not outlawed in New Jersey until 1881.

In New York[37] separate schools for Negroes and whites had been permitted by statute prior to 1867 when the Fourteenth Amendment was submitted to the legislature of that State. In practice separate schools for Negroes were established in the City of New York and in Brooklyn. School segregation was not completely outlawed by statute in New York until 1938. Hence the New York legislature which ratified the Fourteenth Amendment did not understand that it would require abolition of school segregation. Furthermore, the New York courts in decisions rendered over the period 1869 to 1900 agreed that this was not the effect of the Amendment.

Ohio[38] ratified the Fourteenth Amendment in 1867, a statutory system of separate schools having been in effect there for many years. It rescinded its ratification in 1868, although the governor advised the legislature that nothing had occurred in the intervening year to indicate that ratifi-

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[36]App. B. at 35-36.
[37]*Id.* at 36-38.
[38]*Id.* at 41-42.

cation did not represent the wishes of the people. The rescinding resolution made no mention of any possible effect which the Amendment might have upon the segregated school system then existing in Ohio. In 1871, the Supreme Court of Ohio unaminously sustained the constitutionality under the Fourteenth Amendment of Ohio's separate school statute. Ohio continued its segregated school system for almost twenty years after the Fourteenth Amendment had been adopted and did not outlaw such segregation until 1887, demonstrating that the Amendment was not understood as prohibiting or requiring the abolition of segregation in the public schools of Ohio.

Although Oregon[39] does not appear to have had any constitutional or statutory provisions regarding school segregation, separate schools existed in Portland as late as 1867, after Oregon had ratified the Amendment, and were not discontinued until 1871. In 1868 Oregon rescinded its earlier ratification of the Amendment, but there is no evidence that this was induced by any supposed effect of the Amendment on the public schools of the State.

When Pennsylvania[40] ratified the Fourteenth Amendment in 1867, the school authorities of that State had been required since 1854 to establish separate schools for Negroes when twenty or more Negro pupils were available. Such school segregation was upheld by the Pennsylvania courts when attacked on constitutional grounds in 1873 and was not abolished until 1881. Thus, in Pennsylvania as in New York, the courts and the legislatures both agreed that the Fourteenth Amendment did not prohibit segregation in the public schools of that State.

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[39]App. B at 42-43.
[40]*Id.* at 43-45.

We pause to note that in view of the indisputable facts thus far considered, we cannot understand how appellants reach the conclusion that the majority of the Union States understood that it forbade segregation in public schools (Br. 158, 182).

(6) The eight seceded or Reconstructed States continuing to operate or immediately establishing segregated schools after ratifying the Fourteenth Amendment.

We regard as particularly probative the fact that, in seven of the seceded States, legislatures which had been reorganized under the Reconstruction Acts and which ratified the Fourteenth Amendment, also enacted legislation requiring segregation in the public schools. These seven states are Alabama, Arkansas, Georgia, Mississippi, North Carolina, Texas and Virginia. With these may be considered Tennessee which, although readmitted to the Union before the Reconstruction Acts were passed, was nevertheless subjected to many of the influences of Reconstruction.

In Alabama[41] the Reconstructionist legislature, which had ratified the Fourteenth Amendment on July 13, 1868 by overwhelming majorities, on August 11, 1868 adopted a general school law which required segregated schools unless all parents in the district consented to amalgamation.

Similarly, the Reconstructionist legislature in Arkansas,[42] which had ratified the Fourteenth Amendment by unanimous vote on April 6, 1868, passed a statute on July 23, 1868 establishing the public school system and directing the State Board of Education to make the necessary provi-

[41]App. B at 4-6.
[42]*Id.* at 6-7.

sions for establishing separate schools for white and colored children.

In Georgia,[43] at a time when the provisional governor and a majority in both Houses were Republicans, the legislature ratified the Fourteenth Amendment and also enacted the first law establishing a system of public schools in Georgia, containing the provision that "the children of the white and colored races shall not be taught together in any sub-district of the State".

In Mississippi,[44] the Reconstructionist legislature which adopted the Fourteenth Amendment enacted legislation to establish a free school system containing no reference to segregation. Although the House twice defeated amendments to the statute which would have specifically required segregation, the legislation was construed by the lieutenant governor, a Republican, as permitting the people, if they so desired, to provide separate schools. In practice the schools established under this legislation were segregated schools and school segregation was expressly made a requirement by statute in 1878.

The Reconstructionist legislature of North Carolina[45] ratified the Fourteenth Amendment on July 4, 1868. The new State constitution, which had been adopted at a convention assembled in January 1868, neither required nor prohibited segregated education. Two days after ratification of the Fourteenth Amendment the governor, in his inaugural address, stated that it was "believed to be better for both [races] and more satisfactory to both, that the schools should be distinct and separate". Within a few

[43]App. B at 12-14.
[44]*Id.* at 29-31.
[45]*Id.* at 38-40.

weeks the legislature adopted a joint resolution urging the establishment of a system of free but segregated schools. Shortly thereafter, pursuant to further recommendation by the governor, legislation was enacted authorizing the school authorities to establish separate schools for the children of each race.

In Tennessee[46] the same legislature which ratified the Fourteenth Amendment amended the school law to require segregated education in Tennessee—an enactment described by the Republican governor in his second inaugural address as "the wise and desirable School Law".

In Texas[47] the same Reconstructionist legislature which ratified the Fourteenth Amendment enacted a school statute empowering a board of directors to "make any separation of the students or school necessary to insure success". In practical effect this gave the local authorities the discretion to segregate students as local conditions might require.

In Virginia[48] the Reconstructionist legislature which ratified the Fourteenth Amendment established a system of free schools by legislation which contained the provision that "white and colored persons shall not be taught in the same schools, but in separate schools".

Notwithstanding these facts, appellants assert that the States seeking readmission understood that the Amendment "stripped them of power to maintain segregated schools" (Br. 142; and see 157). They apparently base this conclusion upon an implied conspiracy among the seceded States to defer legislation providing for separate schools until after those States had achieved reinstatement by Congress.

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[46]App. B at 46-48.
[47]*Id.* at 48-51.
[48]*Id.* at 52-53.

A review of the evidence reveals that the conspiracy which appellants allege finds no support in the facts. Of the seceded States, only two, Louisiana and South Carolina adopted constitutions expressly prohibiting segregated schools. The constitutions adopted by the other seceded States neither required nor forbade separate schools. Yet Congress reinstated them on the basis of those constitutions and ratification of the Fourteenth Amendment, under the provisions of the Reconstruction Act which did not so much as mention the subject of separate schools. Appellants can not have appreciated that the very same Reconstructionist legislatures which ratified the amendment set up the segregated school systems. Moreover, as we have shown in our Appendix B, some of these States had separate school statutes in force when Congress approved their readmission. Plainly these facts completely demolish appellants' theory.

It is stated by appellants (Br. 157) that as to the eleven Rebel States the evidence clearly reveals that the Fourteenth Amendment was understood as prohibiting color distinction in public schools. We submit that the evidence is clearly to the contrary; that the action of neither the States nor the Congress leads to any such conclusion.

Conclusion

To summarize briefly, in the nine States which had no separate schools and few Negro residents at the time of ratification, we do not find any probative evidence upon this question. Suffice it to say, however, that there is no evidence of the existence in those States of any view that the Amendment did require the abolition of public school segregation. Evidence abounds to show that the five States

which contemporaneously discontinued or outlawed segregation did so in the exercise of their own discretion rather than because they considered the matter settled by any prohibition contained in the Amendment. Contemporaneous action of the legislatures of the four Union States which refused to ratify the Amendment indicates that they did not construe it as abolishing segregation. Moreover, there is absolutely no evidence to support an interpretation of their refusal to ratify as recognition of any prohibitory effect of the Amendment with respect to separate schools. Two Border States and nine Northern States continued to operate or immediately established separate schools after ratifying the Amendment. And the Reconstructionist legislatures of eight ex-Confederate States maintained segregated schooling after ratifying the Amendment, often upon the recommendation of provisional or Reconstructionist governors.

From this review of the attitude toward the Fourteenth Amendment of the thirty-seven States which comprised the Union at the time the Amendment was adopted, viewed against the historical background of the educational systems of those States, the conclusion is indisputable that the States did not construe the Amendment as compelling the abolition of separate schools.

II

SECOND QUESTION

If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(A) that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish segregation, or

(B) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

ANSWER

(A) It was not the understanding of the framers of the Amendment that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish segregation in public schools.

(B) It was not the understanding of the framers of the Amendment that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing segregation in public schools of its own force.

As we have seen, the resolution proposing the Fourteenth Amendment as originally drafted provided:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the

> citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property."

This proposed grant of broad legislative power to Congress aroused such vigorous opposition that the framers of the resolution despaired of having it accepted in that form. As redrafted the resolution became Section 1 of the proposed Fourteenth Amendment and reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Thus the proposed Amendment was changed from one which would have conferred upon Congress power to legislate, into an injunction upon the States. By this change we believe that Congress gave unmistakable evidence that it did not wish to ask the people to clothe it with power to legislate regarding the enjoyment of these fundamental rights within the States.

Again, it will be remembered, throughout the debates upon Section 1 of the proposed Amendment as thus recast, assurances were given by its proponents (1) that it was intended only to protect those civil rights which were dealt with in the Civil Rights Act of 1866; (2) that it was intended to remove any existing doubt regarding the constitutionality of the Civil Rights Act of 1866; and (3) that it was also intended to place repeal of the Civil Rights Act of 1866 beyond the power of future Congresses.

The Civil Rights Act of 1866 was enacted, as we have noted, only after the majority in Congress were satisfied

that it would not affect such matters as the separate school systems of the several States but was limited to the civil rights specifically enumerated in the Bill.

We believe it correct to say, therefore, that the resolution whereby the Fourteenth Amendment was submitted to the States for ratification would never have been adopted by Congress in the absence of these assurances or in the presence of an understanding that, after ratification of the Amendment, future Congresses might enact legislation abolishing or prohibiting segregated public school systems within the States.

It is also significant, we think, that Congress refused to pass every bill introduced within the decade immediately following ratification of the Fourteenth Amendment which provided for or could be construed as requiring abolition of segregated schools within the States. In the debates upon these measures their proponents argued that the proposed legislation was both constitutional and desirable. Opposition was based by some on the ground that the proposed measures would be unconstitutional, by others on the ground that they were inexpedient, and by still others on both grounds. There developed a particularly sharp cleavage of opinion as to the effect of Section 5 of the Amendment. Some expressed the view that Section 5 empowered Congress, if it so desired, to pass legislation of the kind under debate. Others were of the opinion that Section 5 did not grant Congress any substantive powers and had not been intended to give Congress any further power than was implied in similar constitutional prohibitions upon the States found elsewhere in the Constitution. This latter group took the position that the rights preserved by the Fourteenth Amendment should be enforced by the courts in suits

brought by those persons who had been deprived of such rights, and not by substantive acts of Congress.

No bill purporting to abolish separate schools within the States ever passed the House. It is true that Sumner's Supplemental Civil Rights Bill which was offered as an amendment to the General Amnesty Bills did enjoy momentary success in the Senate. Even then the amendment passed by the narrowest of margins, the Senate being divided 28 to 28 and the Vice President casting the deciding vote in its favor. However, the Amnesty Bills, as thus amended, failed to pass.

It may be argued from this that a majority of the Senate, even though only a majority of one, thought that Congress had the power to pass the Bill. But this is not at all definite, for conceivably some of those who voted for the Sumner Amendment may have entertained serious doubt as to its constitutionality, although believing in its desirability; and they may have felt that the constitutional question should at least be presented to the courts for decision. Furthermore, when this Supplemental Civil Rights Bill finally passed the Senate of the 42nd Congress it was as a separate measure and then only after all references to *schools,* churches, cemeteries and juries had been stricken.

Finally, it is of importance to remember that the Civil Rights Bill of 1875, as originally introduced, contained provisions which would have required discontinuance of separate schools within the States. It was not until these provisions had been deleted that the Bill was finally enacted into law. Here again the proponents of the measure argued for its constitutionality and desirability and its opponents claimed it was either unconstitutional or inexpedient or both. Those favoring the Bill contended that Section 5 of the Fourteenth Amendment empowered Congress to pass it,

while those opposed to the measure contended that Section 5 added nothing to the legislative power of Congress, but merely permitted Congress to set up procedural machinery for judicial condemnation of violations of the substantive provisions of the Amendment. Those who argued unconstitutionality cited the then recently decided *Slaughter House Cases*. This group eventually proved to be correct for this Court declared the Civil Rights Act of 1875 unconstitutional when that Act came before it. *Civil Rights Cases,* 109 U. S. 3 (1883). Although another bill, which was subject to the construction of prohibiting separate schools, passed the Senate of the 43rd Congress by an equivocal vote, that bill was never acted upon by the House. The fact that over the years which have since passed no Congress has ever attempted to enact legislation abolishing separate schools within the States is further persuasive evidence that later Congresses have agreed that they were not empowered to enact such legislation.

Moreover, this is not surprising. If, as the facts clearly demonstrate, the matter of separate as distinguished from mixed schools is not within the compass of Section 1 of the Fourteenth Amendment nor intended so to be, the language of Section 5 cannot extend the power of Congress to reach it. For the power given to Congress is only to enforce "the provisions of this article". The subjects of its enforcement must lie within the preceding sections and there only. The boundaries of the article are also the boundaries of Congressional power. The Amendment could not have been offered as a Trojan horse.

Nor was it the understanding of the framers of the Amendment that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing segregation in public schools of its own force.

The members of that Congress did not believe that the proposed Amendment touched the subject of separate schools at all.

While the framers of the Amendment certainly knew that the courts had judicial power to construe the Constitution of the United States, we feel safe in stating that it would have been inconceivable to them that the courts in years to come would give to the Amendment a construction directly opposed to the intention of the framers so clearly and permanently recorded in the Amendment's legislative history.

Even those members of Congress who may have believed that Section 5 of the Amendment clothed Congress with the power to legislate separate schools out of existence gave no clear indication of a belief that the courts could accomplish the same purpose by constitutional construction. Although Senators Sherman and Morton made statements which might be subject to a contrary interpretation, their positions were not even internally consistent. Thus those who sought to abolish public school segregation by statute seem to have thought that if separate schools were to be abolished, it was for Congress and Congress alone to achieve that result by legislation. While some members of Congress did express the view that the civil rights protected by the Amendment could be enforced by the courts in appropriate actions, no one stated or even intimated that the courts could by construction enlarge the field of civil rights which Congress intended to protect when it submitted the Amendment to the States for ratification. This would in effect be to amend the Amendment, not to interpret it.

III

THIRD QUESTION

On the assumption that the answers to Questions 2(A) and (B) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in the public schools?

ANSWER

It is not within the judicial power to construe the Fourteenth Amendment adversely to the understanding of its framers, as abolishing segregation in the public schools. Moreover, if, in construing the Amendment, the principle of stare decisis is applied, controlling precedents preclude a construction which would abolish segregation in the public schools. Even if the principle of stare decisis and the controlling precedents be abandoned, and the effect of the Amendment upon public school segregation be examined *de novo*, under established standards of equal protection the Amendment may not be construed to abolish or forbid segregation as a matter of law and *a priori* in all cases. Rather, each case of such segregation must be decided upon the facts presented in the record of that case; and unless the record establishes by clear and convincing evidence that school segregation could not conceivably be warranted by local conditions in the particular case, the Fourteenth Amendment may not be construed to abolish segregation in that case.

May we note at the outset our difficulty in making the basic assumption on which this third question is founded. For we are convinced that the answers to questions 2(A) and (B) do in fact dispose of the issue by demonstrating be-

yond peradventure that the framers of the Amendment did not understand that future Congresses or courts might abolish segregation in schools. To hold otherwise would be nothing less than an expansion of the Amendment to embrace a matter which the framers clearly intended to be beyond its reach—whether then or in the future.

A. It is not within the judicial power to construe the Fourteenth Amendment adversely to the understanding of its framers, as abolishing public school segregation.

It is, of course, within the judicial power of this Court to construe the Constitution—indeed that is its first and highest function. *Marbury* v. *Madison,* 1 Cranch 137 (1803). But in construing—by the very meaning of the term—the function of the Court is to interpret the language under scrutiny in accordance with the understanding of the framers. That is fundamental:

> "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte Bain,* 121 U. S. 1, 12 (1887).

So also, in first considering the constitutionality of a federal tax on income, the Court laid down these standards:

> "But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences na-

> turally attendant upon the one construction or the other.
>
> We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?" *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 558 (1895).

There the holding, that the tax in question was a direct tax violative of the constitutional mandate of apportionment, resulted eventually in the passage of the Sixteenth Amendment which gave Congress power to collect taxes on incomes without apportionment. The principles enunciated in the *Pollock* case and the situation which resulted from that holding appear to be equally applicable to the case at bar. The equal protection clause of 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. If segregation is to be eliminated, this must be accomplished through legislative action by the States or by constitutional amendment. The Court will give the language of the Fourteenth Amendment only as broad a meaning as its framers meant it to have—especially where, as here, the subject is one specifically considered by the framers. This is no more than a recognition that the concern of the Court is with what "the framers sought to achieve". *Shelley* v. *Kraemer,* 334 U. S. 1, 23 (1948).

Here the purpose of the framers is clear, as we have shown. There is therefore no room for appellants to invoke the principle that the Constitution is often construed

as applying to new matters wholly unknown or not familiar to the framers. *E.g., In re Debs,* 158 U. S. 564, 591 (1895); *United States* v. *Classic,* 313 U. S. 299, 318 (1941). Cases in that category are examples of interpretation of the words of the Constitution to further the presumed intent of the framers that broad provisions should be adapted to new subject matters. In contrast, to interpret the Fourteenth Amendment as abolishing segregation in public schools would frustrate the expressed intent of the framers. Segregation in schools takes essentially the same form today that it has throughout our history. It was a condition well known to those who framed the Fourteenth Amendment and one that they had no intention of abolishing through the adoption of the Amendment.

Finally, there is no escape from the fact that essentially appellants claim for the Court a power which we believe it will be quick to disavow—a supranatural gift of omniscience enabling it to know, better than those who adopted the Amendment and construed it before the ink from its framers' pen was dry, the purposes of the Amendment and its effect, if any, upon racial segregation in the public schools. The basic objection to any such undertaking was succinctly phrased in the concurring opinion in *Adamson* v. *California,* 332 U. S. 46, 64 (1947), with reference to the contention that the Fourteenth Amendment incorporated the first eight Amendments:

> "Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not

contemporaneously known could hardly have influenced those who ratified the Amendment."

B. The application of the principle of stare decisis requires the Court to hold that separate schools do not violate the Fourteenth Amendment.

As Mr. Justice Holmes has said, "Great constitutional provisions must be administered with caution." *Missouri, K. & T. Ry.* v. *May,* 194 U. S. 267, 270 (1904). Accordingly, the Court has created self-imposed limitations upon the exercise of its judicial power, which in their absence would indeed be limitless.

One of the first of these limitations is the principle of stare decisis. It is the product of judicial humility and wisdom—the humble wisdom of the present which regards and follows the accumulated wisdom of the past. If this limitation be applied in the decision of this case, then the Court will undoubtedly find it *not* to be "within the judicial power, in construing the Amendment, to abolish segregation in the public schools". For it would be difficult indeed to find a case so favored by precedent as is the case for South Carolina here. Forty years ago that great student of the Constitution, Charles Evans Hughes, then an Associate Justice of this Court, citing *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), affirmed "that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the two races". *McCabe* v. *Atchison, T. & S. F. Ry.,* 235 U. S. 151, 160 (1914). Twenty-five years ago this Court noted that segregation in public schools had been "many times decided to be within the constitutional power of the state legislature to settle without

intervention of the federal courts under the Federal Constitution". *Gong Lum* v. *Rice,* 275 U. S. 78, 86 (1927). Fifteen years ago the Court observed that the State of Missouri had sought to fulfill, although unsuccessfully, its recognized obligation to provide Negroes with advantages for higher education substantially equal to the advantages afforded for white students "by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions". *Missouri* ex rel. *Gaines* v. *Canada, Registrar,* 305 U. S. 337, 344 (1938). The most recent application of the *Plessy* doctrine was made in 1950. On that occasion the Court, while holding that facilities were not equal under the particular facts of that case, expressly refrained from re-examining the doctrine although urged to do so. *Sweatt* v. *Painter,* 339 U. S. 629 (1950).

Now, as then, it is contended that *Plessy* v. *Ferguson* should be re-examined "in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation". *Id.* at 636. Appellants' answer to the third question consists of a broadside attack on the *Plessy* case, closing with the plea that the separate but equal doctrine of that case should now be overruled (Br. 65). In view of the variety of ways in which appellants' brief attempts to discredit the *Plessy* case, we shall point out the weaknesses inherent in the various attacks they level at it.

Appellants set great store by the dissent of Mr. Justice Harlan in the *Plessy* case (Br. 40-41). But when a school case came before the Court three years later, Mr. Justice Harlan, writing for a unanimous Court in *Cumming* v. *Board of Education,* 175 U. S. 528 (1899), said that public education in schools maintained by state taxation "is

a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land". *Id.* at 545.

Many of appellants' cases present no valid analogy because they involve laws which in effect constituted an absolute denial of a right by the class against whom the differentiation was aimed. In this category fall cases foreclosing the right to work, or to serve as a juror, or to vote. *E. g., Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Truax* v. *Raich,* 239 U. S. 33 (1915); *Strauder* v. *West Virginia,* 100 U. S. 303 (1879); *Nixon* v. *Herndon,* 273 U. S. 536 (1927). There can be little doubt that in such cases the absolute denial of the right involved was unreasonable; indeed, many of the cases relied upon by appellants were distinguished on this ground by the Court in the *Plessy* case. 163 U. S. at 545-6.

Appellants assert that preservation of public peace cannot justify deprivation of constitutional rights (Br. 43). This proposition obviously assumes the very point at issue. The question at hand is whether or not the legislature of South Carolina is in fact depriving anyone of a constitutional right in providing separate but equal schools. The question here is not whether *admitted* constitutional rights may be violated in the exercise of the police power, as was the situation in the authorities relied upon by appellants. *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Birmingham* v. *Monk,* 185 F. 2d 859 (5th Cir. 1950), *cert. denied,* 341 U. S. 940 (1951); and *Morgan* v. *Virginia,* 328 U. S. 373 (1946).

Buchanan v. *Warley,* much cited by appellants (Br. 16, 22, 44, 47, 194), is wide of the mark. There a city ordinance

prohibited a Negro from moving to a block where more than half of the residents were white. The Court held the ordinance invalid under the due process clause of the Fourteenth Amendment, because the municipality could not legally abridge the property right of the white man to sell his property to whomsoever he chose. Thus, the Court held only that the constitutionally protected property right of the white man had been taken away without due process of law. Moreover, it is noteworthy that the Court stressed the Civil Rights Act of 1866 (14 Stat. 27) as demonstrating the intent of the framers of the Fourteenth Amendment to include property rights within its protection:

> "These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color." 245 U. S. at 79.[49]

Furthermore, the Court in distinguishing *Plessy* v. *Ferguson*, reaffirmed the principle of that case and pointed out that courts of high authority have upheld statutes providing for separation in the public schools of white and colored pupils where equal privileges are given. 245 U. S. at 79-80. Hence, in the very case so much cited in appellants' brief, this Court recognized the validity of State statutes

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[49]Cases holding that it is a denial of equal protection for State courts specifically to enforce private restrictive covenants, Shelley v. Kraemer, 334 U. S. 1 (1948), or to award damages for their breach, Barrows v. Jackson, 346 U. S. 249 (1953), also relied on by appellants (Br. 21-22), simply carry out the principle of the Buchanan case in effectuating what "the framers sought to achieve". 334 U. S. at 23. Those cases are obviously irrelevant to the decision whether a State legislature may in its discretion exercise its police power to maintain separate but equal schools.

separating races in certain situations, specifically including schools.

Morgan v. *Virginia,* 328 U. S. 373 (1946) (Br. 25, 45, 48), held merely that because of the possibility that a passenger would be required constantly to change seats, a statute requiring the segregation of passengers in interstate commerce was an undue burden in an area where uniformity was required. In other words, the need for national uniformity overrode the exercise of the local police power. If the Court had felt that the separate but equal doctrine had been "sapped of vitality", as appellants maintain (Br. 48), no reason appears why the *Morgan* and other transportation cases could not have been decided on the basis of the Fourteenth Amendment.

It is noteworthy that the decision and language of *Hall* v. *DeCuir,* 95 U. S. 485 (1877), holding a statute *forbidding* segregation to be an unconstitutional interference with interstate commerce, was emphatically approved in the *Morgan* case. This decision, that a requirement of non-segregation unduly burdens interstate commerce, demonstrates the irrelevance to the problem at hand of those cases holding that segregation is unconstitutional under the commerce clause. *Hall* v. *DeCuir* further demonstrates the inaccuracy of appellants' statement that "where * * * [governmental] power has prohibited racial discrimination, it has been sustained even where it has been urged that the state is acting in derogation of other constitutional rights or protected interests" (Br. 26).

Nor do we understand the argument (Br. 48) that *Henderson* v. *United States,* 339 U. S. 816 (1950) in fact overrules *Chiles* v. *Chesapeake & Ohio Ry.,* 218 U. S. 71 (1910); see also *McCabe* v. *Atchison, T. & S. F. Ry.,* 235

U. S. 151 (1914). The former case merely held that a railroad subjected a passenger to an unreasonable disadvantage in violation of the statutory requirement of § 3(1) of the Interstate Commerce Act by refusing to extend "the use of its existing and unoccupied facilities". 339 U. S. at 825. As stated in *Mitchell* v. *United States,* 313 U. S. 80, 94 (1941), regarded as controlling in the *Henderson* case:

> "The question whether this was a discrimination forbidden by the Interstate Commerce Act is *not a question of segregation but one of equality of treatment.* The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment * * * " (emphasis added)

We are told that segregation in transportation was disapproved in general on the first occasion that the question came before this Court (Br. 36-37). But an examination of appellants' authority, *Railroad Co.* v. *Brown,* 17 Wall. 445 (1873), discloses no basis for this broad assertion. There a statutory grant of power by Congress to a railroad to extend its lines had been conditioned upon the railroad's agreement that no person should be excluded from the cars on account of color. The Fourteenth Amendment was not so much as mentioned in the course of the opinion. We find it difficult to understand how this example of statutory construction is in any way relevant to a problem arising under the equal protection clause of the Constitution.

It is also contended that the *Plessy* case was an unwarranted departure from the main stream of constitutional development, and is no more than a judicial aberration which should now be discarded (Br. 38-40). The extraordinary

assertion is made that there "[r]ace for the first time since the adoption of the Fourteenth Amendment was sanctioned as a constitutionally valid basis for state action" (Br. 39). However, it is abundantly clear that this was not the first time the question of separate but equal schools had arisen; rather, the *Plessy* case affirmed a principle previously enunciated in both State and Federal courts. The leading decisions on the question had been handed down by the courts of New York, Ohio, Indiana, California and Massachusetts. The authorities are collected in Appendix D to our brief filed at the former hearing and will not be repeated here.

Nor will it do to attack *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), on the ground that the separate but equal doctrine was not put in issue (Br. 48). The short answer is that there a unanimous Court noted that, while most of the cases it had cited, concerned the establishment of separate schools as between white and black pupils, "we cannot think that the question is any different or that any different result can be reached where the issue is as between white pupils and pupils of the yellow races". *Id.* at 87. Thus the question before the Court was equated with the cases concerning separate but equal schools. And the Court there reaffirmed the cardinal principle that the matter "is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment". *Ibid.*

It is asserted that *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950), in effect constitute a repudiation of the separate but equal doctrine (Br. 48-50). But neither case disturbed this doctrine, for in each case the Court expressly found that the facilities offered to the Negro student were unequal. That was the only point decided, as the Court took pains to state.

Appellants seek comfort from the *Sweatt* case on the ground that there, as well as in the *McLaurin* case, the Court took account of a number of factors which it considered essential to securing the full benefits of a graduate school education (Br. 26-28; 48-50). The *Sweatt* and *McLaurin* cases clearly do not control the case at bar, because of the fundamental difference between public school education at the primary and secondary levels and the many factors going to make up a fully rounded graduate school education. Of the many elements considered by this Court in the *Sweatt* and *McLaurin* cases as essential to a well rounded graduate school education, not one emphasized by the appellants has any bearing whatever on education at the primary or secondary school level. The mere recital of the major factors which the Court stressed will demonstrate the difference between the situation in those cases and the problem at bar.

In the *Sweatt* case, the Court found inequality of educational opportunity from the fact that the white law school was superior in point of library facilities, availability of law reviews and similar facilities, size of student body, variety of courses and opportunity for specialization, reputation and number of faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. Moreover, the Court realistically recognized that the law is an intensely practical profession; hence it found inequality from the fact that students in the Negro law school were denied an interplay of ideas and association with most of the lawyers, witnesses, jurors, judges and other officials with whom the Negroes would inevitably be dealing later as members of the Texas bar.

In the *McLaurin* case, the Court found inequality from a studied series of regulations aimed at keeping the Negro apart from all of his fellow students, the net effect of which was to impair and inhibit his ability to study, to engage in discussions and to exchange views with other students, and in general to receive an effective graduate instruction in his chosen profession.

These factors are nowhere present in instruction at the public school level, where segregation presents different problems. Indeed, appellants' own witness recognized this in testifying that the area of higher education is the most favorable for making a change from segregation (Dr. Redfield, R. 166). The distinction between the two levels of education was also ably analyzed by the court below where, after outlining the factors bearing on proper graduate school education, it stated:

> "The problem of segregation at the common school level is a very different one. At this level, as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture. Moreover, education at this level is not a matter of voluntary choice on the part of the student but of compulsion by the state. The student is taken from the control of the family during school hours by compulsion of law and placed in control of the school, where he must associate with his fellow students. The law thus provides that the school shall supplement the work of the parent in the training of the child and in doing so it is entering a delicate field and one fraught with tensions and difficulties. In formulating educational policy at the common school level, therefore, the law must take account, not merely of the matter of affording instruction to

> the student, but also of the wishes of the parent as to the upbringing of the child and his associates in the formative period of childhood and adolescence. If public education is to have the support of the people through their legislatures, it must not go contrary to what they deem for the best interests of their children." 98 F. Supp. at 535.

Finally, a historical dissertation is offered in an effort to show that the separate but equal doctrine has been "an instrumentality of defiant nullification of the Fourteenth Amendment" (Br. 50-65). Little need be said regarding this unilateral thesis. We quite agree with the statement that "there is grave danger in the oversimplification of complexities of history" (Br. 57). This portion of the brief is infected with the same emotionalism that pervades the supplement (Br. 199-235), although mercifully it is free of the adjectival difficulties which confront the reader of the latter. Nevertheless, this historical thesis is but another example of appellants' apparent attempt to obscure the fundamental constitutional question by references to "inferior status", "[t]he final blow to the political respectability of the Negro", the "concept of the Negro as an inferior fit only for slavery", "the whole racist complex" and the like (Br. 50-65, *passim*). This catalogue of inflammatory labels is a poor substitute for a rational discussion of the problem at hand, which is to be judged by the application of well-settled principles governing the effect of the Fourteenth Amendment on the police power of the State of South Carolina.

Our effort has been to meet the chief lines of argument in appellants' multi-pronged attack on the *Plessy* case, rather

than to deal with each and every case they have cited. The variety of the onslaught has necessitated a more detailed treatment than we would have preferred; for the short answer to the sum total of the attack is perhaps nowhere better stated than in the opinion of the court below in this case:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States [in *Gong Lum* v. *Rice, supra*] at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics." 98 F. Supp. 529, at 537.

C. Even if the principle of stare decisis and the controlling precedents be abandoned, and the effect of the Amendment upon public school segregation be examined *de novo*, under established standards of equal protection the Amendment may not be construed to abolish or forbid segregation as a matter of law and *a priori* in all cases. Rather, each case of such segregation must be decided upon the facts presented in the record of that case; and unless the record establishes by clear and convincing evidence that school segregation could not conceivably be warranted by local conditions in the particular case, the Fourteenth Amendment may not be construed to abolish segregation in that case.

Even if we are to assume that the Court will disregard in this case the self-imposed limitation of stare decisis and re-open the entire question, there remain other limitations upon the power of constitutional construction which we think prohibit an interpretation of the Fourteenth Amendment as having the effect of abolishing segregation in the public schools.

The claim is made that such segregation deprives appellants of the equal protection of the laws. The Court has, over the years, evolved an established set of principles for testing that claim; indeed, the equal protection clause has customarily been narrowly construed, in contrast to the due process clause. Roberts, *The Court and the Constitution,* 67-8 (1951).

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).

That proposition has its roots in a proper appreciation of the Federal-State relationship in the framework of the Constitution. Essential to this relationship is the recognition that the governments of the States "possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people". *Munn* v. *Illinois,* 94 U. S. 113, 124 (1876). Among these are the police powers, which "are nothing more or less than the powers of government inherent in every sovereignty, * * * the power to govern men and things". *License Cases,* 5 How. 504, 583 (U. S. 1847); see *Munn* v. *Illinois,* 94 U. S. 113 (1876).

The police power "extends to all the great public needs" and it "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant public opinion to be greatly and immediately necessary to the public welfare". *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110-11 (1911); see *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421 (1952). It "is not confined to a narrow category", and the States "are entitled to their own standard of the public welfare". *Id.* at 423-4. It has been said to be "the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government". *Eubank* v. *Richmond,* 226 U. S. 137, 142-43 (1912); see *Sligh* v. *Kirkwood,* 237 U. S. 52, 58, 59 (1915). It was the magnitude of this power that the Court stressed in refusing to upset the State statute in the *Plessy* case. 163 U. S. at 544.

This Court has constantly recognized that when a classification and differentiation may be justified by local conditions, the legislative decision that those conditions require different treatment must be respected and upheld unless those attacking the constitutionality of the legislation meet the burden of proving by clear and convincing evidence that the alleged warrant of local conditions does not in fact exist. Thus, the Court has said:

> "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Missouri, K. & T. Ry.* v. *May,* 194 U. S. 267, 269 (1904).

Time and again this Court has had occasion to express this principle. Thus, in sustaining the constitutionality of a State statute, the Court observed:

> "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions,

> which by no means are held *semper ubique et ab omnibus.*" *Otis* v. *Parker,* 187 U. S. 606, 608-09 (1903).

Hence it inevitably followed that:

> "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect." *Ibid.*

Mr. Chief Justice Stone later expressed somewhat the same thought as follows:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584 (1935).

This Court has applied these principles to sustain State legislation discriminating against aliens. In *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914), the Court upheld a

State statute making it unlawful for any foreign born resident to kill a wild bird or animal except in defense of person or property, or for such person to own or be possessed of a shotgun or rifle. Writing for a unanimous bench, Mr. Justice Holmes stated:

> "The question is a practical one dependent upon experience. * * *
>
> Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts * * *" *Id.* at 144.

In *Ohio* ex rel. *Clarke* v. *Deckebach,* 274 U. S. 392 (1927), the Court unanimously sustained a Cincinnati ordinance which required pool and billiard rooms to be licensed and forbade issuance of such licenses to aliens. Mr. Justice Stone said:

> "Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens * * * it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification. * * * The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience.
>
> It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. * * *" *Id.* at 396-97.

More recently in *Tigner* v. *Texas,* 310 U. S. 141 (1940), the Court observed:

> "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. * * *
>
> How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems." *Id.* at at 147, 148.

Yet again, in *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952), the Court stated:

> "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

From the foregoing standards of construction it follows that racial segregation in the public schools cannot be declared *a priori* unreasonable as a matter of law.

This Court recognized in *Plessy* v. *Ferguson* that racial segregation is the result of racial feeling. But it wisely understood that segregation cannot be effectively destroyed without destroying its causes, and that those causes cannot be legislated out of existence. Neither can they be removed by court decree. We have learned by bitter and costly ex-

perience that a prohibition upon human conduct not accepted by the people, although perhaps a "noble experiment", will inevitably fail.

Public education and the establishment and operation of public schools are within the area of governmental responsibility committed to the States under the Constitution. In meeting its responsibility, a State has power to establish a school system which is capable of efficient administration, taking into account local problems and conditions. In South Carolina local conditions include a large number of both races living in the State, the habits, customs and usages of the people over a long period of time within a framework of racial segregation, the State's past unhappy experience with efforts to require commingling of the races in the public schools, and the destructive effect of such action on the public school system. See Appendix C, *passim,* and our brief on the former hearing, pp. 23-6. These are all material to the legislative determination that separate schools for the two races will promote the efficient accomplishment of the public purpose of educating the children of the State. It is self-evident that any properly conceived system of free public education must rest on a broad basis of support by the public at large.

History has taught that the fear of mixed schools, a fear not confined to one race, greatly hampered the development of free public education in South Carolina in the past. The present public school system in the State has been developed pursuant to the separate school policy established by the State constitution and implemented by statute. As the record here shows, the public schools in many of the State's school districts would not survive the termination of that policy, at the present time and under present con-

ditions, much less be capable of efficient administration. School District No. 1 of Clarendon County is beyond doubt one of those school districts.

In that school district there are 2,799 Negro and 295 white children (R. 265). To require these children to attend mixed schools would, in effect, force the white children to attend what, for all practical purposes, would be colored schools, with a student population of one white child to every ten colored. The only evidence in this record as to how the people of the district might react to this revolutionary change in the character of their schools is that "it would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to make it possible to have public education on that basis at all"; that there would be a "probability of violent emotional reaction in the communities"; that "it would be impossible to have peaceable association [of the races] in the public schools"; and that "it would eliminate public schools in most, if not all, of the communities in the State" (R. 113, 114).

Surely a prohibition upon school segregation which would work an abolition of virtually the entire school system is itself unreasonable and absurd. "The Fourteenth Amendment is not a pedagogical requirement of the impracticable." *Dominion Hotel, Inc.* v. *Arizona*, 249 U. S. 265, 268 (1919).

Appellants offered no evidence to show that the public school system of South Carolina could survive the abolition of segregation. They offered only the testimony of so-called "experts" who said that segregation had some detrimental effect on Negro children. Others who have studied the problem believe that forced commingling of the two races would have far more serious consequences upon the Negro child. We have analyzed these opposing views

in our brief on the former hearing (19-37) and do not pause to repeat the analysis here. We do reiterate our conclusion that there is a sharp conflict of opinion (1) as to the effect of segregation upon the children and the communities involved, and (2) as to the appropriate time when, and circumstances under which, segregation may be abolished, if at all.

However that may be, these are not the sole, nor indeed the major, considerations in respect of the question at issue here. "Experts" could probably be found who would say that the alien whom the law deprives of privileges enjoyed by his citizen neighbor suffers serious psychological and social damage. That circumstance, however, would not affect the case if the deprivation had a reasonable foundation in fact. Cases cited *supra,* pp. 72-75.

Appellants have made no more than a token challenge to the necessity and reasonableness of a dual system of elementary and secondary public schools in South Carolina. They seem to realize that they cannot prevail if the necessity or reasonableness of the State action is the test. Certainly they have failed to show that the facts which originally necessitated separate schools have ceased to exist.

The contention of appellants is rather that the States were so shorn of power by the addition of the Fourteenth Amendment to the Constitution that South Carolina cannot under any circumstances attain the governmental objective of public education, even if in the State's considered judgment separate schools are necessary to the existence and efficient administration of its school system. Yet never since the Fourteenth Amendment became a part of the Constitution has governmental action, Federal or State, legis-

lative or judicial, even suggested such a lack of power on the part of the States, or given countenance to the idea that the fact of race and its impacts upon society may not be recognized and reasonably taken into account in order to accomplish important public purposes.

It is not "racism" to be cognizant of the fact that mankind has struggled with race problems and racial tensions for upwards of sixty centuries. The fact of race is among the most stubborn things in human existence. It was Disraeli who said: "No man will treat with indifference the principle of race. It is the key of history." Appellants' own witnesses recognize that the fact of race presents current problems.[50] Dr. Redfield gave his opinion that "the steps by which, and the rapidity with which segregation in education can be removed with the benefits to the public welfare will vary with the circumstances", and that " the circumstances of the community and how long there has been segregation will have a bearing on it" (R. 166).

In every case of legislative differentiation the question of constitutionality "is a practical one dependent upon experience". *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144 (1914). Here, "local conditions may affect the answer, conditions that the legislature does but that [the Court] cannot know." *Dominion Hotel, Inc.* v. *Arizona,* 249 U. S. 265, 268 (1919). That being so, "it is enough [to sustain the segregation involved] that this Court has no such knowledge of local conditions as to be able to say that it was manifestly wrong". *Patsone* v. *Pennsylvania, supra.* In the last analysis, there is no escape from the hard fact that the question at bar lies in a debatable field. Such questions should be resolved by the legislatures and not by the courts.

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[50]Mrs. Trager, R. 138, 142, 144; Dr. Redfield, R. 166, 169.

IV

FOURTH QUESTION

Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(A) would a decree necessarily follow providing that, within the limits set by normal geographical school districting, Negro children should forthwith be admitted to schools of their choice, or

(B) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

ANSWER

(A) Upon the assumption stated, a decree would not necessarily follow providing that, within the limits set by normal geographical school districting, Negro children should forthwith be admitted to schools of their own choice.

(B) Upon the assumption stated, this Court, in the exercise of its equity powers, may permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions.

This Court's equitable power to avoid the harsh effects of its decrees by allowing defendants a reasonable time in which to comply is but one manifestation of its broad power to fashion remedies to meet the exigencies of unusual situations.

Perhaps the most notable field in which the Court has exercised this equitable power is that of the antitrust cases,[51] where defendants are at times in danger of suffering grave financial loss from the immediate divestiture of proscribed holdings or from the discontinuance of prohibited activities pursuant to the Court's decree, and where the public must often be protected from the ill effects which might be produced by the sudden disruption of long established business practices.[52] See *United States* v. *Timken Roller Bearing Co.,* 83 F. Supp. 284 (N. D. Ohio 1949), modified, 341 U. S. 593 (1951); *United States* v. *Paramount Pictures, Inc.,* 66 F. Supp. 323 (S. D. N. Y. 1946), 70 F. Supp. 53 (1947), rev'd, 334 U. S. 131 (1948), 85 F. Supp. 881 (1949), aff'd per curiam, 339 U. S. 974 (1950), final decree CCH Trade Cases, ¶62,573; *United States* v. *National Lead Co.,* 332 U. S. 319, 333 n. (1947), opinion amended, 332 U. S. 751; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 426 (1945), opinion clarified, 324 U. S. 570; and *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 189 (1944).

In the case at bar, the District Court ordered appellees to report within six months upon the action taken to carry

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[51]Although the Court's jurisdiction there is statutory, the proceedings are "in equity". 15 U. S. C. §§ 4, 9, 25 (1946).

[52]This Court has often observed that the public interest is a significant factor to be weighed by courts of equity in the granting or withholding of relief. E.g., Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 552 (1937); United States v. Morgan, 307 U. S. 183, 194 (1939). Moreover, it has been guided by considerations of public interest in construing various statutory enactments as not affecting this equitable power. E.g., Scripps-Howard Radio, Inc. v. FCC, 316 U. S. 4 (1942); cf. Hecht Co. v. Bowles, 321 U. S. 321 (1944).

Where the public interest might have been adversely affected, plaintiffs have been denied equitable relief altogether and remitted to less effectual remedies at law. E.g., Harrisonville v. W. S. Dickey Clay Manufacturing Co., 289 U. S. 334 (1933); Beasley v. Texas & Pacific Ry., 191 U. S. 492 (1903).

out its order to proceed at once to equalize educational facilities (R. 209-10). An appeal was then taken by appellants, who complained of the relief granted, but this Court remanded the case to secure the views of the District Court (342 U. S. 350), in the light of the additional facts contained in the report filed during the pendency of the appeal (R. 211). Thus this Court impliedly approved the lower court's action in allowing appellees adequate time in which to provide the necessary facilities. See remarks of Judge Parker, R. 279-80, 284-85.

As has been indicated, courts have frequently exercised their discretion to deny or postpone injunctive relief. Hence it is clear that in the event of a ruling adverse to appellees it is within this Court's power to provide for a gradual, orderly transition to a system of mixed schools. Indeed any other course would approach the impossible. Merely as a practical matter a certain period of time must be allowed to effect the necessary adjustments, a fact which appellants themselves recognize (Br. 193). The complex problem of accommodating the schools to a non-segregated status is such that to require an immediate changeover would impose an intolerable burden that could only result in the breakdown of the whole school system.

V

FIFTH QUESTION

On the assumption on which Questions 4 (A) and (B) are based and assuming further that this Court will exercise its equity powers to the end described in Question 4 (B),

(A) should this Court formulate detailed decrees in these cases;

(B) if so, what specific issues should the decrees reach;

(C) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(D) should this Court remand to the courts of first instance with directions to frame decrees in these cases and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at these specific terms of more detailed decrees?

ANSWER

Upon the assumptions stated, this Court should not, and indeed could not, formulate a detailed decree in this case; nor should this Court appoint a special master to hear evidence with a view to recommending specific terms for such a decree. Rather, this Court should remand the case to the District Court for further proceedings in conformity with this Court's opinion.

If the Court should decide to reverse the judgment of the District Court, we do not believe it or the District Court

has judicial power to do more than to forbid compulsory or permissive segregation by State constitution or statute in the context of the particular case under review, and to permit gradual desegregation of existing separate school systems. It will then be solely for the school authorities of the particular State or school district involved to determine how they shall remold its school system upon a non-segregated basis. This determination will necessarily be made in the light of the local conditions prevailing in each case. We again point out that appellants' witness, Dr. Redfield, expressed his view that the steps by which, and the rapidity with which, segregation in education can be discontinued with greatest regard for the public welfare will vary with the circumstances of each community (R. 166); he further stressed the importance of local conditions as a determinative factor bearing upon the extent to which, and the appropriate time when, separate schools may be eliminated (R. 167).

Neither this Court nor the court below can impose a particular plan of non-segregated schools upon the legislature of the State or upon local school boards acting under legislative authority, nor can it constitute itself a Super Board of Education to direct the operation of the State's public schools according to a judicially devised plan.

Cases arising under the antitrust laws have been cited, *supra* p. 81, as illustrating the power of a court of equity to establish by its decree a specific plan of divestiture or divorcement and to grant a period of grace for full compliance with the plan imposed. But the analogy between these cases and the case at bar cannot be carried too far. In dealing with private persons, individual or corporate, the Court's decree may formulate, in greater or less detail, the procedures to be thenceforth followed and may enforce

strict adherence to those procedures by appropriate process. But far different is the case in dealing with action of a legislative or executive character by a sovereign State. A constitution, statute, or course of conduct pursued by a State contrary to the Constitution of the United States may be declared null and void or its continuance enjoined. But what is to follow thereafter, what substitute if any is to be devised, what modifications if any are to be made, and by what means they are to be maintained—these are matters for the State, its legislature, or its authorized agents, and for them alone.

In short, while it is undoubtedly within the judicial power (assuming that a constitutional basis for the decision exists) to declare a particular segregated school law unconstitutional and void, it is not within the judicial power to determine what, if any, non-segregated school system shall be substituted in its place.

Traditionally, in cases involving segregation in education, this Court has refused to scour the record in order to frame a detailed decree. Where school facilities have been held unequal and the situation has necessitated administrative action, the Court has not attempted to define the exact course which must be adopted by the parties in order finally to dispose of the case, but has remanded the case to the lower court for further proceedings "consistent with" or "in conformity with" its opinion. See, *e.g., Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), *mandate reviewed, sub. nom. Fisher* v. *Hurst,* 333 U. S. 147 (1948); *Missouri* ex rel. *Gaines* v. *Canada, Registrar,* 305 U. S. 337 (1938); *cf. Henderson* v. *United States,* 339 U. S. 816 (1950).

Our position in this regard is consistent with that taken by this Court in other cases. In *International Salt Co.*

v. *United States,* 332 U. S. 392 (1947), this Court reviewed the judgment of a district court enjoining certain violations of the antitrust laws. To the defendant's contention that the decree should be modified, this Court replied:

> "The framing of decrees should take place in the District Court rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." *Id.* at 400-01.

To the same effect see *United States* v. *National Lead Co.,* 332 U. S. 319, 334 (1947), opinion amended, 332 U. S. 751, and *Besser Manufacturing Co.* v. *United States,* 343 U. S. 444, 449 (1952).

It is certain that a proper disposition of this cause, on the assumption upon which this fifth question is based, would call for further evidence and findings relating to the particular conditions in the community involved. Various facts would necessarily have to be determined in order to decide the length of the period for compliance with the decree. These might include the location, number, size and accommodations of all the public schools within the particular district; the number, ages, grades and residences of all the children attending the public schools; the proportion of white and Negro children of school age; the number and proportion of Negro and white teachers; the school transportation facilities available in relation to the locations of the schools and residences of the pupils; the nature of present school facilities and the necessity or non-necessity for increasing or redistributing them to accommodate the new non-segregated school systems; the funds needed to accomplish compliance and the existence or non-existence of sources sufficient to supply such funds. These, and other factors too numerous to mention, would undoubtedly enter

into a determination of what might be a reasonable time for compliance with any requirement for discontinuing existing segregation in public school systems.

On most of these subjects the record now before the Court is entirely silent. Since evidence of this kind is still to be adduced, this Court is palpably unsuited to frame a detailed decree. The law is clear that

> "[i]n the exercise of their appellate jurisdiction the Supreme Court [of the United States] can only take notice of questions arising on matters of fact appearing upon the record;* * * ". *Kent's Commentaries* *327.

The rule that no federal appellate court will hear evidence not presented in the trial court deprives the Court of any power to frame a properly dispositive decree in this case. *Realty Acceptance Corp.* v. *Montgomery,* 284 U. S. 547 (1932); *Roemer* v. *Simon,* 91 U. S. 149 (1875); *United States* v. *Knight's Administrator,* 1 Black 488 (U. S. 1861); *Russell* v. *Southard,* 12 How. 139 (U. S. 1851). This rule was at an early time embodied in an express statutory prohibition[53] and appeared in the 1911 codification of the Judical Code[54] in the following form:

> "Upon the appeal of any cause in equity * * * no new evidence shall be received in the Supreme Court * * *"

Although that statute was repealed in connection with the recodification of 1948,[55] the repeal cannot be construed as an affirmative grant of power to the Court to receive evidence. The more reasonable conclusion is that the codi-

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[53] 2 Stat. 244 (1803).
[54] 28 U. S. C. § 863 (1911).
[55] 62 Stat. 869 (1948).

fiers viewed the question as sufficiently settled by the time-honored rules of equity practice. The relevant rule is clearly stated in *Russell* v. *Southard,* 12 How. 139, 159 (U. S. 1851), as follows:

> "* * * according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. * * *
>
> Indeed, *if the established chancery practice had been otherwise,* the act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes." (emphasis added)

Although today the statute has been repealed, the "established chancery practice" remains.

Nor should this Court appoint a special master to hear evidence with a view to recommending specific terms for a decree in this case. A special master merely acts as an "instrument" of the court. See *Ex Parte Peterson,* 253 U. S. 300, 312 (1920). Consequently, his powers can be no greater than those of the court which appoints him. Since, as we have already shown, this Court may not in this case hear evidence pertaining to local conditions, a special master is similarly barred from doing so.[56]

This principle was applied in *Shawkee Manufacturing Co.* v. *Hartford-Empire Co.,* 322 U. S. 271, 274 (1944) where this Court rejected the suggestion that a court of

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[56]Original jurisdiction cases in which this Court has appointed special masters to hear evidence are myriad. E.g., United States v. Oregon, 75 L. Ed. 1473 (1931); Pennsylvania v. West Virginia, 252 U. S. 563 (1920). Plainly, however, these cases do not constitute precedents for any such action in an appellate proceeding.

appeals appoint a master to hear certain questions relating to the extent of damages, and observed that the question of the apppointment of a special master must depend upon further proceedings in the district court.

Federal courts of appeals have, it is true, appointed special masters in cases in which they have been empowered by statute to review proceedings before federal administrative bodies. See, *e.g., NLRB* v. *Remington Rand, Inc.,* 130 F. 2d 919 (2d Cir. 1942). Cases of this kind afford no precedent for the appointment of a special master in appellate proceedings, however, since on an appeal from an administrative agency the court of appeals is, in effect, the court of original jurisdiction.

So far as has been discovered, the Court's appointment of a special master in this case would be unprecedented. Nor is this surprising, for the procedure would be contrary to principle as well as precedent. The office of an appellate court is to apply the law to the facts of record. It is for the lower court to formulate the decree consistent with the high court's view of the law, ascertaining if need be additional facts to that end. This function lies outside the proper province of the appellate court and hence is traditionally not within its judicial power.

It follows that, upon the assumptions stated in the fifth question, this Court should remand the case to the District Court with directions to formulate and enter such decree as may be appropriate in the light of this Court's opinion.

Conclusion

In our opinion, the only proper decree in this case is one affirming the judgment below.

Respectfully submitted,

ROBERT McC. FIGG, JR.
S. E. ROGERS
Counsel for Appellees.

T. C. CALLISON
Attorney General of South Carolina

JOHN W. DAVIS
WILLIAM R. MEAGHER
TAGGART WHIPPLE
Of Counsel.

November 30, 1953.

APPENDIX A

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APPENDIX A: History of Congressional Action upon the Question of Separate Schools and the Fourteenth Amendment

Introduction

The views of the Congress with regard to the question of separate public schools may be derived not only from Congress' view of the Fourteenth Amendment, but from three additional sources: (1) measures which Congress considered just prior to the adoption of the Fourteenth Amendment, (2) measures it considered concurrently with the Amendment, and (3) measures it considered during the decade immediately following.

Some forms of evidence of Congressional intent are naturally more probative than others. For example, the disposition which Congress makes of a particular measure is normally a more positive evidence of intent than is the utterance of an individual member of that Congress. The views of those who sponsored a measure and conducted it along its legislative itinerary are, of course, entitled to respectful consideration. And occasionally the general temper of Congressional thinking can be recognized from the cumulative effect of individual views. On a specific question of this kind, however, general statements as to equality can throw little light. Our principal concern must necessarily be with attempting to discover what effect the particular speaker thought the particular measure would have upon the particular matter of school segregation. In selecting and presenting the material in this Appendix, we

have attempted to give due weight to each of these elements of proof.

Debates upon the various measures considered here proceeded concurrently at times, so that it would be hopelessly confusing to attempt to trace their development in an absolutely chronological style. For that reason, this Appendix is organized in subdivisions which deal with each important measure in turn, preserving chronology where the practicalities permit.

When the 39th Congress convened in December of 1865, its immediate task was the administration and reconstruction of the seceded States and the delineation of a policy to govern the civil status of the newly-freed slaves. In the course of its first session it considered and acted upon the First Supplemental Freedmen's Bureau Bill, the Civil Rights Bill, and the Fourteenth Amendment to the United States Constitution, all of which were concerned with the resolution of those two great problems and all of which were closely related to one another. On the theory that the policy of Congress with respect to segregated schooling in the District of Columbia also constitutes evidence of Congressional intent with regard to measures which might affect schools operated by the States, reference is occasionally made to legislation in that area, since it is not to be supposed that Congress would adopt for the District a policy which it intended to prohibit to the States.

The Establishment of Separate Schools for Negroes in the District of Columbia Before the End of the Civil War

From the time when Negro education was first introduced in the District of Columbia, the policy of Congress there has been one of segregated schooling. After slavery had been abolished in the District in April, 1862, Congres-

sional legislation of May 20, 1862 empowered the authorities of Washington County to provide schools for Negro children outside the cities in Washington County, to be supported by a tax on Negro property.[1] On May 21, 1862 a bill was enacted providing for the education of colored children in the cities of Washington and Georgetown, to be supported by a tax on Negro property in the cities.[2] A few months later a separate board of trustees was created to manage the Negro schools in the cities of Washington and Georgetown.[3] And on June 25, 1864, Congress repealed those portions of the Acts of May 20, 1862 and May 21, 1862 which had provided for the support of Negro schools by taxation on Negro property only, substituting a requirement that a portion of all school funds should be set aside for Negro schools in the proportion that the number of Negro children bore to the number of white children.[4]

The First Supplemental Freedmen's Bureau Bill

The First Supplemental Freedmen's Bureau Bill was one of the initial attempts of Congress to legislate on the subject of the civil rights of the freedmen.[5]

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[1]12 Stat. 394 (1862).
[2]12 Stat. 407 (1862).
[3]12 Stat. 537 (1862).
[4]13 Stat. 187 (1864).
By way of significant contrast, acts of the same Congresses prohibited the exclusion of any person from the street railway cars of the District of Columbia on account of color. 12 Stat. 805 (1863); 13 Stat. 326 (1864); 13 Stat. 536 (1865). It is also noteworthy that Senator Grimes of Iowa, later to be a member of the Joint Committee of Fifteen on Reconstruction, saw no inequality in segregated transportation. Cong. Globe, 38th Cong., 1st Sess. 3133 (1864).
[5]The Freedmen's Bureau had been established by a bill enacted in March, 1865, giving the Bureau general powers of relief and guardianship over Negroes and refugees and the administration of abandoned lands. It made no provision for the protection of the civil rights of the freedmen. 13 Stat. 507 (1865).

On December 13, 1865, Senator Wilson of Massachusetts introduced a bill (S. No. 9) in the Senate which would have invalidated all laws "whereby or wherein any inequality of civil rights and immunities" existed because of "distinctions or differences of color, race, or descent" in the South.[6] The Senate never voted either upon this bill or upon its successor, Wilson's S. No. 55.[7] In one of the few comments made with regard to the merits of S. No. 9, Senator Sherman, Ohio Republican, suggested that the specific civil rights intended to be granted should be enumerated.[8]

On January 5, 1866, Senator Trumbull of Illinois introduced a bill to enlarge the powers of the Freedmen's Bureau (S. No. 60). The bill was referred to the Judiciary Committee, of which Trumbull was chairman, and reported out of Committee with amendments on January 11, 1866.

The first five sections were concerned with matters unrelated to schools. Section 6 would have empowered commissioners to purchase sites and buildings for asylums and schools for the freedmen and refugees.[9] While there was nothing in the Bill or in the debates to indicate whether Congress intended the schools so established to be segregated or mixed, there is evidence to the effect that, in practice, the Freedmen's Bureau operated separate schools.[10] A pre-election speech of William W. Holden, the Republican Party's successful candidate for the governorship of North Carolina in 1868, was reported as follows in the newspaper of which he was editor:

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[6]Cong. Globe, 39th Cong., 1st Sess. 39 (1865).
[7]*Id.* at 519.
[8]*Id.* at 42.
[9]*Id.* at 210.
[10]"The Bureau's principal concern was with combatting Southern opposition to educating the Negroes at all. See letters of Brig. Gen. C. H. Howard, Cong. Globe, 39th Cong., 1st Sess. 2275, 2777 (1866).

> "The Governor then passed to the question of schools and militia. He exposed in a masterly manner the frauds which had been practiced upon the honest people of the State by designing rebel demagogues. The colored people were opposed to attending the same schools. The white race were opposed to it. *The Bureau has its separate schools for white and colored;* the Northern States have separate schools for the races.—It is satisfactory on all hands that the races be separated in the schools. Those men who charge upon the Republicans the desire to force the two races into the same schools; or who state that the [proposed North Carolina] Constitution forces any such things, speak wilfully false."[11] (emphasis added)

Holden's newspaper repeatedly emphasized this stand on the question of separate schools throughout the campaign. In an article published in the issue of April 21, 1868, the following statement appears: "The Freedmen's Bureau, acting for the Government, has separate schools." [12]

Section 7 of the First Supplemental Freedmen's Bureau Bill declared that if, because of any State or local law, custom or prejudice,

> "* * * any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full

[11]The Daily North Carolina Standard (Raleigh), April 3, 1868, p. 3, col. 2.

[12]The Daily North Carolina Standard (Raleigh), April 21, 1868, p. 3, col. 2. See also remarks of General Butler, Representative from Massachusetts in a later Congress, relating to his experience with Negro schools which he had established as a military commander during the war. 2 Cong. Rec. 455-57 (1874); *infra*, p. 61.

> and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes * * * on account of race * * * it shall be the duty of the President of the United States, through the Commissioner, to extend military protection over all cases affecting such persons so discriminated against." [13]

Section 7 and Section 8, the latter of which described the penalty for violation of the prohibition contained in the former, were limited in their operation to those States or districts in which the ordinary course of judicial proceedings had been interrupted by the war, *i.e.*, the Rebel States.[14]

During the House and Senate debates on the Bill, no member of either body ever suggested that Section 7 should be construed to require mixed schools. Representative Dawson, Pennsylvania Democrat, accused certain radical politicians of agitating for mixed schools, but his remarks cannot reasonably be understood to imply that this Bill would accomplish any such result.[15]

Representative Donnelly, Minnesota Republican, expressed indignation that the Tennessee Black Code "provides that colored children shall not be admitted into the same schools with white children, while it makes no provision for their education in separate schools".[16] The inference is clear that he considered the establishment of separate schools a proper alternative.

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[13]Cong. Globe, 39th Cong., 1st Sess. 318 (1866).

[14]*Id.* at 322.

[15]*Id.* at 541. By quoting fragments of Dawson's statement out of context, appellants create the erroneous impression that he said *this Bill* would outlaw separate schools (Br. 82). Clearly such is not the case.

[16]*Id.* at 589.

Representative Rousseau, a Kentucky independent Republican, who opposed the Bill, informed the House that in Charleston, South Carolina, the public schools had already been taken over by Freedmen's Bureau authorities for the exclusive benefit of the Negroes. The person in charge of the schools wrote:

> "The old trustees have applied to be put in possession of them [the public schools]. This General Saxton has refused unless they will agree to give a fair share of them to the colored children. The Normal, Morris Street and Meeting Street Schools I have opened and they are already well filled with colored children. The white children, of course do not attend."[17]

It would seem unreasonable not to infer from the school official's letter that, had the Charleston trustees agreed to turn over some of the schools to the Negroes, *i.e.*, "a fair share," the schools might have been conducted on a segregated basis. It is true that, in the course of his remarks upon the letter, Rousseau said: "Here are four schoolhouses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction * * *".[18] No doubt Rousseau was much exercised over the then-existing condition of affairs which confronted the whites with the alternatives he noted. In his zeal to defeat the Bill, however, he appears to have omitted any reference to the third alternative offered by General Saxton—namely, separate schools. In any event, he did not say that he viewed this Bill as forcing mixed schools.

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[17] *Id.* at Appendix 71.

[18] *Ibid.*

The members of both Houses were considerably more vocal in estimating the effect the Bill would have upon state laws which prohibited miscegenation. Although several of the Bill's antagonists expressed the fear that it would nullify antimiscegenation laws,[19] none of those who supported the measure expressed any such opinion. In fact, the Bill's sponsor in the Senate, Senator Trumbull, emphatically stated and reiterated that it was not intended to have any such effect.[20] And two members of the House who spoke in favor of the Bill—Moulton of Illinois and Phelps of Maryland—assured its opponents that it would not affect antimiscegenation statutes.[21]

On this subject Moulton said:

> "* * * I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman. It is a simple matter of taste, contract, and understanding between the parties. Besides, there is no deprivation of that right. The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black. * * * I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts.

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[19]Senator Hendricks, *id.* at 318; Senator Davis, *id.* at 418; Representative Marshall, *id.* at 629; Representative Thornton, *id.* at 632; Representative Rousseau, *id.* at Appendix 69.

[20]*Id.* at 322, 420.

[21]*Id.* at 632, Appendix 75.

> These are the great civil rights that belong to us all, and are sought to be protected by this bill."[22]

In the course of the same speech, Moulton made the following statement:

> "Now, let me call the attention of this House to one or two other remarks of the gentleman from Illinois [Mr. Marshall]. He alludes to the condition of the negro in the State of Illinois, and says that this bureau might operate there. In my humble judgment, it would be impossible for this bureau to operate there, for these reasons: in the first place, the ordinary course of legal proceedings have never been interrupted in our State; and in the second place, there is now no law upon our statute-books discriminating between the whites and the blacks other than the constitutional provision regulating suffrage. At the last session of our legislature they swept from our statute-books all those odious black laws making discrimination between the whites and the blacks, so that today in the State of Illinois a black man can now give testimony in our courts; a black man can make contracts; a black man can purchase property, and hold it and transmit it as he pleases. He can come into and go out of the State at pleasure. Such is the condition of the law in the State of Illinois today, and therefore it is not possible this bureau could operate in Illinois."[23]

In the session of the Illinois legislature to which Moulton referred, certain laws discriminating against Negroes were repealed,[24] but the statute excluding Negroes from white schools was re-enacted with amendments not germane

[22] *Id.* at 632.
[23] *Id.* at 633.
[24] Ill. Pub. Laws 105 (1865).

to this question.[25] In fact, in the report of the Superintendent of Public Instruction of Illinois for 1865-6, he notes that there were 6,000 Negro children of school age in Illinois for whom no schools were provided because the law did not contemplate their mixing colored with white children.[26] Not until 1874 was a statute requiring the admission of Negro children to white schools enacted by the Illinois legislature.[27] Thus it would appear that Moulton did not consider either separate schools or anti-miscegenation statutes within the prohibition of the First Supplemental Freedmen's Bureau Bill.

On February 19, 1866, after the Bill had passed both Houses, the President vetoed the measure and his veto was sustained.[28] However, a similar bill was enacted over the President's veto later in the same session on July 16, 1866.[29]

The significance of the First Supplemental Freedmen's Bureau Bill to the present inquiry lies not only in the background it provides with regard to the temper of Congressional thinking on the question of Negro rights immediately prior to the passage of the resolution which became the Fourteenth Amendment. A further significance can be extracted from its points of similarity to the Civil Rights Act of 1866, the name so often linked in the debates upon the Fourteenth Amendment with that of the Amendment itself. Senator Trumbull, who introduced both the First Supplemental Freedmen's Bureau Bill and the Civil Rights Bill of 1866 on the same day, pointed out the kinship be-

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[25]*Id.* at 112, 113.

[26]Report of Superintendent of Public Instruction of Illinois 28 (1865-66).

[27]Ill. Rev. Stat. 983, c. 122, § 100 (1874).

[28]Cong. Globe, 39th Cong., 1st Sess. 943 (1866).

[29]14 Stat. 173 (1866).

tween the two bills, the former to be operative only as a temporary measure in the South and the latter to extend permanently to all sections of the country.[30] The similarity of the two bills is shown by the fact that the civil rights specifically enumerated in the two were identical.[31]

The Civil Rights Act of 1866

As has already been noted, the Civil Rights Bill of 1866 (S. No. 61) was introduced in the Senate by Senator Trumbull, Illinois Republican and Chairman of the Judiciary Committee, on January 5, 1866.[32]

Section One of the Bill, as originally introduced, contained the following broad provision:

> "* * * there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; * * *."

The section then continued:

> "* * * but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any

[30]Cong. Globe, 39th Cong., 1st Sess. 322 (1866).
[31]*Id.* at 318, 474, 1292.
[32]*Id.* at 129.

> law, statute, ordinance, regulation, or custom to the contrary notwithstanding."[33]

In presenting the Bill to the Senate, Trumbull advised his colleagues that the rights intended to be protected thereby were those "set forth in the bill".[34] In answer to the queries of those who were concerned about the breadth of meaning contained in the phrase "civil rights", he said:

> "The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property.
>
> * * * * *
>
> This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." [35]

Senator Willard Saulsbury, Democratic opponent of the Bill, nevertheless evinced concern over the sweeping nature of the clause which introduced the specific enumeration of rights, *i.e.*, "That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of servitude."[36]

Senator Cowan, Pennsylvania Republican, was the only member of the Senate who introduced the subject of mixed

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[33]*Id.* at 474.

[34]*Id.* at 475.

[35]*Id.* at 476. For further evidence that Trumbull did not view the establishment of mixed schools as one of the requirements of the Bill, see his statements in a later Congress. Cong. Globe, 42nd Cong., 2nd Sess. 901, 3189 (1872); *infra*, pp. 43, 48.

[36]Cong. Globe, 39th Cong., 1st Sess. 476-77 (1866).

schools in the debates on the Bill. In speaking against the Bill, he suggested that it might be construed to require mixed schools.[37] No other Senator expressed any such view.

When the Bill was brought before the House of Representatives, its floor leader was Representative Wilson of Iowa, Chairman of the Judiciary Committee, to which the Bill had been committed. In explaining what the broad language of the first section of the Bill comprehended, Wilson said:

> "This part of the bill will excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities'. What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. * * * *Nor do they mean that* * * * *their children shall attend the same schools.* These are not civil rights or immunities. * * *"[38] (emphasis added)

Other supporters of the Bill assured its opponents that it was not intended to encompass any rights other than those which it specifically enumerated,[39] and that it was not intended to affect social relationships.[40]

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[37]*Id.* at 500. Senators Johnson and Davis, Democrats, feared that the Bill might invalidate state antimiscegenation statutes, *id.* at 505-6, 598, but Trumbull assured them that it was not intended to have that effect. *Id.* at 600. Fessenden agreed with Trumbull on this question. *Id.* at 505.

[38]*Id.* at 1117.

[39]Thayer of Pennsylvania, *id.* at 1151, and Shellabarger of Ohio, *id.* at 1293.

[40]Windom of Minnesota, *id.* at 1159.

In spite of these reassurances, several members of the House echoed the fears that had been expressed in the Senate with respect to the sweeping nature of the introductory language of the Bill.[41] Representative Rogers of New Jersey, Democrat, was the only member of the House who unequivocally stated that the language might be construed to compel mixed schools.[42]

Representative Bingham, Republican member of the Joint Committee on Reconstruction and the man who was to become the Father of Section 1 of the Fourteenth Amendment, moved to instruct the committee to which the Bill was about to be recommitted to strike out of the first section of the Bill the controversial words "and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of servitude."[43]

Before the vote on the motion to instruct the committee was taken, Wilson, the Bill's sponsor, addressed the following remarks to Bingham:

> "He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and *when he talks of setting aside school laws* * * *

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[41]Rogers of New Jersey, *id.* at 1122; Thornton of Illinois, *id.* at 1157; Kerr of Indiana, *id.* at 1270-71; Bingham of Ohio, *id.* at 1291.

[42]*Id.* at 1121. Rogers was particularly disturbed by the broad language relating to "civil rights and immunities". *Id.* at 1122. Kerr of Indiana, Democrat, and Delano of Ohio, Republican, took the view that the Bill would invalidate State statutes which provided public schools for whites but none for Negroes. *Id.* at 1268, 1271, Appendix 158. Kerr's statements on this question are admittedly somewhat ambiguous but should be understood, we submit, as referring merely to Indiana's policy of providing no schools for Negroes.

[43]*Id.* at 1271-72, 1291.

> *of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here * * *."*[44] (emphasis added)

Bingham's motion to instruct the committee was defeated, many of those who voted against the motion no doubt having been convinced by its protagonists that, even as the Bill was then constituted, it would not affect such matters as separate schools.

In spite of the motion's defeat, however, the Judiciary Committee adopted Bingham's suggestion and struck the general language relating to "no discrimination in civil rights and immunities" before reporting the Bill out.[45] Wilson explained the Committee's action as follows:

> "* * * the amendment which has just been read proposes to strike out the general terms relating to civil rights. *I do not think it materially changes the bill;* but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended.
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> * * * * *
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> *To obviate * * * the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section."*[46] (emphasis added)

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[44]*Id.* at 1294.

[45]*Id.* at 1366. "It is impossible to say just why the words were struck out, though it might be inferred that it was done in order to secure the passage of the bill, for there might have been considerable opposition which had not been expressed. Thirty-seven Republicans had moreover voted to that effect, and this of itself must have had some weight." FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 35 (1908).

[46]Cong. Globe, 39th Cong., 1st Sess. 1366-67.

The Bill passed the House on March 13, 1866.[47] When it was returned to the Senate, it was referred to the Judiciary Committee. On March 15, 1866, Senator Trumbull reported the Bill to the Senate with the Committee's recommendation that the Senate concur in the amendments of the House. The amendments were approved[48] and the Bill was sent to the President.

On March 27, 1866, President Johnson returned the Bill to Congress with a veto accompanied by a long veto message.[49] In stating his objections to the Bill, the President conceded that it only affected the rights enumerated therein:

> "* * * a perfect equality of the white and colored races is attempted to be fixed by Federal law in every State of the Union, over the vast field of state jurisdiction covered by *the enumerated rights*. In no one of these can any State ever exercise any power of discrimination between the different races." (emphasis added)

The Bill was passed over the veto after short debates—in the Senate on April 6, 1866 and in the House on April 9, 1866[50]—to become law on April 9, 1866.[51]

The consensus of Congress that the Bill as finally enacted did not affect such matters as separate schools but was limited to the civil rights specifically enumerated is dramatically illustrated in the views expressed by the conservative Senators Cowan and Davis after the Bill had been amended in the House. It will be remembered that Senator Cowan was from the beginning one of the Bill's most deter-

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[47] *Id.* at 1367.
[48] *Id.* at 1413-16.
[49] *Id.* at 1679.
[50] *Id.* at 1808, 1861.
[51] 14 Stat. 27 (1866).

mined opponents. In fact, in the early days of the debate, he was the lone member of the Senate who took the position that the Bill, if passed, would outlaw segregation in the public schools.[52] Although he fought the Bill to the end on the ground that Congress was without constitutional power to pass it, Senator Cowan's statement in support of the veto implied that he too was at last convinced that the Bill would affect only those civil rights which it enumerated:

> "I agree, and am quite willing as an inhabitant of one of the States of this Union, or a citizen, or an elector, or any other word you may choose to use in order to designate me, that all the people of this country shall enjoy the rights conferred upon them by this bill. I have never had any objection to that; and if my own State, Pennsylvania, did not confer all these rights, or almost all of them, certainly the voice of no one in that State should be heard sooner, longer, or louder than my own until they were secured. That all men should have the right to contract, I agree. That all people should have the right to enforce their contracts, I agree. I might limit the right of a great many people to purchase and hold real estate, but as a general proposition I would allow them to purchase, hold, and lease, and to be entitled to their remedies for the defense of their property. There is no doubt in my mind about that."
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> * * * * *
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> This portion of the first section confers upon all persons born in the United States *the rights which are here enumerated,* * * *."[53] (emphasis added)

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[52]*Supra,* pp. 12-13.

[53]Cong. Globe, 39th Cong., 1st Sess. 1781 (1866).

Senator Davis of Kentucky, another dedicated opponent of the Bill and one who earlier in the debates had charged that it would outlaw anti-miscegenation statutes,[54] also later agreed, after the Senate had adopted the amendments of the House, that the Bill would affect only those civil rights which it enumerated. On March 15, 1866 he said:

> "It [the Bill] is a greater stride toward the consolidation of all power by Congress than has ever before been taken or conceived. It declares that all the acts of the various State Legislatures *relating to the subjects of civil rights that are specified in the bill* shall be common and uniform in their application to the people of each State, without regard to race or color; * * *."[55] (emphasis added)

Later in the same speech he again objected to Congress' attempt to deprive the States of the power to regulate "the classes of civil rights that are set forth in this bill and which are assured by it to negroes in the same fullness that the laws of the States guaranty them to white citizens".[56]

It is true, as appellants point out (Br. 88), that the same Senator Davis, speaking three weeks later in support of the President's veto of the measure, warned that the Bill might invalidate "ordinances, regulations, and customs" which provided for segregation on ships and trains and in hotels and churches.[57] Appellants may not have observed, however, that Davis, although speaking after the Bill had been amended, mistakenly read the original unexpurgated version to the Senate at the outset of his speech.[58] Moreover,

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[54]See note 37, *supra*.
[55]Cong. Globe, 39th Cong., 1st Sess. 1415 (1866).
[56]***Ibid.***
[57]*Id.* at Appendix 183.
[58]*Id.* at Appendix 182.

in expounding his views, he continually made reference to the language of the clause which had been excised as the source of the Bill's broad scope and, contrary to appellants' implication, made no reference whatsoever to the "security of person and property" clause.

We submit that Davis' view of March 15, the day the Senate adopted the House amendments, is far more reliable than is his later statement erroneously based on the original version of the Bill. Nor is it surprising to anyone at all conversant with Congressional proceedings that Davis' mistake of April 6 was not remarked upon by his fellows. That speech was delivered only a few minutes before the vote overriding the veto was taken; and each of the two conservatives who then closed the debate with brief statements against the measure remarked upon the futility of any appeal to reason at that late hour.[59]

Finally, may it be noted that Representative Lawrence of Ohio, Republican, who was the only member of the House who discussed the measure just before that body voted on the President's veto, was clearly of the opinion that the Bill affected only the enumerated rights.[60] In closing he chided Bingham for having insisted that the sweeping language "civil rights or immunities" could have been construed as broadly as Bingham had contended, "an interpretation different from [that of] the committee who reported it." Lawrence pointed out again that "for the purpose of obviating his objection this clause was stricken out".[61]

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[59] *Id.* at 1809.

[60] *Id.* at 1832, 1836. The generalities uttered by Lawrence in the same speech and quoted by appellants (Br. 89) must be read in the light of these specifics. Furthermore, appellants' quotation beginning "This section does not limit the enjoyment of privileges" is especially misleading, since Lawrence was there referring to Article 4, Section 2 of the Constitution and not to the Bill then before the House.

[61] *Id.* at 1837.

The Fourteenth Amendment

Certain constitutional amendments and resolutions introduced by members of the 39th Congress in the early days of its first session provide revealing contrasts to the Fourteenth Amendment as it was finally proposed.

For example, Representative Stevens, Pennsylvania Radical, introduced in the House a proposal to amend the United States Constitution to provide that

> "All national and State laws shall be equally applicable to every citizen and no discrimination shall be made on account of race and color."[62]

This proposal was referred to the Judiciary Committee, from which it was never reported for action by the House.

A resolution proposed by Representative Eliot, Massachusetts Radical, would have provided for "equal rights before the law without distinction of color or race".[63] This proposal was referred to the Joint Committee of Fifteen on Reconstruction but it bears little resemblance to the resolution which they finally recommended to Congress.

A resolution offered by Senator Sumner, Massachusetts Radical, would have imposed five conditions upon which the seceded States should be permitted to resume relations with the Union. Among those conditions was the following:

> "* * * (4) The organization of an educational system for the equal benefit of all without distinction of color or race."[64]

This resolution was never acted upon by either House.

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[62] *Id.* at 10.
[63] *Id.* at 2511.
[64] *Id.* at 2.

Both Stevens and Eliot subsequently expressed their regret that the Fourteenth Amendment in the form in which it was adopted was not as broad in scope as they would have liked. Of the first section of the Amendment, Stevens said:

> "This proposition is not all that the Committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion."[65]

Eliot, referring to the "equal rights" resolution he had offered just after the 39th Congress had convened, expressed his dissatisfaction in the following terms:

> "In the fourth proposition submitted by me in December last I said what, in my judgment, we ought to demand. But that cannot be had. * * *"[66]

Senator Howard, Michigan Radical, also conceded that the Amendment did not go as far as he would have liked. He said:

> "* * * it is not entirely the question what measure we can pass the two Houses; but the question really is, what will the Legislatures * * * do * * *.
>
> * * * * *
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> The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race."[67]

Thus from the lips of the Radicals themselves came the confession that moderate counsel had prevailed.

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[65] *Id.* at 2459.
[66] *Id.* at 2511.
[67] *Id.* at 2896.

The resolution which became the Fourteenth Amendment had its origin in the Joint Committee of Fifteen on Reconstruction. The terms of reference of this Committee of representatives and senators enjoined them to "inquire into the condition" of the seceded States and to "report whether they, or any of them, are entitled to be represented in either House of Congress".[68]

The first section of the Amendment was chiefly Bingham's contribution, although other members of the Committee no doubt left their marks upon it.[69] After extended deliberation,[70] the Committee agreed on February 10, 1866 by a vote of 9 to 5 to report the following resolution to Congress:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immuni-

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[68]The Committee was made up of twelve Republicans—Senators Fessenden of Maine, Grimes of Iowa, Williams of Oregon, Harris of New York, and Howard of Michigan, and Representatives Stevens of Pennsylvania, Bingham of Ohio, Conkling of New York, Boutwell of Massachusetts, Washburne of Illinois, Morrill of Vermont and Blow of Missouri—and three Democrats—Senator Johnson of Maryland and Representatives Grider of Kentucky and Rogers of New Jersey.

[69]FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 60-69 (1908). Before the Joint Committee on Reconstruction was established, Bingham had introduced a resolution in the House "to amend the Constitution to empower Congress to make all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty and property". This bill was referred to the Judiciary Committee. Cong. Globe, 39th Cong., 1st Sess. 14 (1865).

[70]During the course of these deliberations, the Committee rejected a resolution which would have provided that

> "all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void." KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 50 (1914).

> ties of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property."[71]

On February 13, 1866, this resolution was introduced in the Senate by Senator Fessenden[72] and in the House by Representative Bingham.[73] In support of the resolution Bingham told the House that every feature of the resolution was already in the Constitution of the United States except that portion which empowered Congress to enforce its mandate.[74] The "privileges and immunities" he equated to similar language in Article 4, Section 2, of the Constitution; and the "life, liberty and property" phrase he equated to the Fifth Amendment.[75]

It was here that Bingham first made reference to the importance of compelling the states to recognize "this immortal bill of rights", his language giving rise to the debates that have since raged with regard to the intended incorporation of the first eight amendments in the Fourteenth Amendment.[76]

In the discussion which followed, those in favor of the Amendment argued that it merely gave Congress the power to enforce existing constitutional and statutory provisions[77] and those opposed argued that its grant of legislative power

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[71]*Id.* at 61.

[72]Cong. Globe, 39th Cong., 1st Sess. 806 (1866). No action was ever taken on the resolution in the Senate.

[73]*Id.* at 813.

[74]*Id.* at 1034.

[75]*Ibid.*

[76]*Ibid.* Compare FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908), with Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

[77]Bingham, Cong. Globe, 39th Cong., 1st Sess. 1034 (1866), Higby of California, *id.* at 1054, Kelley of Pennsylvania, *id.* at 1057, Woodbridge of Vermont, *id.* at 1088.

to Congress was too broad.[78] One of the most vehement of the latter, Representative Rogers of New Jersey, expressed the opinion that under this Amendment, if it were adopted, Congress would have the power to require the States to provide mixed schools.[79] This Democratic partisan also stated, however, that, if the Civil Rights Bill of 1866 were constitutional, this Amendment was "unnecessary".[80]

As has already been noted, Rogers was to sound the same warning with respect to mixed schools in connection with the enactment of the Civil Rights Bill of 1866 when that measure came before the House several days later.[81] That his opinion of the Civil Rights Bill was contrary to that of the overwhelming majority of his fellow-Congressmen has already been established.[82] That he should have seen the same dark shadows in that Bill's constitutional counterpart is at least a tribute to his consistency, if not to his perception.

After several days of debate upon Bingham's resolution, it soon became clear that even the Republicans were not satisfied with the proposal. For example, Representa-

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[78]Hale of New York, *id.* at 1063-64, Davis of New York, *id.* at 1083, Rogers of New Jersey, *id.* at Appendix 133-34.

[79]*Id.* at Appendix 134. No other member of either House made any such statement in the course of the entire debate.

[80]*Ibid.* Weeks later, when the Fourteenth Amendment was before the House in the form in which it was eventually adopted, Rogers said of the first section:

> "This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill * * *." *Id.* at 2538.

[81]*Id.* at 1121. *Supra,* p. 14. Apparently Rogers was reading from the same notes in speaking on each of these measures, since the words he employed were in each case almost identical.

[82]*Supra,* pp. 13-19.

tives Hale and Hotchkiss of New York, both of whom supported the first supplemental Freedmen's Bureau Bill and the Civil Rights Bill of 1866, objected to the language of the resolution which, in their view, empowered *Congress* to legislate upon matters theretofore left to the States alone.[83]

In answer to the questions of Representative Hale of New York with regard to the intended scope of the resolution, Bingham said:

> "The gentleman [Hale] knows full well, from conversations I have had with him, that so far as I understand this power [the resolution], under no possible interpretation can it ever be made to operate in the State of New York while she occupies her present proud position."[84]

At that time, the State of New York operated separate public schools for Negroes and whites.[85] Although it is perhaps unfair to impute to Bingham a knowledge of that fact, it would appear that he would have refrained from making any such statement unless he was confident that New York at least recognized the fundamental rights to which his resolution was directed.

Hotchkiss also suggested that the resolution should be revised with a view to making it peremptory rather than dependent upon the action of Congress to implement it.[86]

Their first proposal having been found unacceptable, the Joint Committee attempted to draft one which would secure

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[83]Cong. Globe, 39th Cong., 1st Sess. 1063-64, 1095 (1866). Representative Conkling, a Republican member of the Joint Committee on Reconstruction, intimated that he was of the same opinion. *Id.* at 1095. It will be remembered that the resolution began: "The Congress shall have power to make all laws which shall be necessary and proper to * * *." *Supra*, p. 22.

[84]Cong. Globe, 39th Cong., 1st Sess. 1065 (1866).

[85]N. Y. Laws c. 555, Title 10, 1281 (1864).

[86]Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).

the approval of Congress. After considering several new drafts, the Committee decided upon a provision submitted by Bingham:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[87]

This provision was reported to Congress as Section 1 of the proposed Fourteenth Amendment. There is no hint in the Journal of the Committee that this resolution was intended to compel mixed schools.[88] Nor is there any reference to schools in the majority or minority reports of the Joint Committee.[89] With reference to Section 1 of the proposed amendment, the majority report stated that it would "determine the civil rights and privileges of all citizens in all parts of the republic".[90]

Representative Stevens, a member of the Joint Committee, opened debate on the resolution in the House on May 8 and, in reply to the contention that the Civil Rights Act of 1866 secured the same objectives as were contemplated by Section 1 of the resolution, he said that the 1866 Act was repealable and that repeal should be placed beyond the power of future Congresses.[91]

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[87]KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 106 (1914).

[88]*Id.* at 37-129.

[89]II Reports of the Committees of the House, 39th Cong., 1st Sess. VI-XXI, 1-13. The three Democratic members of the Joint Committee dissented from the Committee's recommendation.

[90]*Id.* at XXI.

[91]Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

Again and again in the speeches which followed, the correspondence between Section 1 of the Amendment and the Civil Rights Act was noted. "The provisions of the one are treated as though they are essentially identical with those of the other."[92] Democratic Representative Finck of Ohio, who opposed the Amendment, stated that if the first section were necessary then the Civil Rights Bill was unconstitutional.[93] Representative Garfield of Ohio, Republican, expressed his satisfaction with the first section because it would place it beyond the power of the Democratic Party to repeal the Civil Rights Bill.[94] Republican Representative Thayer of Pennsylvania, speaking in favor of the resolution, said that it merely incorporated into the Constitution of the United States the principle of the Civil Rights Bill.[95] Representative Boyer, Pennsylvania Democrat, agreed with the speakers who preceded him that the resolution embodied the Civil Rights Bill.[96] By the end of the first day's debates, every speaker who had discussed Section 1 of the Amendment had assimilated it to the Civil Rights Bill.

The next day Representative Broomall of Pennsylvania, a Republican supporter of the Amendment, reminded the House that it had voted for the proposition contained in Section 1 in another form in the Civil Rights Bill.[97] This view was reiterated by Representative Raymond of

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[92]Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 44 (1949).

[93]Cong. Globe, 39th Cong., 1st Sess. 2460-61 (1866).

[94]*Id.* at 2462.

[95]*Id.* at 2465. In the debates upon the Civil Rights Bill, Thayer had stated unequivocally that the Bill was intended to affect only those rights specifically enumerated therein. *Id.* at 1151.

[96]*Id.* at 2467.

[97]*Id.* at 2498.

New York, a conservative Republican who had voted against the Civil Rights Bill because he thought it unconstitutional.[98] Representative Eldridge, Wisconsin Democrat, agreed with Finck that this proposal constituted an admission by the majority that the Civil Rights Bill was unconstitutional.[99] Representative Eliot, Massachusetts Republican, insisted that the Civil Rights Bill was constitutional but said he would vote for Section 1 of the resolution to "settle the doubt which some gentlemen entertain upon that question".[100]

There were four Democratic opponents of the Amendment in the House who warned their colleagues that Section 1 would "invest all power in the General Government",[101] "transfer all powers from the State Governments over the citizens of a State to Congress",[102] "consolidate[s] everything into one imperial despotism"[103] or empower Congress to "interfere in behalf of * * * every character of

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[98]*Id.* at 2502. Contrary to appellants' implication (Br. 92), Raymond said nothing in the debates either upon this resolution or upon the Civil Rights Bill of 1866 to justify the conclusion that he thought the resolution broader than the Bill. He did say:

> "And now, although that [Civil Rights] bill became a law and is now upon our statute books, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it." *Ibid.*

[99]*Id.* at 2506.

[100]*Id.* at 2511.

[101]Shanklin of Kentucky, *id.* at 2500.

[102]Harding of Kentucky, *id.* at 3147.

[103]Rogers of New Jersey, *id.* at 2538. As has already been pointed out, Rogers also characterized Section 1 at the same time as "no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill". *Ibid.* Thus it becomes apparent that his sweeping statements on the Amendment contained the seeds of their own destruction. *Supra*, pp. 13-19.

rights".[104] The very extravagance of these claims, however, betrays them as having been uttered in a highly partisan attempt to discredit the resolution in the eyes of independent Republicans and the country.[105] Furthermore, none of the Amendment's supporters articulated any such sweeping claims on its behalf, and an overwhelming majority of those who discussed Section 1 during the debates identified its scope with that of the narrowly-restricted Civil Rights Bill. The resolution passed the House by a vote of 128 to 37.[106]

On May 23, 1866, Senator Howard of Michigan, member of the Joint Committee on Reconstruction, opened the debates on the resolution in the Senate.[107] He began by imputing to the privileges and immunities clause of the resolution a battery of "fundamental guarantees" considerably broader than that ascribed to it by any of its other supporters, hailing the rights declared in the first eight amendments to the United States Constitution as thenceforth applicable to State action.[108] This broad characterization of the privileges and immunities clause by a single member of Congress, albeit a member of the Joint Committee on Reconstruction, has been seriously challenged by

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[104]Randall of Pennsylvania, Cong. Globe, 39th Cong., 1st Sess. 2530 (1866).

[105]"The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann v. Calvert Corp., 341 U. S. 384, 394 (1950).

[106]Cong. Globe, 39th Cong., 1st Sess. 2544–45.

[107]*Id.* at 2765.

[108]"The great object of the first section of the amendment is, therefore, to restrain the power of the States and to compel them to respect these great fundamental guarantees", he said. *Ibid.*

Again, in explaining that the first section did not protect the right to vote, he asserted: "It has * * * not [been] regarded as one of the fundamental rights lying at the basis of society and without which a people cannot exist except as slaves, subject to a despotism." *Ibid.*

present-day students of the Amendment on the ground that the great majority of the members of the 39th Congress entertained no such ambitious aspirations for it.[109] In any case, even though Senator Howard may have thought the resolution incorporated the Bill of Rights, there is nothing in his speech to indicate that he viewed the Amendment as proscribing segregated schools. Indeed, although he went to considerable lengths to enumerate critical "privileges and immunities" encompassed by Section 1, he made no mention whatsoever of schools.

As to the purpose of Section 5 of the Amendment, the enforcement provision, Senator Howard said:

> "The power which Congress has, under this amendment, is derived * * * from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment. * * *"[110]

The Senate took no further action on the resolution until May 29, when Senator Howard introduced a series of amendments thereto, the first of which added the definition of citizenship which is now the first sentence of the Fourteenth Amendment.[111]

In the debates which followed, Senator Doolittle of Wisconsin, a conservative Republican, charged that the entire first section of the Amendment was proposed by the Joint Committee in order to give constitutional validity to

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[109] *E.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN L. REV. 54-66 (1949).

[110] Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

[111] *Id.* at 2869. During the interim, the Republicans conducted party caucuses with a view to gaining party solidarity for the measure and persuading Republican senators to abstain from long speech-making upon "an already thoroughly discussed and understood subject". Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 67-68 (1949).

the Civil Rights Bill.[112] Senator Fessenden, Republican Chairman of the Joint Committee, denied that he had ever heard any mention of the Civil Rights Bill in that connection during the meetings of the Joint Committee at which he was present.[113] When Doolittle pressed Fessenden closely, however, Senator Howard, who had made the Committee's report and opened debate on the resolution, volunteered a statement to the effect that the Committee's purpose had been to "put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power". [114] On the ground that Fessenden was frequently absent from the meetings of the Joint Committee, Flack accepts Howard's view on this question as the more authoritative.[115]

Senator Poland, Vermont Republican, also indicated that the Amendment was intended to place the validity of the Civil Rights Bill beyond question.[116] Senator Stewart, Nevada Republican, stated that the proposed Amendment "involves freedmen's bureaus, civil rights bills, test oaths, and exclusion from office, all supported by military power".[117]

As an example of certain discriminations which he thought would no longer be permitted after the Amendment was adopted, Senator Howe, Wisconsin Republican, told the Senate of a Florida statute which taxed both Negroes and whites to support the white schools but taxed Negroes alone to support the Negro schools.[118] Howe's

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[112]Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).
[113]*Ibid.*
[114]*Ibid.*
[115]FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 90 (1908).
[116]Cong. Globe, 39th Cong., 1st Sess. 2961 (1866).
[117]*Id.* at 2964.
[118]*Id.* at Appendix 219.

attack appears to have been directed not at the concept of separate schools, but at the concept of discriminatory taxation.

Senator Henderson, Missouri Republican, was one of the last to speak on the resolution before the vote was taken. He too indicated by the tenor of his speech that Section 1 of the Amendment was designed to resolve all doubts as to the constitutionality of the Civil Rights Bill.[119] The resolution passed the Senate on June 8, 1866 by a vote of 33 to 11 and was submitted to the States on June 13, 1866.[120]

In sum, the debates on the Fourteenth Amendment in both Houses of Congress reveal that most of those who discussed the Amendment believed that it merely embodied the principles of the Civil Rights Bill. It is true that Senator Howard, and perhaps Representative Bingham, attributed to the phrase "privileges and immunities" a meaning broad enough to include some or all of the rights incorporated in the first eight amendments. Even if we were to agree to that interpretation, however, there is no evidence whatever to substantiate any claim that the framers intended to outlaw segregation in the public schools or to empower the judiciary to do so.

In reaching this conclusion, we do not lose sight of the equal protection clause of the Amendment. As has al-

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[119] *Id.* at 3034-35.

During the election campaign in the summer of 1866 other leading Republicans in both Houses explained to their constituents that the Amendment embodied or reiterated the Civil Rights Bill of 1866—*e.g.*, Senator Trumbull, Chicago Tribune, Aug. 2, 1866, p. 2; Senator Lane of Indiana, Cincinnati Commercial, Aug. 20, 1866, p. 1; Senator Sherman, Cincinnati Commercial, Sept. 29, 1866, p. 1; Rep. Schenck, Cincinnati Commercial, Aug. 20, 1866, p. 1; Rep. Colfax, Cincinnati Commercial, Aug. 9, 1866, p. 2.

[120] Cong. Globe, 39th Cong., 1st Sess. 3042 (1866); 14 Stat. 358 (1866).

ready been pointed out, the Civil Rights Bill of 1866 provided in part that

> "* * * the inhabitants of every race and color * * * shall have the same right to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other * * *."

In "embodying" this particular provision of the Civil Rights Bill in the Fourteenth Amendment, the language was slightly altered but the meaning remained essentially the same. In the early draft of the Amendment introduced by Bingham on February 10, 1866, the principle was presented as follows:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure * * * to all persons in the several States equal protection in the rights of life, liberty and property."

And in the Amendment as finally ratified the provision was rephrased as follows:

> "No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

In prohibiting a State to deny "protection" of the law, the framers merely rephrased the prohibition of the Civil Rights Bill against denying "benefit" for "the security of person and property". "Benefit for security" was, we submit, the equivalent of "protection". Senator Trumbull, who introduced the Civil Rights Bill in the Senate, implied and Representative Wilson, who introduced that Bill in the House, expressly stated that it did not affect the ques-

tion of separate schools. By embodying the provisions of that Bill in the Fourteenth Amendment, the framers of the Amendment merely carried that understanding over into the Constitution.

Contemporary Legislation of Congress Relating to Separate Schools in District of Columbia.

In the spring of 1866, while Congress was debating the resolution which became the Fourteenth Amendment, that body also enacted measures relating to the administration of separate schools for whites and Negroes in the District of Columbia. On May 21, 1866, for example, the Senate passed "An Act donating certain Lots in the City of Washington for Schools for colored children in the District of Columbia".[121] The lots granted were to be "for the sole use of schools for colored children".[122]

Moreover, between April, 1866 and July, 1866, Congress considered and enacted an amendment to the Act of June 25, 1864,[123] which amendment was designed to insure that the trustees of colored schools for the cities of Washington and Georgetown would receive a proportionate share of the school fund.[124] Thus, at a time when the Fourteenth Amendment was under active debate and consideration, the attention of Congress was directed to segregated schools in the District of Columbia and legislation in furtherance of that policy was enacted. And not one voice was heard to say that such segregated schooling was inconsistent in spirit with the policy Congress had just embraced in its resolution proposing the Fourteenth Amendment.

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[121] 14 Stat. 343 (1866).
[122] *Ibid.*
[123] *Supra*, p. 3.
[124] 14 Stat. 216 (1866).

In 1868, just after the Amendment had been ratified by the requisite number of States, Congress again had its attention focused upon the schools of the District of Columbia. A bill to transfer the duties of the Negro trustees of Negro schools to white trustees of the public schools was passed by the Senate in July, 1868,[125] and by the House in February, 1869.[126] The policy of separate schools was not questioned.

Because the Negro community in the District strongly objected to the removal of control over Negro schools from the hands of Negro trustees, the President vetoed the measure[127] and Congress let the matter drop.

Bills for Reinstatement of Seceded States

Soon after certain of the former Confederate States had adopted new Constitutions and ratified the Fourteenth Amendment pursuant to the requirements of the Reconstruction Act of 1867,[128] the 40th Congress, in which almost two thirds of the members of the 39th Congress retained their seats, began to consider bills to readmit the seceded States to the Union. When the House Bill to admit Arkansas was before the Senate on June 1, 1868, Senator Drake, Missouri Republican, moved to amend it by affixing the following condition:

> "That there shall never be in said State any denial or abridgement of the elective franchise, *or of any other right,* to any person by reason or on account of race or color, excepting Indians not taxed."[129] (emphasis added)

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[125]Cong. Globe, 40th Cong., 2d Sess. 3900 (1868).
[126]Cong. Globe, 40th Cong., 3d Sess. 919 (1869).
[127]*Id.* at 1164.
[128]14 Stat. 428 (1867).
[129]Cong. Globe, 40th Cong., 2d Sess. 2748 (1868).

Senator Henderson of Missouri, apparently concerned lest this resolution be construed to prohibit separate schools, offered an amendment which would have specifically permitted such schools.

The Henderson amendment was rejected and the Drake amendment was adopted but not before Senator Frelinghuysen, who had been a member of the 39th Congress, stated that he did not think either the Fourteenth Amendment or the Drake amendment to the Bill then before the Senate "touched" the question of whether or not children might be educated in separate schools.[130] The House of Representatives later refused to accept the Drake amendment and the Senate agreed to its excision.[131]

When the House Bill to admit North Carolina, South Carolina, Louisiana, Georgia and Alabama was before the Senate on June 5, 1868, Senator Trumbull of Illinois, still Chairman of the Judiciary Committee, explained that the Committee had amended the Bill by affixing the condition of the old Drake amendment with the significant exception of the phrase "or any other rights". That phrase, he said, had been omitted on the ground that:

> "The citizens of these States are protected in all their civil rights independent of this bill; and it might lead to misconstruction or misapprehension of what the words 'any other right' meant. It might be construed by some persons as applying possibly to social rights, *or rights in schools,* which the Senator from Missouri [Drake] did not intend."[132] (emphasis added)

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[130] *Ibid.*
[131] *Id.* at 2904.
[132] *Id.* at 2858.

The stipulation that there should never be any denial of the elective franchise on account of color was affixed to the Bill by vote of the Senate on June 5, 1868 and the Bill itself passed the Senate soon thereafter.[133] Although the House then refused to accept the Senate amendment, it proceeded to affix a similar condition to the Bill, requiring that the constitutions of the States in question never be amended so as to deprive any citizen of the right to vote except as punishment for felonies. The Bill was enacted into law on June 25, 1868.[134]

Thus the 40th Congress, the immediate successor to the 39th, fashioned further evidence that separate schools were not within the prohibition of the Amendment.

The Enforcement Acts, 1870 and 1871

Some years later the 41st Congress considered bills designed to implement or enforce the Fourteenth and Fifteenth Amendments. For the most part, those bills were concerned with matters which could not conceivably have involved the question of segregation in the public schools.

Principal among these measures were the First Enforcement Act of 1870[135] and the Second Enforcement Act of 1871,[136] both of which were chiefly concerned with protecting the Negro's right to vote pursuant to the Fifteenth Amendment.

It is significant, however, that the Civil Rights Act of 1866 was appended to the First Enforcement Act of 1870 and re-enacted—presumably in an attempt to bolster it

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[133] *Id.* at 3029.
[134] 15 Stat. 73 (1868).
[135] 16 Stat. 140 (1870).
[136] 16 Stat. 433 (1871).

with the authority of the Fourteenth Amendment. The fact that the Bill was thus re-enacted without modification indicates that Congress was then satisfied that the Fourteenth Amendment had not called upon it to broaden the scope of civil rights beyond those enumerated in the Civil Rights Act.

The Supplemental Civil Rights Bill as an Amendment to the General Amnesty Bills

Senator Charles Sumner, Massachusetts Radical, attempted on several occasions during the years 1870 and 1871 to bring to the floor of the Senate a Supplemental Civil Rights Bill designed to abolish segregation in common carriers, inns, theatres, common schools, churches and cemetery associations. On each occasion the Bill was reported adversely by the Judiciary Committee.[137] Finally, when the General Amnesty Bill (H. R. 380), which had been passed by the House pursuant to Section 3 of the Fourteenth Amendment, was before the Senate on December 20, 1871, Sumner succeeded in circumventing the Judiciary Committee by offering his Supplemental Civil Rights Bill as an amendment to the Amnesty Bill.[138]

The first section of Sumner's amendment, as originally offered, provided in part:

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[137]Cong. Globe, 42d Cong., 2d Sess. 821-22 (1872). As early as March 16, 1867, Sumner had proposed an amendment to a reconstruction bill making it a prerequisite to seating in Congress of Southern Congressmen that:

> "The [State] Constitution shall require the Legislature to establish and sustain a system of public schools open to all, without distinction of race or color."

The amendment was defeated. Cong. Globe, 40th Cong., 1st Sess. 165, 170 (1867).

[138]Cong. Globe, 42d Cong., 2d Sess. 240 (1872).

> "That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility or privilege furnished by common carriers * * * innkeepers * * * theatres * * * common schools * * * church organizations * * * cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude."[139]

Another section provided that no one should be disqualified from serving as a juror in any national or State court by reason of his race. There was also a provision imposing penalties for the violation of the Bill's prohibitions.

In an early test of Senate sentiment the Committee of the Whole defeated the Sumner amendment by a vote of 29 to 30.[140] A few minutes later, however, Sumner renewed his amendment.[141] Most of those who spoke in favor of the amendment pointed to the privileges and immunities clause of the Fourteenth Amendment as the source of Congressional power to enact such a law.[142] Two singled out the equal protection clause for support.[143]

Sumner himself was little troubled by the subtleties of constitutional power. When hard pressed by one of the measure's opponents to articulate its constitutional basis Sumner said:

> "* * * I come to the precise argument of the Senator. He asks for the power. Why, sir, the Con-

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[139] *Id.* at 244.
[140] *Id.* at 274.
[141] *Id.* at 278.
[142] *E.g.*, Frelinghuysen, *id.* at 436; Morton, *id.* at 524-25; Carpenter, *id.* at 762-63; Sherman, *id.* at 843.
[143] Edmunds, *id.* at Appendix 26; Morton, *id.* at 846-47, 898.

> stitution is full of power; it is overrunning with power. I find it not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment. I find it in the original text and our recent additions, again and again. I find it, still further, in that great rule of interpretation conquered at Appomattox, which far beyond the surrender of Lee, was of infinite importance to this Republic. I say a new rule of interpretation for the Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly for human rights. * * *"[144]

In addition to the constitutional power which he found in the surrender at Appomattox, Sumner upon several occasions also testified to having discovered a constitutional basis for his amendment in the Declaration of Independence. At one point in the debates, the following exchange took place:

> "Mr. Morrill, of Maine: The Senator [Sumner] said that the Declaration was as much an authority as the Constitution of the United States.
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> Mr. Sumner: Very well; that I do say, certainly, and a little more."[145]

When another senator questioned Sumner upon the meaning of that exchange, the latter replied:

> "* * * Very well; I say a little more in what it is; that is, as a rule of interpretation. If you give preference to either, it is to the Declaration. Indeed, I cannot escape from that conclusion. It is earlier

[144] *Id.* at 727.
[145] *Id.* at 730.

> in time; it is loftier, more majestic, more sublime in character and principle."[146]

In the light of these remarks, it is difficult to view Sumner's opinion as to the constitutionality of his Bill as in any way reliable.

Some senators argued in favor of the policy behind the Sumner amendment.[147] Of all those who spoke on behalf of the measure, however, not one declared that the Fourteenth Amendment had been intended to accomplish of its own force the result to which the Supplemental Civil Rights Bill was directed. Not one declared that the judiciary might have construed it to achieve that end—in the light of changing conditions or otherwise. In fact, by acknowledging that the Civil Rights Act of 1866 was "imperfect" without this supplement,[148] Sumner conceded that the earlier statute, and indirectly the Fourteenth Amendment to which it was so closely related, had not affected these matters. It is true that Senator Morton of Indiana, Republican, expressed the view that the courts had been empowered to give relief to those who were denied the protection of the Fourteenth Amendment by state action, but in the same breath he said:

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[146] *Id.* at 761.

[147] *E.g.*, Sumner, *id.* at 383; Nye, *id.* at 494; Flanagan, *id.* at 587; Wilson, *id.* at 819-20, 874.

[148] *Id.* at 383. Sumner made a similar statement in a letter written on October 24, 1871, addressed to a Negro convention in South Carolina:

> "The right to vote will have new security when your equal right in public conveyances, hotels, and common schools is at last established; but here you must insist for yourselves by speech, petition, and by vote. Help yourselves, and others will help you also. The Civil Rights law needs a supplement to cover such cases. This defect has been apparent from the beginning; and, for a long time I have striven to remove it." 11 ANNUAL CYCLOPEDIA 1871, 752-53 (Appleton & Co. 1872).

> "But the Senator [Sumner] overlooks the great fact * * * that the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[149]

Senator Carpenter of Wisconsin, Republican, also expressed the view that Section 5 of the Fourteenth Amendment authorized Congress to implement that Amendment by legislation of this kind, although he doubted the constitutionality of the provisions relating to churches and juries.[150]

Among those opposed to the Sumner measure on the ground that it was unconstitutional were Senators Morrill of Maine, Trumbull of Illinois, Tipton of Nebraska and Davis of Kentucky, all of whom had been prominent members of the 39th Congress at the time when the Fourteenth Amendment was proposed.[151] The remarks of these senators are typical of the views expressed by those who opposed the amendment.

Senator Morrill of Maine considered each clause of the Fourteenth Amendment *seriatim* and finally concluded:

> "I hold that in reference to all rights with regard to the matters of education, worship, amusement,

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[149]Cong. Globe, 42d Cong., 2d Sess. 525. Morton had indicated several years earlier that he did not think the Fourteenth Amendment required mixed schools. In 1867, in the same message in which as Governor of the State of Indiana he recommended that the Indiana legislature ratify the Fourteenth Amendment, he also advised the continuance of a policy of separate schools. 9 Brev. Leg. Rep. 20, 26 (Ind. 1867).

[150]Cong. Globe, 42d Cong., 2d Sess. 760-63.

[151]*Id.* at 919. President Grant himself was reported to have expressed doubts as to the constitutionality of measures such as the Sumner amendment. *Id.* at 729.

> recreation, entertainment, all of which enter so essentially into the private life of the people, into the personal rights of the people, they all belong exclusively to the State, of which the Government of the United States has no right to take cognizance."[152]

Morrill thought that the "privileges and immunities of citizens of the United States" referred to in the Fourteenth Amendment included only fundamental rights of the kind enumerated in the Civil Rights Bill of 1866 and not the rights with which the Sumner amendment was concerned. He also stated that the Fourteenth Amendment was merely a prohibition on the States and not an affirmation of substantive power in the Federal Government.[153]

Senator Trumbull's position was that in enacting the Civil Rights Bill of 1866, a measure which had not purported to affect social or political rights, Congress had already gone to the "verge" of constitutionality.[154]

Senator Tipton of Nebraska agreed with Senator Morrill and others that the Sumner amendment was an attempt to invade a province reserved to the States and local governments. He asserted the view that it was the task of the judiciary to prevent violation of the provisions of the Fourteenth Amendment in an appropriate case. The fifth section of that Amendment became operative, he said, only when it was not otherwise possible to redress the wrong.[155]

Senator Davis of Kentucky expressed the view that the Fourteenth Amendment was merely prohibitory upon the States and did not grant Congress any correlative power. Section 5 had not been intended to give Congress any

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[152] *Id.* at Appendix 5.
[153] *Id.* at Appendix 3-4.
[154] *Id.* at 901.
[155] *Id.* at 913-15.

further power than was implied in similar constitutional prohibitions upon the States found elsewhere in the Constitution. Like Senator Tipton, he was of the opinion that violations of the Fourteenth Amendment should be redressed by the courts.[156]

One of the most vocal opponents of the Sumner amendment was Senator Thurman of Ohio. During the course of the debates, he attempted singlehandedly to refute every argument advanced by the amendment's supporters. For example, he pointed out that the amendment went too far in attempting to regulate individual action as contrasted with state action,[157] that the rights enumerated in the Sumner measure were not rights of "citizens of the United States" within the meaning of the privileges and immunities clause of the Fourteenth Amendment,[158] that separate schools and other separate facilities did not violate the equal protection clause,[159] and that "of all insidious blows that ever were aimed at the poor white people of this country this proposition to force negroes into the common schools in association with the whites is exactly the most deadly and inimical".[160] Like Senators Tipton and Davis, he thought that Section 5 of the Fourteenth Amendment did not grant Congress any substantive powers and that any person who had been deprived of his privileges or

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[156]*Id.* at 763-64. Appellants assert that Senator Davis' Kentucky colleague, Senator Stevenson, did not object to this Bill on constitutional grounds (Br. 128). They have apparently overlooked, however, Stevenson's remark: "But I utterly deny the constitutionality of the civil rights bill, or this proposed amendment of the Senator from Massachusetts." *Id.* at 913.

[157]*Id.* at 279.

[158]*Id.* at Appendix 25.

[159]*Id.* at Appendix 26-27.

[160]*Ibid.*

immunities in violation of the Constitution should seek redress in the courts.[161]

Although, as above stated, Senators Tipton, Davis and Thurman each expressed the view that the Fourteenth Amendment was intended to be enforced in appropriate cases by the judiciary rather than by substantive acts of Congress, they nowhere voiced the opinion that the judiciary, under guise of enforcement, might construe the Amendment as outlawing separate schools. In fact, the speeches of Tipton and Thurman clearly reveal that they considered that question one for determination by the States alone.[162]

Senator Kelly of Oregon also opposed the Sumner amendment. In denouncing the measure as an interference with States' rights, he referred to a statute of the State of Arkansas which had provided for equal rights for Negroes upon steamboats, railroads, and public thoroughfares generally:

> "The very fact that the State of Arkansas passed those laws in 1868, when the fourteenth amendment was adopted, shows really that they supposed they had a right to redress those wrongs in their own local tribunals. It was not then their belief that the Federal Government alone could take cognizance of cases of this kind; else why did they pass that statute? I have been told by a Senator from Louisiana that the same laws are there; and so in South Carolina. The Senator from Mississippi who is now absent, the other day in his argument, said they had the same laws there. * * *"[163]

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[161] *Id.* at 526.
[162] *Id.* at 915, Appendix 26.
[163] *Id.* at 895.

In Senator Kelly's opinion, this was further evidence that the Fourteenth Amendment did not take from the State legislatures and tribunals control over matters of this kind.

Senator Ferry of Connecticut, Republican, speaking against the Sumner amendment on both constitutional and public policy grounds, stated:

> "With regard to cemetery associations and schools and churches, I am clearly of the opinion that the Federal Government ought not to interfere.[164]
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> * * * * *
>
> If there be in any State citizens of the United States who, to use the language of the Senator from Massachusetts [Sumner] are insulted, outraged, wronged, by being expelled from cars or inns, let them bring their actions in the courts of the States where the injury is inflicted, or, if they be residents of other States, in the Federal courts; and that is all that I can do, that is all the Senator from Massachusetts can do, and he and they and I will alike find reparation for our injuries afforded to us there. If that remedy is insufficient, go and work and labor and toil with the Legislatures of the States as that Senator has so fearlessly, so faithfully, so gloriously toiled for twenty years in the great cause of liberty and equality."[165]

During the debates, Senator Sumner accepted an amendment to his amendment which provided:

> "But churches, schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by

[164] *Id.* at 893.
[165] *Id.* at 894.

> the contributions of such persons, shall remain according to the terms of the original establishment."[166]

The vote on the Sumner amendment to the General Amnesty Bill was tied at 28 to 28, and the Vice President cast the deciding vote in its favor.[167] But the Amnesty Bill as thus amended failed to pass.[168]

In May, 1872, another General Amnesty Bill which had passed the House (H. R. 1050) was debated in the Senate. Sumner again proposed his Supplemental Civil Rights Bill as an amendment thereto.[169] The debates upon the measure were not, of course, as protracted as the debates upon the earlier General Amnesty Bill, since views upon the question had already been well aired.

Most of those who spoke in favor of the measure sought constitutional support for it in the Fourteenth Amendment.[170] Senator Sherman, who had been a member of the 39th Congress, was the only advocate of the measure who mentioned "equal protection" as the governing concept.[171] He was also the only speaker who expressed the view that the rights with which the Sumner amendment was concerned were already provided for by the Constitution but were being violated by the States with impunity.[172] Had he said no more, it might be concluded that he believed that the

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[166]*Id.* at 487. This amendment was proposed by Senator Frelinghuysen, New Jersey Republican. *Id.* at 435.

[167]*Id.* at 919.

[168]*Id.* at 928-29.

[169]It was first offered by a motion to strike out and insert, *id.* at 3181, and later by a motion to amend, *id.* at 3268.

[170]*E.g.*, Sherman, *id.* at 3192; Howe of Wisconsin, *id.* at 3259.

[171]*Id.* at 3192.

[172]*Ibid.*

Fourteenth Amendment had outlawed segregation in the public schools of its own force. He went on, however, to approve a recent decision of the Ohio Supreme Court[173] which had held that the Fourteenth Amendment did not render unconstitutional a statute of the State of Ohio which permitted the establishment of separate public schools:

> "The Supreme Court of the State of Ohio have recently passed upon our law in that State, which does in certain cases provide for separate schools for colored children, and have held it to be constitutional, and I believe they are right. There, in certain cases defined by the law, the colored people may have, when they are of a certain number, separate schools, and provision is made in such cases as that for a distribution pro rata of the funds. In ordinary cases [where colored persons are few in number] by the common consent and custom of everyone since the war was over, the whites and blacks go to the same schools. * * *"[174]

Plainly Senator Sherman did not believe that the Fourteenth Amendment had of its own force outlawed segregation in the public schools, since he subscribed to the constitutional views expressed by the Ohio Supreme Court.

One of the most uncompromising opponents of the Civil Rights Bill was Senator Trumbull of Illinois, who, as Chairman of the Judiciary Committee, had introduced, and led the debates on, the Civil Rights Bill of 1866 in the 39th Congress. Taking particular exception to the provision for mixed schools, Senator Trumbull said:

> "The right to go to school is not a civil right and never was."[175]

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[173]State ex rel. Garnes v. McCann, 21 Ohio St. 198 (1871).
[174]Cong. Globe, 42d Cong., 2d Sess. 3193 (1872).
[175]*Id.* at 3189.

Many others joined Senator Trumbull in denouncing the Sumner amendment as unconstitutional.[176]

Other opponents of the amendment merely characterized it as inexpedient. Senator Boreman of West Virginia, for example, did not oppose the measure as beyond the power of Congress to enact, but rather as impolitic:

> "* * * I cannot vote for * * * the provision in regard to schools. * * *
>
> It is said here we are denying equal rights to the colored and white people in the schools. I deny it. * * * It is true that there are separate schools, schools for white children and schools for the colored; but nevertheless the provisions of the school laws from beginning to end apply precisely to the one as they do to the other; * * *."[177]

Senator Ferry of Connecticut agreed with Senators Trumbull and Boreman that separate but equal facilities did not violate the principal of equality, citing segregation of the sexes as a parallel case.[178] In fact, he later moved to strike the reference to schools,[179] in defense of which motion he said:

> "* * * in the community where I reside there is no objection to mixed schools, as they are termed; and if I were called upon to vote there, I should vote for them. It would be a useless expense to establish separate schools for a few colored people in the community. But I cannot judge other communities by that community. * * * I believe that the Senator's bill relating to the District of Columbia, for instance, would utterly destroy the school system in the District. * * *
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> * * * * *

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[176] *E.g.*, Casserly of California, *id.* at 3196; Bayard of Delaware, *id.* at 3260-61; Stockton of New Jersey, *id.* at 3261.

[177] *Id.* at 3195.

[178] *Id.* at 3190.

[179] *Id.* at 3256.

> There is nothing * * * in the establishment by different communities, as each may think it expedient for itself, of separate schools, in conflict with the fourteenth amendment; and the proposition with respect to schools therefore is simply by legislation by Congress, without any constitutional provision demanding it, acting compulsorily upon all the school districts in the United States."[180]

Ferry agreed with Sherman that the Ohio court which had recently upheld the constitutionality of separate public schools was right.[181] His amendment, however, was defeated by a vote of 25 to 26.[182]

Senator Blair of Missouri then offered an amendment which would have permitted the people of each community to decide by election whether their schools should be separate or mixed.[183] Blair's amendment was defeated by a vote of 23 to 30.[184]

A motion to strike out the Sumner amendment was defeated in the Committee of the Whole by a vote of 29 to 29, with the Vice President casting the tie-breaking vote.[185] The amendment itself was subsequently defeated by a vote of 27 to 28 but finally carried by a vote of 28 to 28, the Vice President voting in its favor.[186] Again Sumner's efforts proved futile, however, since the General Amnesty Bill, to which the measure was appended, did not receive the necessary two-thirds majority.[187]

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[180] *Id.* at 3257-58.
[181] *Id.* at 3257.
[182] *Id.* at 3258.
[183] *Id.* at 3258. During the debates upon this amendment, several Southern senators predicted that the adoption of the Sumner amendment would destroy the public school system in the South. Hill of Alabama, *id.* at 3259-60; Alcorn of Mississippi, *id.* at 3262.
[184] *Id. at* 3262.
[185] *Id.* at 3264-65.
[186] *Id.* at 3268.
[187] *Id.* at 3270.

Two weeks later the Senate, at last satisfied that amnesty and supplemental civil rights would not mix, reconsidered the Supplemental Civil Rights Bill as a separate measure in Sumner's absence and, after striking all references to schools, churches, cemeteries and juries, passed the Bill by a vote of 28 to 14.[188] The General Amnesty Bill was then carried by a vote of 38 to 2.[189]

The Supplemental Civil Rights Bill which had passed the Senate was never considered in the House. On March 11, 1872, Representative Hereford of West Virginia moved to suspend the rules and adopt a resolution which declared that Congress had no constitutional power to force mixed schools upon the States or to pass any law interfering with churches, public carriers, or innkeepers.[190] Although the motion to suspend the rules was defeated, the vote was taken without debate and more than a third of the members of the House did not vote on the motion.[191] Thus it was clearly not a true test of the sentiment of the House upon the question of mixed schools.

The debates upon the Supplemental Civil Rights Bill in its association with the General Amnesty Bills reveal a marked division of the Senate on the constitutionality of the measure, as well as on its wisdom. One might presume that a majority of the Senate must have thought Con-

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[188] *Id.* at 3735-36.

[189] *Id.* at 3738. During the debates upon the Amnesty Bill, Sumner returned to the Senate and denounced the "emasculation" of his Civil Rights Bill. He again attempted to append the original Supplemental Civil Rights Bill to the Amnesty Bill, but without success. *Id.* at 3737-38.

[190] *Id.* at 1582.

[191] A few days earlier the same House had amended a Federal Aid to Education Bill to permit federal funds to be used for separate schools. See p. 56, *infra*.

gress had the power to require mixed schools, since on several occasions a bare majority supported the Civil Rights Bill. The political overtones of the Bill's attachment to the Amnesty Bills, however, raise at least a reasonable doubt as to the validity of any such presumption. The realists upon the floor of the Senate constantly reminded their fellows that the Amnesty Bills could not conceivably obtain the support of the necessary two-thirds so long as the Civil Rights Bill was appended to it. Therefore, it is especially significant that, when considered on its own merits as a separate measure, the Civil Rights Bill did not receive majority support until the provision pertaining to schools had been deleted.

One thing is certain. Even if the success of the Civil Rights Bill when adopted as an amendment to the Amnesty Bill were probative evidence of a bare majority's belief in its constitutionality, it is merely evidence of their belief in the power of *Congress* to accomplish those ends by authority of Section 5 of the Fourteenth Amendment. It does not go to the question of the peremptory scope of the Fourteenth Amendment nor to its enforcement by the judiciary. And the fact that, of all those who discussed the Bill, not one man complained that the courts should have applied the Fourteenth Amendment to outlaw segregation in the public schools is the most cogent evidence of the prevailing opinion that the courts, at least, had no such power.

Attempts to Require Mixed Schools in the District of Columbia

Sumner's efforts in behalf of mixed schools were not confined during this period to the States. He was also active

in trying to persuade the Senate to abolish public school segregation in the District of Columbia.

In February of 1871, a Bill (S. No. 1244) which purported to reorganize and administer the District schools under a single Board of Education was reported from the Committee on the District of Columbia.[192] The Committee had amended the Bill to provide that:

> "* * * no distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils to any of the schools under the control of the board of education, or in the mode of education or treatment of pupils in such schools."[193]

Senator Patterson of New Hampshire, who reported the Bill from Committee, immediately moved to strike the provision which the Committee had inserted.[194] In supporting his motion, Patterson said:

> "I think this amendment [of the Committee] will tend to destroy the schools of the city, or to put them back at least ten or fifteen years."[195]

Patterson opposed requiring mixed schools for the District more on policy than on principle. If the Committee's amendment were stricken, he explained, the decision as to whether Negroes and whites should be mixed would be left to the Board of Education of each school district.[196]

Sumner spoke at great length in opposition to Patterson's motion, for the most part reiterating his earlier statements of policy. He was supported in debate by Harris of

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[192]Cong. Globe, 41st Cong., 3d Sess. 1053 (1871).
[193]*Id.* at 1054.
[194]*Ibid.*
[195]*Ibid.*
[196]*Id.* at 1054, 1056.

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[192]Cong. Globe, 41st Cong., 3d Sess. 1053 (1871).
[193]*Id.* at 1054.
[194]*Ibid.*
[195]*Ibid.*
[196]*Id.* at 1054, 1056.

Louisiana, Carpenter of Wisconsin, Sawyer of South Carolina, Revels of Mississippi and Wilson of Massachusetts.[197] In advocating mixed schools for the District of Columbia, Harris said:

> "We have not been able so far to operate those schools in our State very successfully; but in Louisiana we have difficulties to contend with that they have not here in Washington."[198]

Besides Patterson, those who arrayed themselves against the Committee amendment were Thurman of Ohio, Tipton of Nebraska and Hill of Georgia.[199] Thurman opposed mixed schools on the ground that existing prejudices would imperil the common school system.[200] Tipton pointed out that his own town in Nebraska would establish separate schools if there were a sufficient number of Negroes there.[201]

Hill then moved to resolve the question by amending the Committee's amendment to read as follows:

> "And no distinction, on account of race, color, or previous condition of servitude, shall be made in providing the means of education, or in the mode of education or treatment of pupils in such schools."[202]

This amendment, Hill explained, would still leave the decision of whether or not to establish separate schools to the local boards. Sumner was not satisfied with this compromise motion, of course, but no further action was taken on the Bill during the 41st Congress.

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[197] *Id.* at 1055-61.
[198] *Id.* at 1055.
[199] *Id.* at 1056-60.
[200] *Id.* at 1057.
[201] *Id.* at 1059.
[202] *Id.* at 1060.

A year later, at Sumner's instance, the Senate of the 42nd Congress considered what appears to have been essentially the same measure—this time labeled "a bill to secure equal rights in the public schools of Washington and Georgetown" (S. No. 365).[203] Although Sumner wished to force a vote upon the Bill without debate, Stockton of New Jersey and Bayard of Delaware insisted upon being heard in opposition. Senator Stockton asserted that equality did not assume identity. He said:

> "I think in the condition the two races are before the law as you have placed them in this country we are bound to legislate on all subjects of legislation with equality toward them. But when you leave the appropriate subjects of legislation, and * * * interfere with my individual rights, with my right to say where my children shall go to school, when you attempt really an enforced system of education, you are treading on the bounds of that civil liberty which our ancestors came to this country to establish. * * *"[204]

Ferry of Connecticut proposed an amendment to the Bill which, in effect, would have referred the Bill to the electorate of the District for approval or disapproval.[205] Soon it became apparent that the sentiment of the Senate was against the Sumner measure; and, after Sumner's motion to table a pending Appropriations Bill so that the District Bill might be considered was defeated by a vote of 19 to 32 on May 7, 1872,[206] Sumner let the matter drop. The

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[203]Cong. Globe, 42d Cong., 2d Sess. 2539 (1872).

[204]*Id.* at 2540.

[205]*Id.* at 3057-58.

[206]*Id.* at 3125. A day earlier the Senate had rejected, by a vote of 17 to 22, Sumner's motion to take up the Bill. *Id.* at 3100.

schools of the District of Columbia remained separate, as they do to this day.

The Federal Aid to Education Bill

In 1872, the House of Representatives of the 42nd Congress considered a bill (H. R. 1043) which proposed to subsidize education in the States out of receipts from sales of public lands.[207] The Bill was silent on the question of separate or mixed schools, and some members feared that it might be construed to require mixed schools.[208]

On February 8, 1872, Representative Hereford of West Virginia offered an amendment which provided:

> "That no moneys belonging to any State * * * under this act shall be withheld * * * for the reason that the laws thereof provide for separate schools for white children and black children, or refuse to organize a system of mixed schools."[209]

The amendment was adopted by a vote of 115 to 81.[210] The Education Bill then passed the House[211] but was never debated in the Senate. Certainly the majority of the House would not have approved the Hereford amendment had they thought State laws providing for separate schools violated the Fourteenth Amendment.

The Civil Rights Act of 1875

Shortly after the 43rd Congress convened in December, 1873, Representative Butler of Massachusetts reported

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207 Cong. Globe, 42d Cong., 2d Sess. 396 (1872).
208 Storm, *id.* at 569; Kerr, *id.* at 791; and Harris, *id.* at 855.
209 *Id.* at 882.
210 *Ibid.*
211 *Id.* at 903.

from the House Judiciary Committee, of which he was Chairman, a Civil Rights Bill (H. R. 796)[212] which, after extensive amendment and exhaustive debate, was eventually passed by both Houses to become the Civil Rights Act of 1875. A similar bill was introduced in the Senate by the indefatigable Sumner in January of the following year.[213] Although the Sumner Bill passed the Senate, it was not passed by the House.

As originally introduced, both Bills contained language intended to require mixed schools. The House Bill provided in part as follows:

> "that whoever, being * * * in charge of any public inn * * * public amusement * * * stagecoach, railroad * * * cemetery or other benevolent institution, or any public school supported * * * at public expense * * * shall make any distinction as to admission or accommodation therein of any citizen of the United States because of race, color * * * shall, on conviction thereof, be fined not less than $100 nor more than $5,000 * * *."[214]

In sponsoring the Bill, Butler had this to say:

> "This bill gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what every member on this floor and every member in this District has, and every man in New England has, and every man in England has *by the common law and the civil law* of the country * * * we propose simply to give to whoever has this right taken away from him the means of overriding

[212] 2 Cong. Rec. 318 (1873).

[213] 2 Cong. Rec. 945 (1874).

[214] *Id.* at 318.

> that state of hostile legislation, and of punishing the man who takes that right away from him. That is the whole of that bill."[215] (emphasis added)

He apparently believed that State governments had actually deprived the Negroes of rights which belonged to all men at common law. But his predication of such rights on the common law, and his acceptance of the fact that state statutes might in some instances have abrogated such rights, clearly indicate that he did not think that the Fourteenth Amendment of its own force invalidated such state statutes. The constitutional base upon which he rested Congress' authority to pass this Bill was the privileges and immunities clause of the Fourteenth Amendment, although some of his language might be regarded as referring to the equal protection clause:

> "* * * the result of the late war has been that every person born on the soil, or duly naturalized, is a citizen of the United States, entitled to all the rights, privileges, and immunities of a citizen. All legislation, therefore, that seeks to deprive a well-behaved citizen of the United States of any privilege or immunity to be enjoyed, and which he is entitled to enjoy in common with other citizens, is against constitutional enactment. * * * No State has a right to pass any law which inhibits the full enjoyment of all the rights she gives to her citizens by discriminating against any class of them provided they offend no law; * * *."[216]

As might have been expected, the main speech-making support for Butler's Bill came from the Negro and Repub-

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[215] *Id.* at 340.
[216] *Id.* at 340.

lican representatives of various Southern States[217] and a few representatives of the Northern States.[218] Diverse reasons were advanced for its passage, ranging from the general argument that justice, liberty and humanity demanded it[219] to the constitutional argument that the equal protection clause of the Fourteenth Amendment in conjunction with Section 5 thereof gave Congress the authority to pass it.[220]

There was strong opposition to the Bill, especially to the school clause.[221] Those who opposed it emphasized not only its impolitic nature but also its unconstitutionality. Many referred to the distinction recently pointed out in the *Slaughter House Cases* between a person's privileges as a citizen of the United States and his privileges as a citizen of a State.[222] The privilege of attending the common schools, they insisted, was derived from State citizenship.

With reference to Section 5 of the Fourteenth Amendment, Bright of Tennessee said:

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[217]Rainey of South Carolina, *id.* at 343; Ransier of South Carolina, *id.* at 382, 407; Elliott of South Carolina, *id.* at 407-10; Cain of South Carolina, *id.* at 565-67; Walls of Florida, *id.* at 416-17; Purman of Florida, *id.* at 422; Stowell of Virginia, *id.* at 425-27.

[218]Frye of Maine, *id.* at 375; Lawrence of Ohio, *id.* at 412-14; Monroe of Ohio, *id.* at 414; Mellish of New York, *id.* at 567.

[219]Walls of Florida, *id.* at 417.

[220]Elliott of South Carolina, *id.* at 409-10; Walls of Florida, *id.* at 416; and Lawrence of Ohio, *id.* at 412.

[221]Cain of South Carolina, who favored mixed schools, said:

> "* * * I know that, indeed, some of our republican friends are even a little weak on the school clause of this bill * * *." *Id.* at 566.

[222]Beck of Kentucky, *id.* at 342; Herndon of Texas, *id.* at 420; Buckner of Missouri, *id.* at 428, 429; Atkins of Tennessee, *id.* at 453; Stephens of Georgia, *id.* at 380; Durham of Kentucky, *id.* at 406; Harris of Virginia, *id.* at 376; and Read of Kentucky, *id.* at Appendix 342-43.

> "* * * the fourteenth amendment confers no new grant of power upon the Congress of the United States. I say, sir, that that question has been settled both by legislative and judicial precedents."[223]

Stephens of Georgia evaluated Section 5 of the Amendment as follows:

> "The proper remedies before were, and now are, nothing but the judgments of courts, *to be rendered in such way as Congress might provide,* declaring any State act in violation of the prohibitions to be null and of no effect * * * No new power over this matter of a different nature or character from that previously delegated over like subjects was intended to be conferred by the concluding sections of either the fourteenth or fifteenth article of amendment. * * *"[224] (emphasis added)

Durham of Kentucky stated the typical view of the opponents of the Bill when he said:

> "I believe the matters and things embraced in this bill are alone the subject of State legislation. * * *"[225]

Most opponents of the school provision feared that mixed schools would destroy the common school system of the Southern States, noting that in such event the Negro would be the chief sufferer.[226]

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[223] *Id.* at 415.

[224] *Id.* at 380.

[225] *Id.* at 405.

[226] Those expressing this view with regard to the situation prevailing in their respective States were Bright of Tennessee, *id.* at 415; Beck of Kentucky, *id.* at 342-343; Harris of Virginia, *id.* at 377; Mills of Texas, *id.* at 385; Durham of Kentucky, *id.* at 406; Blount of Georgia, *id.* at 411; Herndon of Texas, *id.* at 421; Buckner of Missouri, *id.* at 429; Bell of Georgia, *id.* at Appendix 3; Vance of North Carolina, *id.* at 554; Read of Kentucky, *id.* at Appendix 341; Wilson of Maryland, *id.* at Appendix 417.

Apparently satisfied that the Bill could not pass, Butler moved to recommit it.[227] His own doubts as to the wisdom of requiring mixed schools are apparent from his remarks at that time:

> "But there are reasons why I think this question of mixed schools should be very carefully considered. The negroes * * * have never, till the last few years, had any opportunity for education. * * * in negro schools which I established as military commander during the war I found that while I had plenty of school-boys with 'shining morning faces,' there were none 'creeping unwillingly to school.' * * * And I shall move to recommit this bill, among other reasons, because I want time to consider whether upon the whole it is just to the negro children to put them into mixed schools.
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> * * * * *
>
> And, therefore, I am quite content to consider this question in the light of what on the whole is best for the white and the colored child before the matter is again before the House."[228]

From this it must be clear that Butler did not believe that the Fourteenth Amendment had outlawed public school segregation of its own force, since he was willing to let considerations of policy govern the case.

In the meantime, in the Senate, Sumner had introduced his familiar Supplemental Civil Rights Bill (S. No. 1), including the provision for mixed schools.[229] After he had twice sought in vain to bring the Bill before the Senate without prior reference to committee, it was finally sent to the Committee on the Judiciary on January 27, 1874.[230]

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[227] *Id.* at 455.
[228] *Id.* at 456-57.
[229] *Id.* at 2.
[230] *Id.* at 10, 945-51.

Before the measure was discharged from Committee, Sumner died and the duty of leading debate on the Bill on April 29, 1874 devolved upon Senator Frelinghuysen of New Jersey. The amendments by the Committee had changed the Bill so that it now provided:

> "all persons * * * shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances * * * theaters * * * common schools * * * cemeteries * * * subject only to the conditions and limitations established by law, and applicable alike to citizens of every race * * *."[231]

Frelinghuysen found a constitutional basis for the Bill in the Thirteenth, Fourteenth and Fifteenth Amendments in general and in the privileges and immunities and equal protection clauses of the Fourteenth Amendment in particular.[232] The Bill was intended, he asserted, to prevent the exclusion of persons from public schools on account of "nationality" alone, although he thought there was nothing in it to forbid white persons and Negroes from voluntarily going to separate schools.[233]

The general understanding appears to have been that the school provision was intended to invalidate statutes requiring separate schools,[234] but at least two of those who

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[231] *Id.* at 3451.

[232] *Id.* at 3453. It will be recalled, however, that, as a member of the 40th Congress, Frelinghuysen had expressed the opinion that the Fourteenth Amendment did not "touch" the question of separate schools. *Supra,* p. 36.

[233] *Id.* at 3452.

[234] Thurman, *id.* at 4088.

supported the Bill construed it as not affecting such statutes.[235]

Others who supported the measure defended its constitutionality in varying terms. Morton of Indiana made the assertion that the "great object of the fourteenth amendment was to establish the equality of races" and maintained that the equal protection clause denied States the power to discriminate against any class of men.[236]

Howe of Wisconsin also relied upon the privileges and immunities and equal protection clauses, contending that Congress, rather than the judiciary, had been empowered to determine which privileges are those of a citizen.[237] Although he was apparently in sympathy with every purpose

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[235]Pratt, *id.* 4082; and Alcorn, *id.* at Appendix 305. An exchange between two members of the House of Representatives who were referring to this Senate Bill also illustrates the difference of opinion:

> "Mr. Ellis H. Roberts [of New York]. I understand the true construction of the Senate bill in reference to schools to require that the colored people shall have the same schools as the white people.
>
> Mr. Small [of New Hampshire]. There is nothing of the kind in the Senate bill; it only requires that they shall have equal privileges." 3 Cong. Rec. 981 (1875).

[236]2 Cong. Rec. Appendix 359 (1874). As far as has been discovered, Morton was the only advocate of any Civil Rights Bill who unequivocally stated that the judiciary had been empowered by the Fourteenth Amendment to rule school segregation laws unconstitutional. *Ibid.* But see note 149, *supra*, for inconsistency of Morton's remarks.

[237]*Id.* at 4150. "Before these amendments were added to the Constitution there was supreme jurisdiction in the government of the States to say what were and what were not the privileges of a citizen. Since these three amendments have been added to the Constitution that supreme jurisdiction is in the Government of the United States * * * in which department is it? * * * Is it the judicial? If the Legislature be silent, can you find writs and crimes and definitions which the courts of their own motion will execute and enforce? No one will assert that. If it be in the General Government any where it is in the legislative tribunal, and we are charged with the duty of providing for the execution of the amendments." *Ibid.*

of the Bill, he did not agree, that it was "necessary to mingle them [the races] * * * in the schoolhouses, in order that they might there unlearn this prejudice which separates one color from the other."[238]

Alcorn of Mississippi, citing Section 5 of the Fourteenth Amendment, agreed with Howe that Congress was the tribunal which should finally determine how the people's privileges should be safeguarded.[239] He did not, however, as a matter of policy favor mixed schools.[240]

Many opponents of the Bill denounced it as unconstitutional. Most of them reminded the Senate of the decision in the *Slaughter House Cases*.[241] Thurman of Ohio reiterated many of the arguments which he had made against the constitutionality of the measure when it had been presented as an amendment to the General Amnesty Bills. He contended that Section 5 of the Fourteenth Amendment did not "add one iota to the power of Congress". It merely gave Congress the authority to "make a case" for the judiciary, that is, to set up procedural machinery for judicial condemnation of violations of the substantive provisions of the Amendment.[242]

Stockton of New Jersey agreed with Thurman. He thought that the question of whether or not to require mixed schools was one for the State legislatures. "Equal" school facilities were required by the Fourteenth Amendment, he asserted, but "equal" did not mean "the same".[243] Merrimon

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[238] *Id.* at 4151.

[239] *Id.* at Appendix 304.

[240] *Id.* at Appendix 305.

[241] *E.g.*, Thurman of Ohio, *id.* at 4086; Stockton of New Jersey, *id.* at 4146; Cooper of Tennessee, *id.* at 4156; Eli Saulsbury of Delaware (brother of Willard Saulsbury, member of the 39th Congress), *id.* at 4159; Merrimon of North Carolina, *id.* at Appendix 314; Norwood of Georgia, *id.* at Appendix 241.

[242] *Id.* at 4084.

[243] *Id.* at 4145-46.

of North Carolina insisted that the equal protection clause did not prevent the education of Negroes in separate and equal schools any more than it forbade separate schools for the sexes.[244] Sargent of California, a Republican, also thought that the Fourteenth Amendment did not require mixed schools.[245] He offered an amendment designed to make it clear that the Bill permitted separate schools but the amendment was rejected by a vote of 26 to 21.[246]

Some senators, while they did not question the power of Congress to prohibit separate schools, nevertheless objected to the measure as most unwise. For example, Stewart of Nevada, who had been a member of the 39th Congress, took that position,[247] thus indicating that he did not consider the question foreclosed by the Fourteenth Amendment.

On May 23, 1874, after an all night session, the Bill passed the Senate.[248] It was never acted upon by the House.

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[244] *Id.* at Appendix 313. Merrimon also contended that Congress did not have the power to enact such a measure. *Id.* at Appendix 311. Others who thought the Bill unconstitutional were Ferry of Connecticut, *id.* at 945; Morrill of Maine, who had been in the 39th Congress, *id.* at 949; Norwood of Georgia, *id.* at Appendix 233; Bogy of Missouri, *id.* at Appendix 321; Cooper of Tennessee, *id.* at 4156; Saulsbury of Delaware, *id.* at 4159; and Kelly of Oregon, *id.* at 4162-63.

[245] *Id.* at 4172.

[246] *Id.* at 4167. Two of the votes against the Sargent amendment were cast by Pratt and Alcorn, both of whom had stated during the debates that they did not think the Bill, as amended by the Committee on Judiciary, required mixed schools. *Supra,* p. 63. Apparently they either deemed the Bill sufficiently clear on this point not to require further amendment, or else they preferred to leave the question open.

[247] *Id.* at 4167. Others who expressed concern for the future of the common schools if mixed schools were forced upon the States included Thurman of Ohio, *id.* at 4089; Stockton of New Jersey, *id.* at 4145; Bogy of Missouri, *id.* at Appendix 321; Cooper of Tennessee, *id.* at 4156; Saulsbury of Delaware, *id.* at 4161; and Sargent of California, *id.* at 4174-5. Most of these senators also contended that the Bill was unconstitutional.

[248] *Id.* at 417.

During the Second Session of the 43rd Congress, the House of Representatives renewed consideration of Butler's H. R. 796 on February 3, 1875.[249] This Bill, as will be remembered, had been referred back to Committee in the previous Session.[250] As amended and resubmitted by the Judiciary Committee, it contained the following proviso allowing separate schools:

> "Provided, That if any State or the proper authorities in any State, having the control of common schools or other public institutions of learning aforesaid, shall establish and maintain separate schools and institutions, giving equal educational advantages in all respects for different classes of persons entitled to attend such schools and institutions, such schools and institutions shall be a sufficient compliance with the provisions of this section so far as they relate to schools and institutions of learning."[251]

Almost immediately amendments relating to common schools were offered by White of Alabama, Cessna of Pennsylvania and Kellogg of Connecticut. White's amendment would have made it clear that mixed accommodations were not required in the case of any of the facilities to which the Bill related—*i.e.*, inns, public conveyances, schools, etc.[252] Cessna's amendment would have substituted the Senate Bill (generally interpreted to prohibit separate schools) *in toto*.[253] And Kellogg's motion was to omit all reference to schools whatsoever by deleting both the proviso added by

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[249]3 Cong. Rec. 936 (1875).
[250]*Supra*, p. 61
[251]*Id.* at 1010.
[252]*Id.* at 939.
[253]*Id.* at 938.

the Judiciary Committee and all mention of schools in the original Bill.[254]

As in previous debates, there were many speeches on the Bill, but no new fundamentals were presented. Storm's statement that "I believe this subject has been talked threadbare * * *"[255] was no doubt justified.

In sponsoring the Bill, Butler was again content to defend its constitutionality on the basis of the privileges and immunities clause within whose scope, he thought, were included all those rights sought to be affected by this Bill.[256] Cain of South Carolina favored mixed schools but stated that he was willing to compromise "for the sake of the welfare of the republican party".[257] Cain, himself a Negro, was asked whether the Negroes of South Carolina wanted mixed schools. In reply he said:

> "So far as my experience is concerned I do not believe they do. In South Carolina, where we control the whole school system, we have not a mixed school except the State college."[258]

Blount of Georgia pointed out that the majority of the House were "lame ducks" in that they had lost their seats in the election of the past November.[259] He interpreted the defeat which the Republicans had suffered at that election as a repudiation of the Party's Civil Rights measures.[260] Phelps of New Jersey, a Republican, agreed.[261]

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[254] *Id.* at 939.
[255] *Id.* at 950.
[256] *Id.* at 939.
[257] *Id.* at 981.
[258] *Ibid.*
[259] *Id.* at 977.
[260] *Ibid.*
[261] *Id.* at 1001.

Some members spoke in favor of the Cessna motion to substitute the Senate Bill,[262] but that motion was eventually defeated.[263] The White amendment too was rejected.[264] A large group, however, continued to oppose the Bill in its entirety.[265]

Finally the Kellogg amendment to strike all references to schools was adopted by a vote of 128 to 48.[266] The significance of this vote can be determined from Kellogg's speech in support of his amendment:

> "The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of the education of the colored children of the Southern States. * * * The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.
>
> But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by

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[262]*E.g.*, Rainey of South Carolina, *id.* at 959; Hoar of New York, *id.* at 979; Burrows of Michigan, *id.* at 1000; Phillips of Kansas, *id.* at 1003; Williams of Wisconsin, *id.* at 1002; Lynch of Mississippi, *id.* at 945.

[263]*Id.* at 1011.

[264]*Id.* at 1010.

[265]Finck of Ohio, *id.* at 947; Storm of Pennsylvania, *id.* at 950; Lamar of Mississippi, *id.* at 952; Hunton of Virginia, *id.* at Appendix 117; Whitehead of Virginia, *id.* at 952; Blount of Georgia, *id.* at 977; Sener of Virginia, *id.* at 978; Stanard of Missouri, *id.* at 981; Chittenden of New York, *id.* at 982; Caldwell of Alabama, *id.* at 982; Eldredge of Wisconsin, *id.* at 982; Brown of Kentucky, *id.* at 985; Southard of Ohio, *id.* at 996; Phelps of New Jersey, *id.* at 1002.

[266]*Id.* at 1011.

> which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of the past ten years and leave them to the mercy of the unfriendly legislation of the States where the party opposed to this bill is in power. And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation. The States establish schools, raise taxes for that purpose, and they are also aided by private benefactions; and they have a right to expend the money, so raised, in their own way. * * *"[267]

After Kellogg's amendment had been adopted, the Bill was passed by a vote of 162 to 99 on February 5, 1875.[268]

Three weeks later the Bill was taken up by the Senate,[269] where there was a brief debate devoted in the main to the jury provision and the constitutionality of the Bill with regard to that provision. There was no mention of schools in this debate. The following day, February 27, 1875, the Senate passed the Bill and sent it to President Grant who signed it into law on March 1, 1875.[270]

With the enactment of the Civil Rights Bill of 1875 the post-war campaign to define the rights of the freedmen appears to have ended. The persistent attempts of the Radicals to abolish separate schools did not succeed. True, a measure which many thought would accomplish that

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[267] *Id.* at 997.
[268] *Id.* at 1011.
[269] *Id.* at 1791.
[270] *Id.* at 2013; 18 Stat. 335 (1875).

result finally passed the Senate. However, an amendment thereto designed to allow the continuance of separate schools was rejected by only a slim majority which included at least two highly ambiguous votes. For this reason and because this Bill was never considered by the House, it is doubtful that any real significance can be attributed to its momentary success in the Senate.

On the other hand, significance abounds in contemporaneous action on the Bill of the House of Representatives. The members of the House voted overwhelmingly to amend their Bill by omitting all reference to schools after the sponsor of the amendment had contended that such matters should be left to the State legislatures. It was this Bill, subsequently approved by the Senate, which became law, rather than the Senate Bill.

APPENDIX B

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APPENDIX B: History of State Action upon the Question of Separate Schools and the Fourteenth Amendment.

Introduction

The materials for this Appendix have been obtained from (1) data supplied by the Attorneys General of the several States in answer to a questionnaire circulated among them by the Attorney General of the State of Virginia; (2) the legislative journals of the several States containing the gubernatorial messages and the legislative proceedings in respect of the Fourteenth Amendment; and (3) authoritative works upon the history of public school education in the several States with particular reference to racial segregation.

In seeking evidence of the understanding of the State legislatures as to the effect of the Fourteenth Amendment upon segregation in public schools, we have explored two principal sources. The first is the legislative debates on the Amendment. While in most instances the gubernatorial messages are available, in only two States, Indiana and Pennsylvania, are the reports of the legislative debates extant. Significantly, in the debates of the legislatures of both of these States, Section 1 of the Amendment was identified as reiterating the prohibitions of the Civil Rights Act of 1866.

The second, and by force of circumstances, the principal evidentiary source, consists of the action or the absence of action, of the State legislatures (a) in respect of the Fourteenth Amendment and (b) in respect of segregation in the schools.

For example, if the same legislature which ratified the Amendment either established a segregated school system or continued an already existing one, this is to us strong evidence that the legislature did not understand that the Amendment of its own force prohibited such segregation.

Where we have found Reconstructionist legislatures in the seceded States, under provisional governors, ratifying the Fourteenth Amendment and at the same time establishing or continuing segregated schools in those States, we have regarded this as perhaps the most cogent proof that the Reconstructionists themselves did not understand or contemplate that the Amendment required abolition of racial segregation in the public schools. In this connection we have examined the thinly veiled charge made by appellants (Br. 142-157) that the eleven seceded States which sought reinstatement designedly delayed legislation continuing or establishing segregated school systems until after their reinstatement in the Union. We have found no evidence to support this charge. On the contrary, some seceded States had school segregation statutes in force when they were readmitted to the Union; in all but two seceded States (Louisiana and South Carolina) the Reconstructionist State constitutional conventions adopted constitutions which did not prohibit separate schools; and nearly all of the Reconstructionist State legislatures, often at the suggestion of the provisional governors, continued or established separate schools for the two races.

On the other hand, where States refused to ratify, or having ratified later rescinded their ratification of the Amendment, we have looked to see whether or not the refusal or rescission was in any wise induced by an understanding that the Amendment would prohibit segregated school systems existing or to be formed in those States. We have found no evidence to that effect. In fact, the action of those States in continuing or establishing separate school systems after the Amendment was proclaimed ratified, demonstrates a positive understanding that the Amendment did not affect the question.

Of the 37 States to which the Amendment was submitted, 5 abandoned segregated schooling in word or deed at or about the time they ratified the Fourteenth Amendment. This action, unexplained, would be equivocal. But the evidence discloses that such action merely reflected local policy. There is no evidence that the Fourteenth Amendment entered into the deliberations of the legislators. Particularly is this true of the three seceded States whose governments were dominated by Negroes and Radicals. After the Reconstruction period, the legislators or people of those States restored their segregated school systems.

Finally, there is a group of ratifying States in which racial school segregation either never existed or had been abandoned or outlawed before the Fourteenth Amendment was submitted to their legislatures. These States, for the most part, had comparatively small Negro populations and therefore no racial problem giving rise to the need for school segregation. For that reason, there is little evidence of comment or action in those States on the question at issue here.

The Fourteenth Amendment was proposed by Congress on June 13, 1866 and submitted to the States on June 16, 1866. On July 28, 1868, the Secretary of State proclaimed that the Amendment had been ratified. Thirty-seven States considered the Amendment. We now review factually and in alphabetical order the proceedings in each of these States.

We 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. These errors we have endeavored to expose lest they mislead the Court, as they apparently have the appellants, to the thoroughly absurd conclusion that "three-fourths of the States understood and contemplated the Amendment to forbid legislation compelling the assignment of white and Negro youth to separate schools" (Br. 140).

Alabama

The governor submitted the Fourteenth Amendment to the legislature on November 12, 1866, recommending its rejection,[1] and the legislature followed his recommendation, the vote in the Senate being 21 to 9 and in the House 52 to 33.[2] One month later the governor recommended ratification on the ground that only by ratification could Alabama obtain reinstatement of its representatives in Congress.[3] But the legislature rejected this recommendation and refused to ratify the Amendment by larger majorities than

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[1]Ala. Sen. J. 36 (1866-7).

[2]*Id.* at 155; Ala. House J. 84 (1866-7).

[3]Ala. Sen. J. 176 (1866-7).

before.[4] The records of these proceedings contain no reference to the school system. The Alabama government was thereafter reorganized under federal military rule.

The Alabama constitutional convention convened on November 4, 1867 and on December 5, 1867, adopted an article dealing with public education, which appellants characterize as an "anti-segregation article" (Br. 149). It was nothing of the kind. It simply required the Board of Education "to establish throughout the State, in each township, or other school district which it may have created, one or more schools at which all the children of the State, between the ages of five and twenty-one years, may attend free of charge".[5] These provisions were altogether compatible with separate schools for colored and white children.

The Fourteenth Amendment was ratified without debate on July 13, 1868, by overwhelming majorities, 67 to 4 in the House and unanimously in the Senate.[6] The same legislature on August 11, 1868, adopted a general school law[7] which required segregated schools unless all parents consented to amalgamation.[8] Segregation was made mandatory

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[4]The vote was 28 to 3 in the Senate and 69 to 8 in the House. Ala. Sen. J. 182 (1866-7); Ala. House J. 213 (1866-7).

[5]ALA. CONST. Art. XI, § 6 (1867). Compare LA. CONST. Tit. VII § 135 (1868) which provided: "There shall be no separate schools * * * established exclusively for any race by the State of Louisiana."

[6]Ala. House J. 10 (1868); Ala. Sen. J. 10 (1868).

[7]Ala. Acts 148 (1868).

[8]*Ibid.* The words were as follows:

> "That in no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate schools for both white and colored children."

by the State constitution adopted in 1875[9] and continues to this day.[10]

The Fourteenth Amendment and segregated education were adopted contemporaneously by the same legislature in Alabama, and Alabama was reinstated by Congress even though its newly adopted constitution did not require mixed schools.

Arkansas

Arkansas rejected the Fourteenth Amendment when it was first presented.[11] Objections to the Amendment were set forth in committee reports, which neither state nor imply that the Amendment would proscribe school segregation.[12] The same legislature which first considered the Amendment enacted a statute "to declare the rights of persons of African descent", by which segregation in the public schools was specifically required.[13]

The military constitutional convention met January 7, 1868 and adopted a new State constitution which was ratified March 13, 1868. It provided for establishment of a system of "free schools for all persons" of school age.[14] Although appellants say it "is reported that this article was adopted to nullify the segregated school law" of 1867

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[9]ALA. CONST. Art. XII, § 1 (1875).

[10]ALA. CONST. Art. XIV, § 256 (1901).

[11]Ark. Sen. J. 262 (1866); Ark. House J. 291 (1866-7).

[12]Ark. Sen. J. 258 (1866); Ark. House J. 288 (1866-7).

[13]Ark. Stat. No. 35, § 5, 100 (1866-7).

[14]ARK. CONST. Art. IX, § 1 (1868).

(Br. 143), we are unable to find support for that statement in the treatise cited by them as authority.[15]

The Reconstructionist legislature, elected pursuant to the new constitution, ratified the Fourteenth Amendment by unanimous vote in the House on April 3, 1868 and in the Senate on April 6, 1868.[16] On July 23, 1868, the same legislature enacted a statute establishing the public school system and directing the State Board of Education to "make the necessary provisions for establishing separate schools for white and colored children".[17] So far as we can determine, this is the only school law enacted by that legislature. We have been unable to find any intervening statute of the kind suggested in appellants' brief[18] establishing schools on a non-segregated basis.

Segregation was continued by the next school law enacted in 1873.[19]

The same Reconstructionist legislature that ratified the Fourteenth Amendment at the same time continued segregated schools in Arkansas.

California

California never ratified the Fourteenth Amendment. The Assembly elected in 1867 was strongly Democratic and the new Democratic governor was opposed to the Reconstruction policy of Congress.[20] The Democratic Assembly received a committee report recommending rejection of the

[15]STAPLES, RECONSTRUCTION IN ARKANSAS 28 (1923).
[16]Ark. House J. 22 (1868); Ark. Sen. J. 24 (1868-9).
[17]Ark. Stat. No. LII, § 107 (1868).
[18]Br. 143.
[19]Ark. Stat. c. CXXX, § 108 (1873).
[20]Cal. Sen. J. 101 *et seq.* (1867-8).

Fourteenth Amendment.[21] The Senate, which remained under Republican control, received a report from its committee recommending ratification.[22] The houses, thus deadlocked, took no further action.

Prior to 1866 California's school system, first established pursuant to its constitution of 1849,[23] consisted of compulsory segregated schools. In 1866 a statute was enacted permitting Negro children to enter white schools if the majority of the white parents did not object.[24] The Superintendent of Public Instruction in 1867 spoke of the establishment of separate schools for other than white children as one of the more important improvements recently effected by the school laws,[25] stating:

> "The people of this state are decidedly in favor of separate schools for colored children."[26]

In 1874 the legislature enacted a statute which expressly provided that "the education of children of African descent * * * must be provided for in separate schools" but required admission of Negroes into white schools where separate colored schools were not provided.[27] In 1874 the California Supreme Court held that the segregated school system did not violate the Fourteenth Amendment.[28] In 1885 new legislation provided that "every school, unless otherwise provided by law, must be open for the admission of all children"; however, the same Act gave the school trustees

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[21]Cal. Ass. J. 611 (1867-8).
[22]Cal. Sen. J. 676 (1867-8).
[23]CAL. CONST. Art. IX, § 3 (1849).
[24]Cal. Stat. c. CCCXLII, § 57 (1865-6).
[25]Report of the California Superintendent of Public Instruction 14 (1866-7).
[26]*Id.* at 22.
[27]Cal. Stat. 97 (1873-4).
[28]Ward v. Flood, 48 Cal. 36 (1874).

power to establish separate schools for children of Mongolian descent.[29]

California thus had segregated education all during the Reconstruction period and continued the system far beyond the ratification of the Fourteenth Amendment by other States. There is no evidence that California's refusal to ratify the Amendment was induced by an understanding that it would require abolition of California's segregated schools.

Connecticut

Connecticut was the first State to ratify the Fourteenth Amendment. Ratification was recommended by the governor and followed without extended discussion in the Senate on June 25, 1866 by a vote of 11 to 6 and in the House on June 29, 1866 by a vote of 131 to 92.[30]

The public school system in Connecticut dates back to 1644. At no time prior to ratification of the Amendment were segregated schools required by State law. However, in 1867, within a year after Connecticut voted to ratify the Fourteenth Amendment, segregated schools were required in Hartford by local ordinance. They also existed in New Haven.[31] On August 1, 1868 the legislature outlawed segregated schools.[32]

The Negro population in Connecticut in 1870 was 9,668 out of a total population of 537,454. Clearly that State had no serious racial problem when it ratified the Fourteenth

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[29]Cal. Stat. c. CXVII, § 1, 99 (1885). This statute with subsequent amendments permitted the establishment of separate schools for Indians, Mongolians, Chinese and Japanese until 1947. Cal. Stat. c. 737, p. 1792 (1947).

[30]Conn. Sen. J. 335, 375 (1866); Conn. House J. 410 (1866).

[31]MORSE, THE DEVELOPMENT OF FREE SCHOOLS IN THE UNITED STATES AS ILLUSTRATED BY CONNECTICUT AND MICHIGAN 127, 144, 192 (1918); WARNER, NEW HAVEN NEGROES 34, 71-2 (1940).

[32]Conn. Pub. Acts c. CVIII, p. 206 (1868).

Amendment. Although it outlawed segregated schools contemporaneously with ratification of the Amendment, it apparently did so as a matter of State policy rather than under any supposed compulsion of the Fourteenth Amendment.

Delaware

Delaware refused to ratify the Fourteenth Amendment. The governor in his inaugural address on January 15, 1867, pointed to the danger of encroachment on the rights of State governments which he thought inherent in the Amendment.[33] The Amendment was rejected on February 7, 1867, in the House by a vote of 15 to 6 and in the Senate by a vote of 6 to 3.[34] Delaware did not ratify the Amendment until more than 30 years later in 1901.[35]

The Delaware constitution of 1831 directed the legislature to establish free public schools[36] and prior to the Civil War the legislature provided free schools for all white children.[37] In 1874 separate schools for the races were made permissible.[38] The constitution of 1897, in effect when Delaware ratified the Amendment in 1901, made the maintenance of separate schools compulsory.[39]

The appellants draw from the historical facts in Delaware the remarkable conclusion that "the General Assembly in a series of discriminatory statutes [including the school law of 1874] demonstrated that it fully understood that equality before the law demanded non-segregation" (Br.

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[33]Del. House J. 95 (1867).
[34]Del. House J. 226 (1867); Del. Sen. J. 176 (1867).
[35]Del. Laws c. 235 (1901).
[36]Del. Const. Art. VII, § 11 (1831).
[37]Del. Rev. Stat. c. 42, § 11 (1852).
[38]Del. Rev. Stat. c. 42, § 12 (1874).
[39]Del. Const. Art. X, § 2 (1897).

183). We must confess our complete inability to follow this kind of reasoning.

There is no evidence that Delaware refused to ratify the Fourteenth Amendment because of a belief that it would require the State to admit Negroes into its public school system on a mixed school basis. The Delaware legislature which ratified the Amendment in 1901 plainly did not regard it as incompatible with existing compulsory segregated schools.

Florida

The governor on November 4, 1866, recommended rejection of the Fourteenth Amendment but did not make any reference to school segregation.[40] In both houses committee reports were made. The House report mentioned merely that a separate free school system had been established for Negroes although there was no public school system for whites.[41] Both houses unanimously rejected the Fourteenth Amendment in December, 1866.[42]

The report of the Superintendent of Public Schools for Freedmen for 1866 noted that there were in existence 35 day schools and 30 night schools for Negroes with 2,700 pupils. These were schools for Negro children supported by Florida at a time when there were no such schools provided for white children.

In 1868, under pressure of the Reconstruction Act, Florida adopted a new constitution. Article 8 of that constitution made it "the paramount duty of the State to make ample provision for the education of all the children residing

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[40]Fla. Sen. J. 8 (1866).
[41]Fla. House J. 75, 78 (1866).
[42]Fla. Sen. J. 111 (1866); Fla. House J. 149 (1866).

within its borders, without distinction or preference".[43] This Article did not, we submit, prohibit separate and equal schools.

The Fourteenth Amendment was ratified on June 9, 1868.[44] A uniform system of public schools was the subject of a bill introduced in the legislature of 1868, the same legislature that ratified the Fourteenth Amendment. The bill passed the House without provision for segregated schools.[45] In the Senate an amendment to require school segregation was adopted but a vote upon the bill was indefinitely postponed on the last day of the session.[46] A general school law was enacted in 1869 which neither forbade nor required segregated schools.[47] In 1873 an act was passed prohibiting segregation in public schools.[48] School segregation became mandatory under the Florida constitution of 1885, effective 1887.[49]

Five years after it ratified the Fourteenth Amendment, Florida outlawed public school segregation. It does not appear that this was done under a supposed compulsion in the Fourteenth Amendment.

Georgia

The Fourteenth Amendment was presented to the Georgia legislature by the governor on November 1, 1866, in a message in which he opposed ratification.[50] It was

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[43]FLA. CONST. Art. IX, § 1 (1868).

[44]Fla. Sen. J. 9 (1868); Fla. House J. 9 (1868). The legislature contained 23 Democrats, 13 carpetbaggers (visitors from the North), 21 scalawags (Southern loyalists), and 19 Negroes. DAVIS, CIVIL WAR AND RECONSTRUCTION IN FLORIDA 259 (1913).

[45]Fla. House J. 205 (1868).

[46]Fla. Sen. J. 225-7 (1868).

[47]Fla. Laws c. 1686 (1869).

[48]Fla. Laws c. 1947 (1873).

[49]FLA. CONST. Art. XII, § 12 (1885).

[50]Ga. House J. 7 (1866).

rejected by a vote of 147 to 2 in the House and 38 to 0 in the Senate.[51] The government was then reorganized under military rule pursuant to the Reconstruction Acts..

At the constitutional convention of 1867 a proposal to establish a public school system "without partiality or distinction" failed of adoption. So also did proposals requiring segregated schools.[52] There emerged an article on education which simply provided for "a thorough system of General Education, to be forever free to all children of the State".[53]

On July 24, 1868, Bullock, the Reconstruction governor, recommended ratification of the Fourteenth Amendment.[54] The Amendment was ratified by a vote of 89 to 69 in the House and 27 to 14 in the Senate.[55] Congress did not, however, recognize this ratification since Negroes had been excluded from their seats in the 1868 legislature. At the 1870 session the governor again called on the legislature to ratify the Fourteenth Amendment and at the same time to ratify the Fifteenth Amendment. [56] That legislature ratified the Fourteenth Amendment by a vote of 71 to 0 in the House and 24 to 10 in the Senate.[57] Governor Bullock was a Republican and a majority in both the Senate and House of the 1870 legislature were Republicans. At this session the first law establishing a system of public schools in Georgia was enacted.[58] This Act provided that

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[51]Ga. House J. 68 (1866) ; Ga. Sen. J. 72 (1866).
[52]J. of the Const. Conv. of Ga. 69, 151, 479, 558 (1867-8).
[53]GA. CONST. Art. VI, § 1.
[54]Ga. House J. 60 (1868).
[55]Ga. House J. 50 (1868) ; Ga. Sen. J. 46 (1868).
[56]Ga. Sen. J. 65 (1860).
[57]Ga. House J. 74 (1870) ; Ga. Sen. J. 74 (1870).
[58]Ga. Pub. Laws 49 (1870).

> "the children of the white and colored races shall not be taught together in any sub-district of the State."[59]

An amendment to eliminate this provision was rejected in the House.[60]

Appellants' suggestion that Georgia adopted a State constitution containing no reference to school segregation in order to induce Congress to qualify the State for reinstatement, and then, after reinstatement, adopted a compulsory segregated school system (Br. 150-51) is insupportable in view of the fact that both the convention which adopted the State constitution and the legislature which set up the segregated school system were Reconstructionist and under Republican control.

The immutable fact is that the Reconstructionist legislature that ratified the Fourteenth Amendment also enacted a school law providing for segregated schools.

Illinois

Governor Oglesby recommended ratification when the Illinois legislature met in 1867, stating that the Fourteenth Amendment had received "emphatic approval and endorsement by the people of the State".[61] The Amendment was ratified by the Senate on January 10, 1867 by a vote of 17 to 8 and by the House on January 15, 1867 by a vote of 60 to 25.[62]

Although Illinois statutes did not at that time contain express provision for school segregation, separate schools

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[59]Ga. Pub. Laws 57 (1870).
[60]Ga. House J. 449 (1870).
[61]Ill. Gen. Ass. Rept. 29 (1867).
[62]Ill. Sen. J. 76 (1867); Ill. House J. 134 (1867).

were maintained on a local option basis. The report of the Superintendent of Public Instruction for 1865-6, notes that there were then in Illinois 6,000 Negro children of school age for whom no schools were provided because the law[63] did not contemplate their co-attendance with white children.[64] In his report for the subsequent biennium, the Superintendent said:

> "The question of co-attendance, or of separate schools, is an entirely separate and distinct one, and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of but little importance, and one which need not and cannot be regulated by legislation."[65]

In 1870 Illinois adopted a new constitution, which although it provided for a free public school system for the education of "all the children", contained no provisions regarding separate or mixed schools.[66] Resolutions which would have made a segregated school system mandatory were twice defeated by the convention; but appellants' statement that the provision finally adopted "stems from a resolution in which the convention directed the Education Committee to submit an article which would call for the establishment of a public school system * * * 'without regard to color or previous condition'" (Br. 174) is grossly misleading. The fact is that a motion to establish

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[63]Ill. Stat. 460 (1858).

[64]Report of Superintendent of Public Instruction of Illinois 28 (1865-6); Ill. Stat. 105 (1865).

[65]Report of Superintendent of Public Instruction of Illinois 21 (1867-8).

[66]Ill. Const. Art VIII, § 1 (1870).

schools "without regard to color, etc." was made by a single member and was referred, without any vote or discussion, to the Education Committee as a matter of parliamentary routine. In view of the constitutional provision finally adopted, clearly the motion of that member was of no significance.[67]

Following adoption of the constitution of 1870, Illinois continued its separate schools at local option. The governor in his message to the legislature in 1871 stated:

> "The question whether children of different complexions shall be admitted to and instructed in the same school is one of mere local and temporary interest, and may be safely left to those who vote and pay the taxes."[68]

Illinois did not end school segregation until 1874.[69]

The evidence is to the effect that at the time it ratified the Fourteenth Amendment, Illinois had permissive school segregation on a local option basis and continued this system for a substantial period of time after the Amendment had become part of the Constitution.

Indiana

Governor Oliver P. Morton of Indiana, afterwards United States Senator, in his message of January 11, 1867 recommended ratification of the Fourteenth Amendment and at the same time suggested that the Negroes be educated in separate schools. On the subject of schools he said:

> "The laws of Indiana exclude colored children from the common schools, and make no provision

[67] J. of the Const. Conv. of Ill. 429-31, 860-1 (1869).
[68] Ill. House J. 47 (1871).
[69] Ill. Rev. Stat. c. 122, § 100 (1874).

> whatever for their education. I would therefore recommend that the laws be so amended as to require an enumeration to be made of the *colored* children of the State, and such a portion of the school fund as may be in proportion to their number, be set apart and applied to their education by the establishment of separate schools, under such suitable provisions and regulations as may be proper. I would not recommend that white and colored children be placed together in the same schools, believing, as I do, in the present state of public opinion, that to do so would create dissatisfaction and conflict, and impair the usefulness of the schools * * *."[70] (emphasis added)

In a protracted debate on the Amendment, the Republicans asserted that the people had already voted for its ratification and that a vote should be taken at once.[71] One Democratic opponent of ratification stated that if the Amendment were adopted the Negroes "would sit with us in the jury box and with our children in the common schools".[72] But to the objection that the first section of the Amendment merely repeated the principles of the Civil Rights Act of 1866, one of the Amendment's supporters replied that those principles should be made permanent by writing them into the fundamental law.[73] The Senate ratified by a vote of 29 to 16 and the House by a vote of 55 to 36.[74]

The school law of 1865 excused Negroes and mulattoes from payment of the school tax as no schools were provided

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[70]Ind. Gen. Ass. Doc., Pt. I, 21 (1867).
[71]Brevier Leg. Rep. 44 (Ind. 1867).
[72]*Id.* at 80.
[73]*Id.* at 88.
[74]*Id.* at 58, 90.

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[73]*Id.* at 88.
[74]*Id.* at 58, 90.

for their children.[75] No amendment to the school law of 1865 was successful at the 1867 session, although a bill to provide separate schools for Negroes when any taxpayer objected to their admission to the white schools was passed by the Senate.[76] The 1865 law was, however, changed in 1869 when taxation for common school purposes was made uniform and the education of Negro children was provided for in separate schools.[77] The debate on this statute, the record of which is extant, does not indicate that the Fourteenth Amendment at any time entered into the consideration of the legislators.[78] Some opposed educating the Negro at all; some were for separate schools because they believed that the Indiana constitution required free education for the Negro; and some favored amalgamated schools because they considered segregated schools a violation of the Indiana constitution. But none indicated a belief that segregated schools violated the Fourteenth Amendment.

In 1874 the Supreme Court of Indiana held that the legislation of the State providing for segregated schools did not violate the Fourteenth Amendment.[79] Segregated schools were made permissive rather than mandatory by later statute of 1877 which also required that, in the absence of a separate school for their accommodation, colored children should be admitted into the white schools.[80]

In short, the evidence is that Indiana supplied no free schools for Negroes when it ratified the Amendment in 1867. In 1869, after the Amendment had become part of

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[75]Ind. Laws, Act of March 6, 1865, § 1.

[76]Brevier Legislative Rep. 267-8, 353, 444 (1867); *cf. id.* at 356, 444.

[77]Ind. Laws 41 (1869).

[78]Brevier Legislative Rep. 34, 341-2, 491-6, 506-12, 533 (1869).

[79]Cory v. Carter, 48 Ind. 327 (1874).

[80]Ind. Laws 124 (1877).

the Federal Constitution, Indiana established a uniform free school system on a segregated basis.

Iowa

Iowa did not consider the Fourteenth Amendment until 1868. At the convening of the legislature in that year, the governor recommended ratification.[81] The new governor, in his inaugural address a few days later, noted that the Iowa constitution of 1857 had abolished all distinction on the basis of race and color and asked that the Negro be enfranchised.[82] The Amendment was ratified April 3, 1868 by a vote of 68 to 12 in the House and 34 to 9 in the Senate.[83]

The Iowa constitution of 1857 provided "for the education of all the youths of the state through a system of common schools".[84] In 1858 the legislature required the local school boards to provide separate schools for Negro children unless all parents in the district agreed to amalgamation.[85] The Superintendent of Public Instruction considered this statute offensive to the State constitution as impinging on the duties of the Board of Education.[86] In 1858 the statute was held by the Supreme Court of Iowa to offend the State constitution.[87]

While the Fourteenth Amendment was before the legislature, the Supreme Court of Iowa had occasion to consider the effect of the same constitutional provision upon an

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[81]Iowa Sen. J. 33 (1868).

[82]*Id.* at 48.

[83]*Id.* at 264; Iowa House J. 132 (1868).

[84]IOWA CONST. Art. IX, § 12 (1857). At an earlier date, Iowa had limited public education to whites and exempted the property of Negroes from school taxes. Iowa Code §§ 1127, 1160 (1851).

[85]Iowa Laws c. 52, § 30 (1858).

[86]Report of the Superintendent of Public Instruction of Iowa 102 (1864); *Id.* at 97 (1866).

[87]District v. Dubuque, 7 Iowa 262 (1858).

asserted discretion in local district school authorities to establish separate schools for white and colored children. On April 14, 1868 the Court held that under the constitution of 1857 local district school authorities had no such discretion.[88] The courts of Iowa thereafter adhered to the view that the State constitution forbade school segregation in two decisions rendered in 1875.[89] These decisions are of special significance in view of the holding of the Iowa court in 1873 that segregation by a common carrier in its dining facilities violated the Fourteenth Amendment.[90]

Thus when the Fourteenth Amendment was submitted to the Iowa legislature, segregation in the public schools had already been declared violative of the constitution of the State. And just after the Fourteenth Amendment had been ratified by Iowa, school segregation in that State was again declared invalid under the State constitution without regard to the Fourteenth Amendment.

Kansas

The governor recommended ratification of the Fourteenth Amendment to the legislature convened January 8, 1867 and asked for a unanimous vote.[91] The Senate ratified the Amendment unanimously, and the House by a vote of 76 to 7.[92]

Prior to 1867 Kansas had provided by statute for permissive school segregation at the option of local school boards.[93] While it is true, as appellants state (Br. 179),

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[88]Clark v. Board of Directors, 24 Iowa 266 (1868).

[89]Smith v. Directors, 40 Iowa 518 (1875); Dove v. Independent School District, 41 Iowa 689 (1875).

[90]Coger v. Northwest Union Packet Co., 37 Iowa 145 (1873).

[91]Kans. Sen. J. 43 (1867).

[92]*Id.* at 76, 128; Kans. House J. 79 (1867).

[93]Kans. Laws c. 46, Art. IV, §§ 3, 18 (1862); Kans. Laws c. 67, § 4 (1864); Kans. Laws c. 46, § 1 (1865).

that in 1867 Kansas enacted a statute making it illegal for a district school board to refuse "the admission of any children into the common schools", this statute would not appear to affect the question of segregation and, in fact, Kansas continued its permissive segregated school system.

In 1868, the year after the Amendment had been ratified in Kansas, the legislature reenacted earlier legislation giving to Boards of Education in cities of the first and second class discretion "to organize and maintain separate schools for the education of white and colored children".[94] This act passed in the House by a vote of 72 to 1 and unanimously in the Senate.[95] This permissive segregation has continued ever since except for the three-year period 1876-1879.[96]

The evidence is that the very next legislature following that which ratified the Fourteenth Amendment authorized permissively segregated public schools in Kansas cities of the first class and second class.

Kentucky

The governor recommended rejection of the Fourteenth Amendment without discussing its merits when he sent it to the legislature on January 3, 1867.[97] The Amendment was rejected January 10, 1867 in the House by a vote of 67 to 27 and in the Senate by a vote of 24 to 9.[98] Nothing in these proceedings indicates that school segregation was an issue.[99] Kentucky never reconsidered the Amendment.

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[94]Kans. Gen. Stat. c. 18, Art. V., § 75; c. 19, Art. V, § 57 (1868).

[95]Kans. House J. 637 (1868); Kans. Sen. J. 389, 391, 399 (1868).

[96]Kans. Laws c. 122 (1876); Kans. Laws c. 81, § 1 (1879); Kans. Gen. Stat. §§ 72-1724 (1949).

[97]Ky. House J. 19 (1867).

[98]*Id.* at 63; Ky. Sen. J. 64 (Adjourned Sess. 1867).

[99]"There was no occasion for debate upon a question on which everybody's mind was made up, and it was felt that this was no occasion for mere idle display." Louisville Daily Courier, January 9, 1867, p. 1, col. 9.

The same legislature which considered the Fourteenth Amendment enacted a statute permitting establishment of separate schools for Negroes to be supported by taxes collected from Negroes.[100] No real system of Negro education was established until 1882, and public schools in Kentucky have been segregated ever since they were instituted.[101] The Kentucky constitution of 1891 made segregated schools compulsory.[102]

In view of these undisputed facts, a very careful reading is required in order to avoid misunderstanding the statements of appellants (Br. 184) that "the legislature was silent on the specific question of compulsory segregated schools", and that "no definite compulsory education statute was enacted until 1904".

Although Kentucky did not ratify the Fourteenth Amendment there is no evidence that its failure to do so was due to an understanding that the Amendment would require a racially consolidated public school system.

Louisiana

The governor, a Union man, in 1867 recommended adoption of the Amendment, but stated that the legislature would probably disagree with him.[103] He evidently did not believe the Amendment would prohibit school segregation, for he recommended separate schools for Negro children in

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[100]Ky. Laws c. 1913, § 6 (1867).

[101]Trout, *Negro Education in Kentucky,* COURIER JOURNAL, May 1953.

[102]KY. CONST. § 187 (1890).

[103]La. Sen. J. 5 (1867).

the same address.[104] The Amendment was rejected unanimously by both houses of the 1867 legislature.[105]

Thereafter, pursuant to the Reconstruction Acts, a provisional governor was appointed "in obedience to instruction from the general commanding the army".[106] The new legislature of 1868, composed mainly of Negroes, enthusiastically adopted the Amendment, by a vote of 57 to 3 in the House and 22 to 11 in the Senate.[107]

In the same year Louisiana adopted a new constitution which prohibited segregation in the public schools.[108] Although this provision was adopted by a vote of 61 to 12 and a number of the members explained their votes, none of them mentioned the Fourteenth Amendment.[109] The result of this constitutional provision was riotous confusion.[110] No effective schools were established while it remained in effect.[111] The requirement for mixed schools finally was eliminated by the Louisiana constitution of 1879,[112] and ever since then segregated schools have existed in Louisiana. Thus appellants' implication that racial segregation in public education was not permitted by law in Louisiana until 1898 (Br. 149) is erroneous.

Although Louisiana prohibited segregated schools at the same time that it ratified the Fourteenth Amendment,

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[104]La. Sen. J. 7 (1867).
[105]*Id.* at 20; La. House J. 23 (1867).
[106]La. Sen. J. 3 (1868).
[107]La. House J. 8 (1868); La. Sen. J. 21 (1868).
[108]La. Const. Tit. XII, § 135 (1868).
[109]J. of the La. Const. Conv. of 1868, 200-1.
[110]Annual Report of the Louisiana State Superintendent of Public Education, LIII-LXXVI (1874); *id.* at 40-73 (1875).
[111]Annual Report of the Louisiana State Superintendent of Public Education IV (1877).
[112]La. Const. Art. 224 (1879); *cf.* Art. 231.

there is no evidence that this was done because of some thought that the Amendment required it.

Maine

Pursuant to recommendation of the governor, Maine ratified the Fourteenth Amendment by overwhelming votes, 126 to 12 in the House and unanimously in the Senate, on January 16, 1867.[113]

Maine never required segregation in its public schools.[114] The reason is obvious, since in 1870 the Negro population was 1,606 out of a total population of 626,915.

Maryland

Maryland never ratified the Fourteenth Amendment. The governor submitted it to the legislature in 1867[115] without mention of its possible effect on the educational system, and no reference to the school system is found in the lengthy report of the Joint Committee on Federal Relations to which the Amendment was referred.[116] Maryland rejected the Amendment on March 23, 1867—in the Senate by a vote of 13 to 4 and in the House by a vote of 47 to 10.[117] No further action on the Amendment was ever taken.

In Maryland the educational problem was not whether the Negroes should have separate schools, but whether they should be educated at all. In the Maryland constitutional

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[113]Me. House J. 78 (1867); Me. Sen. J. 101 (1867).

[114]CHADBOURNE, A HISTORY OF EDUCATION IN MAINE (1936). It is interesting to note, however, that marriages between whites and Negroes were prohibited in Maine as late as 1895. See Me. Rev. Stat. c. 59, § 2 (Supp. 1885-95).

[115]Documents of the Gen. Ass. of Md., 21 (1867).

[116]*Id.*, Doc. MM (1867).

[117]Md. Sen. J. 808 (1867); Md. House J. 1141 (1867).

convention of 1864, it was made clear that the delegates thought education for the Negro was not yet timely, although a separate system for his education might be appropriate in the future.[118] The Superintendent of Public Instruction recommended separate schools for Negroes in his report of 1865.[119]

Maryland held another constitutional convention in 1867. No requirement for segregation is contained in the constitution then drafted, but the debates make it clear that amalgamated schools were so far from the minds of the Maryland people that the delegates did not think them even necessary for discussion, much less prohibition.[120]

The first comprehensive school system was set up by a law effective April 1, 1868.[121] This statute provided that free schools should be available to all white children between 6 and 18 and continued:

> "The total amount of taxes paid for school purposes by the colored people of any county, or in the city of Baltimore, together with any donations that may be made for the purpose, shall be set aside for the maintaining the [sic] schools for colored children, which schools * * * shall be subject to such rules and regulations as said respective Boards shall prescribe."[122]

The establishment of segregated schools was substantially contemporaneous with consideration of the Fourteenth Amendment in Maryland. Even after the Fourteenth Amendment was proclaimed as ratified on July 28, 1868,

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[118]Debates of the Md. Const. Conv. of 1864, 1250-6.

[119]Report of the Maryland Superintendent of Public Instruction 22-3 (1865); see also *id.* at 64 (1866).

[120]Debates of the Md. Const. Conv. of 1867, 198-203, 243-8, 251-7.

[121]Md. Laws c. 407 (1868).

[122]*Id.* at p. 766.

Maryland continued its segregated schools by statutes enacted in 1870, 1872 and again in 1878.[123] While it is true, as appellants assert (Br. 184) that Maryland "has never enacted a law specifically forbidding racial segregation in its public schools", Maryland has provided for segregated schools pursuant to law from 1868 down to the present day.[124]

Although Maryland refused to ratify the Fourteenth Amendment, there is no evidence that its refusal was founded upon an understanding that the Amendment would forbid a segregated public school system within the State. And after the Amendment was proclaimed ratified, Maryland continued to operate separate schools.

Massachusetts

The governor of Massachusetts, in his message of January 4, 1867, recommended ratification of the Fourteenth Amendment. With reference to Section 1 of the Amendment, he observed that it was advisable thus to incorporate the Civil Rights Act of 1866 in the Constitution.[125] The Amendment was ratified by the House on March 15, 1867, and by the Senate on March 20, 1867.[126]

The City of Boston had separate schools for Negroes in 1827, pursuant to a regulation of its school committee.[127] These schools were held inoffensive to the Massachusetts constitution in *Roberts* v. *City of Boston,* 5 Cush. 198

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[123]Md. Laws C. 311, c. 18, § 1 (1870); Md. Laws C. 377, c. XVIII, § 1 (1872); Md. Rev. Code Art. 27, §§ 95, 98 (1878).

[124]Md. Ann. Code Art. 77, c. 9, § 124 (1951); c. 18, § 207.

[125]Message of the Governor of Massachusetts to the General Court 67 *et seq.* (Jan. 4, 1867).

[126]Mass. Acts and Resolves 788 (1867).

[127]Regulations of the School Committee of the City of Boston § II, par. 8 (1827).

(Mass. 1848). In 1855, however, the legislature provided explicitly that Negroes should be admitted without segregation into the public schools.[128]

In 1870 the Negro population of Massachusetts was 13,947 as compared with a white population of 1,443,156. Thus there was neither a racial problem nor a segregated school system in Massachusetts when its legislature ratified the Fourteenth Amendment in 1867.

Michigan

In his message to the Michigan legislature of January 2, 1867, the governor described the purposes of the Fourteenth Amendment but made no mention of its possible relation to the school system.[129] Ratification was accomplished swiftly. In the Senate the vote was 25 to 1 on February 15, 1867, and in the House the vote was 77 to 15 on the next day.[130]

The State constitution of 1850 eliminated the word "white" from the provisions governing voting qualifications and declared slavery to be intolerable.[131]

Separate schools for Negroes were established in Detroit as early as 1839.[132] Over the period 1842 to 1866 statutes were enacted permitting the school authorities in larger municipalities to establish separate schools in their discretion.[133] On January 16, 1867, one month before Michi-

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[128] Mass. Acts and Resolves c. 256 (1854-5).

[129] Message of the Governor of Michigan to the Legislature 47-8 (January 2, 1867).

[130] Mich. Sen. J. 125 (1867); Mich. House J. 180-2 (1867).

[131] MICH. CONST. Art. VII, § 1 (1850); Art. XVIII, § 11.

[132] FARMER, THE HISTORY OF DETROIT AND MICHIGAN 750-1 (1884).

[133] People *ex rel.* Workman v. Board of Education of Detroit, 18 Mich. 400 (1869).

gan ratified the Fourteenth Amendment, the legislature enacted a statute relating to schools containing the following provision:

> "All residents of any district shall have an equal right to attend any school therein * * *."[134]

The parents of a Negro child in Detroit sought a writ of mandamus to require his admission to a white school. This action came before the Supreme Court of Michigan in 1869.[135] Chief Justice Cooley determined that the writ should issue on the basis of the 1867 statute. He did not, however, rest his decision on the Fourteenth Amendment or indeed even refer to it in his opinion. Provisions explicitly forbidding school segregation were adopted in 1871.[136]

Although Michigan in effect prohibited school segregation by statute four years after it ratified the Fourteenth Amendment, there is no evidence that school segregation was regarded as a violation of the civil rights protected by the Amendment.

Minnesota

The governor recommended ratification of the Fourteenth Amendment on January 10, 1867, in the same message in which he urged that the color distinction as to voting be removed from the State constitution.[137] The Senate and House approved ratification within a week by overwhelming majorities.[138]

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[134]Mich. Laws (1867), Act No. 34, § 28.
[135]People *ex rel.* Workman v. Board of Education, supra, n.133.
[136]1 Mich. Laws (1871), Act No. 170, § 28.
[137]Message of the Governor of Minnesota to the Legislature 25-6 (January 10, 1867).
[138]Minn. Sen. J. 23 (1867); Minn. House J. 26 (1867).

Minnesota had outlawed school segregation in 1864, two years before the Fourteenth Amendment was proposed.[139] Furthermore, Minnesota had no racial problem. Its Negro population in 1870 was 759 out of a total population of 439,706.

Mississippi

The governor in 1867 advised the legislature to reject the Fourteenth Amendment.[140] The two houses considered a long adverse report by a joint committee, and both unanimously voted rejection.[141] Thereafter, under the Reconstruction Acts, the provisional governor, who signed his message as Major General, U. S. Army, on January 15, 1870 transmitted both the Fourteenth and Fifteenth Amendments to the Legislature together with resolutions for their ratification.[142] Within two days ratification had been accomplished by an overwhelming vote.[143]

The Mississippi constitution of 1868 contains no mention of mixed or segregated schools, providing only for the establishment of "a uniform system of free public schools * * * for all children between the ages of five and twenty-one years".[144] Neither the proposed resolution regarding equality before the law "regardless of race, color or previous conditions", nor the proposed Bill of Rights, both referred to by appellants (Br. 154), was ever adopted by the constitutional convention.[145]

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[139]Minn. Laws Chap. IV, 25-6 (1864).
[140]Miss. House J. 8 (1867).
[141]*Id.* at 201-2, App. p. 77; Miss. Sen. J. 195-6 (1867).
[142]Miss. House J. 13 (1870).
[143]Miss. Sen. J. 19 (1870); Miss. House J. (1870).
[144]See Miss. Const. Art. VIII, § 1 (1868).
[145]J. of the Miss. Const. Conv. 123, 131, 134 (1868).

Legislation to establish a free school system was enacted in 1870 by the same legislature that ratified the Fourteenth Amendment.[146] Segregation was not mentioned in this statute. In fact, amendments specifically requiring segregation were twice defeated in the House.[147] This act, however, contained the following section:

> "Sec. 49. *Be it further enacted,* That all the children of this State between the ages of five and twenty-one years, shall have, in all respects, equal advantages in the Public Schools. And it shall be the duty of the School Directors of any District to establish an additional School in any Sub-District thereof, whenever the parents or guardians of twenty-five children of legal school age, and who reside within the limits of such Sub-District, shall make a written application to said Board for the establishment of the same."

This section, in practical application, resulted in segregation. That it was intended to permit segregation is apparent from the speech of Lieutenant Governor Towers, a Republican, given in the Senate while the act was under consideration.[148] He said:

> "The provisions of this bill are wise in this respect, for while it recognizes no class distinctions (which of itself ought to render *any law* odious in a republican government), it nevertheless consults the convenience and meets all reasonable demands of the people, by providing for the establishment of an additional school or schools, in any sub-district where the parents or guardians of twenty-five or more children desire it.

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[146]Miss. Laws c. 1 (1870).
[147]Miss. House J. 464-6, 500-1 (1870).
[148]Miss. Sen. J. 440 (1870).

> This leaves the details of the law where they rightfully belong—and where they can be readily arranged, and all conflicting interest harmonized—with the people. If the people desire to provide separate schools for white and black, or for good and bad children, or large and small, or male and female children, there is nothing in this law that prohibits it. The widest latitude is granted, and certainly no class of children in the State can be said to be excluded from school advantages by any provision of the bill."

The schools established under this statute were, with two exceptions, segregated schools.[149] School segregation was expressly required by statute in 1878[150] and by the State constitution of 1890.[151]

Thus, while it is true, as appellants state (Br. 154-5), that school segregation did not become compulsory in Mississippi until 1878, it is also a fact, which appellants do not mention, that segregated schools were permitted by law from the very moment when the Fourteenth Amendment was ratified.

Missouri

Missouri ratified the Fourteenth Amendment in 1867 on the recommendation of the governor and by substantial majorities in both houses.[152] No reference was made to the schools in those proceedings.

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[149]Message of the Governor of Mississippi 16 (1871); Annual Report of the Superintendent of Public Instruction of Mississippi 66, 124-7 (1871). (In 1871 there were 1,739 white schools, 860 colored schools and two mixed schools in Mississippi); App. 4-5, 11.

[150]Miss. Laws c. XIV, § 35 (1878).

[151]Miss. Const. § 207 (1890).

[152]Mo. Sen. J. 30 (1867); Mo. House J. 50 (1867).

The constitution of 1865 specifically permitted establishment of separate schools for Negroes.[153] Statutes implementing that article by providing for separate schools were enacted in 1865, 1868, 1869 and 1874.[154] The next constitution adopted by Missouri in 1875 required segregated schools.[155] Although the draft of the article on education was debated in the constitutional convention for three days, the only reference to the section requiring segregated schools to be found in the record is "Section Three was read and adopted".[156] Statutes requiring segregated education pursuant to this constitutional provision were enacted in 1879, 1887, and 1889.[157]

The Missouri legislature which ratified the Fourteenth Amendment permitted existing school segregation to continue and successive legislatures preserved the segregated school system. Within a decade after ratification of the Fourteenth Amendment the people of the State made school segregation mandatory.

Nebraska

Nebraska was admitted to the Union on March 1, 1867, pursuant to an act of Congress which provided that no right should be denied "to any person by reason of race or color"[158] While this enabling act was pending in Congress, a "Bill to remove all distinctions on account of race or color in our public schools" passed the Nebraska legislature but

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[153]Mo. CONST. Art. IX, § 2 (1865).
[154]Mo. Laws 177 (1865); 170 (1868); 86 (1869); 163-4 (1874).
[155]Mo. CONST. Art. XI, § 3 (1875).
[156]9 Debates of the Mo. Const. Conv. of 1875, 145 (1942).
[157]Mo. Rev. Stat. § 7052 (1879); Mo. Laws 264 (1887); Mo. Laws 226 (1889).
[158]14 Stat. 377 (1867).

was not signed by the governor.[159] Nevertheless, Nebraska was admitted into the Union.

Nebraska ratified the Fourteenth Amendment by substantial majorities in the House on January 30 and in the Senate on June 15, 1867.[160] The first school law enacted in 1867 after reinstatement was silent on the subject of school segregation.[161] When the University of Nebraska was established in 1869, the legislature specifically declared that color should not be a bar to admission.[162]

Nebraska had only 789 Negroes out of a total population of 122,993 in 1870. It had no racial problem and, as a State, never had a segregated school system.

Nevada

In his message to the legislature on January 10, 1867, Governor Blasdel urged ratification of the Fourteenth Amendment, and in the same message called attention to the report of the Superintendent of Public Instruction which stated that the failure to educate Negroes and to establish schools for them violated the Nevada constitution. Neither the message nor the report mentioned the Fourteenth Amendment.[163] Both the House and the Senate voted to ratify the Amendment by substantial majorities.[164]

Nevada had previously excluded Negroes and other non-Caucasian races from its public schools, though providing that separate schools might be established for them.[165]

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[159]Neb. House J. 99, 105 (1867).
[160]*Id.* at 123; Neb. Sen. J. 174 (1867).
[161]Neb. Laws 101-10 (1867).
[162]Neb. Laws 172, 177 (1869).
[163]Nev. Sen. J., App. pp. 9, 14 (1867).
[164]Nev. Sen. J. 47 (1867); Nev. Ass. J. 25 (1867).
[165]Nev. Stat. c. CXLV, § 50 (1864-5).

Appellants state that the Nevada legislature "took no affirmative action [with respect to separate schools] after it ratified the Amendment" (Br. 180). This is erroneous. In 1867 the same legislature that ratified the Fourteenth Amendment changed the earlier statute to read as follows:

> "Negroes, Mongolians, and Indians shall not be admitted into the public schools, but the Board of Trustees may establish a separate school for their education, and use the Public School funds for the support of the same."[166]

This amendment had been recommended by the standing Committee on Education with a minority report urging elimination of color distinction. But there is nothing to indicate that the Fourteenth Amendment played any part in this division of opinion.[167]

In 1872 the Nevada Supreme Court held that a statute providing separate schools for Negroes was invalid under the constitution of Nevada, though not under the Fourteenth Amendment.[168] A dissenting opinion stated:

> "The case of relator was sought to be maintained on the ground that the statute was in violation of the Fourteenth Amendment to the constitution of the United States. I fully agree with my associates that this proposal of counsel is utterly untenable."[169]

The Nevada legislature which ratified the Fourteenth Amendment provided for compulsory segregation in the public schools.

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[166]Nev. Stat. c. LII, § 21 (1867).

[167]Nev. Ass. J. 206, 211 (1867).

[168]State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872).

[169]Appellants cite this case (Br. 181) as vitiating the first section of the Nevada school law, but fail to state that the decision was based on the Nevada constitution and not on the Fourteenth Amendment.

New Hampshire

The Fourteenth Amendment was transmitted to the legislature by the governor on June 21, 1866, with a short message recommending ratification.[170] Resolutions in favor of ratification were adopted in both houses by substantial majorities.[171]

The Negro population of New Hampshire in 1870 was 580, or less than 0.2% of the total. New Hampshire never had segregated schools.

New Jersey

The Fourteenth Amendment was ratified in New Jersey on September 11, 1866 by a vote of 34 to 29 in the Assembly and by 11 affirmative votes in the Senate, 10 Democrats not voting.[172]

Control of the New Jersey legislature passed to the Democrats in 1868, and in April of that year the legislature adopted a resolution rescinding the ratification of the Amendment.[173] This resolution, which was adopted over the veto of the governor,[174] stated a number of objections to the Amendment but made no reference to its effect upon the school system.

In New Jersey school segregation was not mandatory but permissive. In 1844 a public school system was established "for the equal benefit of all persons."[175] In 1850, by special act, Morris Township was permitted to establish

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[170]N. H. House J. 137 (1866).
[171]N. H. House J. 231 (1866); N. H. Sen. J. 94 (1866).
[172]N. J. Sen. J. 14 (Extra Sess. 1866); Minutes of the Ass. 8, 17 (N. J. 1866).
[173]N. J. Laws 1225 (1868).
[174]N. J. Sen. J. 356 (1868).
[175]N. J. CONST. Art. IV, § 7(6) (1844).

a separate colored school district.[176] These statutes were construed in 1868 to permit separate but equal schools for the two races at local option.[177] It was not until 1881 that New Jersey prohibited by statute the permissive segregation which had existed prior to and after its consideration of the Fourteenth Amendment.[178]

Apparently New Jersey did not regard the Amendment as having any effect upon segregated schools since it continued to operate them after the Amendment was proclaimed ratified.

New York

New York ratified the Fourteenth Amendment on January 10, 1867. The vote in the Senate was 23 to 3,[179] and in the House 71 to 36.[180]

Separate schools had long been permitted in New York. As early as 1841 legislation was enacted permitting separate schools for Negroes.[181] In 1850 legislative charters were granted to Brooklyn, Buffalo, Albany and Canandaigua permitting them to maintain separate schools.[182] In 1864 a statute authorizing local school authorities to establish separate and equal schools for Negroes, when they deemed it expedient to do so, was enacted as a part of a general revision of the school law.[183] This act permitting segregation was reenacted in New York in 1894.[184]

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[176]N. J. Laws 63-4 (1850).

[177]Annual Report, State Superintendent of Schools 41-2 (N. J. 1868).

[178]N. J. Laws c. CXLIX, p. 186 (1881).

[179]N. Y. Sen. J. 34 (1867).

[180]N. Y. Ass. J. 77 (1867).

[181]N. Y. Laws c. 260, § 15 (1841).

[182]N. Y. Laws c. 143 (1850).

[183]N. Y. Laws c. 555, Title X, § 1 (1864). Similar authorization for separate schools for Indians is found in the same act. Title XIII, § 12.

[184]N. Y. Laws c. 556 (1894), Title XV, Art. 11.

Almost immediately after ratifying the Fourteenth Amendment, New York adopted a new constitution at a constitutional convention convened in 1867. Although that instrument provided for free instruction of all persons of school age, it left untouched existing legislation providing for permissive school segregation.[185] And this fact assumes additional significance, since the same convention approved a committee report which appellants (Br. 169-70) describe as "a ringing declaration that Negroes should have full equality in the enjoyment of all civil and political rights and privileges".[186]

A substantial number of separate schools were established and maintained pursuant to this legislative permission. In 1867 New York City had separate Negro schools with almost 2,000 pupils in them.[187] In 1868 there were nine separate Negro schools or departments in Brooklyn.[188] Total expenditures for Negro schools in 1869 amounted to almost $65,000, and separate Negro schools were still maintained in Brooklyn and New York.[189] In 1870 expenditures remained about the same and Brooklyn still reported separate Negro schools, there being no report from New York City.[190]

The problem of school segregation and civil rights under the Federal Constitution and statutes was considered by the New York courts soon after the Fourteenth Amendment

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[185]N. Y. CONST. Art. IX (1868).

[186]Documents of the Convention of the State of New York No. 15 (1867-8).

[187]Report of the New York Superintendent of Public Education 75-6, 206, 208-9 (1867).

[188]*Id.* at 19, 219-20, 247-9 (1868).

[189]*Id.* at 78-9, 202-3, 227 (1869).

[190]*Id.* at 97-8, 230 (1870).

was ratified. In four cases they upheld the validity of separate schools for Negroes.[191]

School segregation was not outlawed in New York until 1938.[192]

The New York legislature which ratified the Fourteenth Amendment took no action to discontinue existing permissive school segregation and apparently did not regard attendance at mixed schools as a civil or political right or privilege protected by the Amendment.

North Carolina

North Carolina rejected the Fourteenth Amendment on first considering it. The Amendment was submitted to the legislature by the governor on November 19, 1866,[193] considered by a joint committee of both houses with an adverse report,[194] and defeated by overwhelming votes.[195]

Thereafter, pursuant to the Reconstruction Acts, the provisional governor recommended ratification in a message to the legislature on July 2, 1868, and ratification was accomplished on July 4.[196]

A new constitution was drafted in 1868, and the constitutional convention on March 16, 1868, adopted a resolution asserting that the interest and happiness of the races

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[191]Dallas v. Fosdick, 40 How. Pr. 249 (1869); People *ex rel.* Dietz v. Easton, 13 Abb. Pr. (N. S.) 159 (1872); People *ex rel.* King v. Gallagher, 93 N. Y. 438 (1883); People *ex rel.* Cisco v. School Board, 161 N. Y. 598, 56 N. E. 81 (1900). (showing that the school board in the Borough of Queens maintained separate schools for Negroes as late as 1900).

[192]N. Y. Laws c. 134 (1938); see N. Y. Education Law § 921 (McKinney's 1917, 1938) and historical notes.

[193]N. C. House J. 24 (1866-7).

[194]N. C. Sen. J. 96 (1866-7).

[195]*Id.* at 138; N. C. House J. 183 (1866-7).

[196]N. C. Laws 89 (Special Sess. 1868).

would best be promoted by the establishment of separate schools.[197] . The constitution of 1868 provided merely "for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years".[198] This evidently made separate or mixed schools optional, for two days after the Fourteenth Amendment was ratified, the governor of North Carolina, in his inaugural address, stated:

> "It is believed to be better for both [races] and more satisfactory to both, that the schools should be distinct and separate."

Appellants state (Br. 146) that three days after the Fourteenth Amendment was ratified "the lower house adopted a resolution providing for the establishment of separate schools, but it failed to win support in the upper house which successfully carried a resolution instructing the Board of Education to prepare a code for the maintenance of the system of free schools contemplated in the constitution". Appellants cite, in support of this statement, Noble, *A History of Public Schools in North Carolina,* at pp. 297, 299. These pages deal with the actions of the constitutional convention which adjourned in March 1868, and they do not support the statement made.

On the contrary, both the House and Senate which had ratified the Fourteenth Amendment on July 4, 1868 passed a resolution as follows:

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[197]Constitution of the State of North Carolina Together with Ordinances and Resolutions of the Constitutional Convention Assembled in the City of Raleigh 122 (Jan. 14, 1868).

[198]N. C. CONST. Art. IX, § 2 (1868).

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> "That it is the duty of this and all future General Assemblies of North Carolina to provide for and continue a system of free public schools for both races, but at the same time to provide that the white and colored children of the State shall be taught in separate schools."

The resolution was proposed in the House by Representative Bowman, Republican Chairman of the Committee on Education. It passed the House July 14, 1868 by a vote of 91 to 2 and the Senate a few weeks later by a vote of 26 to 1.[199]

In a message to the legislature dated November 17, 1868, less than five months after the ratification of the Amendment, the governor, with respect to the question of education, said:

> "The schools for the white and colored children should be separate * * *."

On April 12, 1869 North Carolina adopted legislation pursuant to the earlier resolutions of the 1868 legislature. It provided:

> "Sec. 50. The school authorities of each and every Township shall establish a separate school or separate schools for the instruction of children and youth of each race * * *".[200]

The provisional governor of North Carolina recommended, and the Reconstructionist legislature which ratified the Fourteenth Amendment established, a compulsory segregated public school system.

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[199]N. C. House J. 54 (1868); N. C. Sen. J. 237 (1868).
[200]N. C. Laws c. 184, § 50 (1868-9).

Ohio

Ohio ratified the Fourteenth Amendment on recommendation of the governor[201] in the Senate on January 3, 1867, by a vote of 21 to 12 and in the House the next day by a vote of 54 to 25.[202] No mention of schools is made in these proceedings.

Ohio reversed its position in January of the following year despite the opposition of the Repubican governor, Hayes, later to become President of the United States, who said that nothing had occurred in the intervening year to indicate that ratification did not represent the wishes of the people.[203] A resolution rescinding ratification nevertheless was passed by both houses.[204] Again no mention was made of schools.

Ohio had a long tradition of separate schools for Negro children which continued almost twenty years after ratification of the Fourteenth Amendment. A statute establishing common schools for Negroes was enacted as early as 1831.[205] Additional statutes were enacted in 1847 and 1848 to permit separate schools for Negroes if the residents of the school district objected to their co-attendance with whites.[206] By 1860 separate schools for Negro children were required when there were more than 30 such children in

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[201]Documents of the Gen. Ass. of Ohio 281 (1866).

[202]Ohio Sen. J. 7 (1867); Ohio House J. 12 (1867); Ohio Laws 320 (1867).

[203]Inaugural Address of the Governor of Ohio on Jan. 13, 1868, p. 3.

[204]Ohio House J. 33 (1868); Ohio Sen. J. 33-9 (1868); Ohio Laws 280 (First Sess. 1868).

[205]Ohio Laws (1st Sess., 29th Gen. Ass.) 414 (1831).

[206]Ohio Laws 81 (1847-8); 17 (1848).

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[205]Ohio Laws (1st Sess., 29th Gen. Ass.) 414 (1831).

[206]Ohio Laws 81 (1847-8); 17 (1848).

the school district.[207] A statute of 1874 authorized separate schools in the discretion of the local authorities, and this provision was codified in 1880.[208]

Segregation was practiced in fact as well as in law. In 1867 there were approximately 10,000 pupils in separate Negro schools in 52 of Ohio's 88 counties.[209] Statistics on separate schools are also available through the next few years.[210] Segregated schools were attacked as contrary to the Fourteenth Amendment in the immediate post-Civil War period but the Ohio court sustained their constitutionality under the Amendment.[211] Segregation was not outlawed by statute until 1887—twenty years after Ohio had ratified the Fourteenth Amendment.[212]

Ohio believed that segregated schools and the Fourteenth Amendment were compatible.

Oregon

Ratification of the Fourteenth Amendment was recommended by the governor in his inaugural address in 1866.[213] It was quickly ratified by both Houses on September 19, 1866.[214] In 1868 Oregon rescinded its ratification of the

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[207]2 Ohio Rev. Stat. c. 102, § XXXI (1860).

[208]Ohio Laws 513 (1878); 1 Ohio Rev. Stat. c. 9, § 4008 (1880).

[209]Report of Commissioner of Common Schools of Ohio, 2 Ohio Gen. Ass. Doc. p. 477, Table B (1867).

[210]See similar reports for 1868, 1869, and 1870; for example, in 1870 there were 144 teachers employed in separate Negro schools in Ohio. Report of Commissioner of Common Schools of Ohio, Ohio Gen. Ass. Doc., pp. 754-7, Tables U and V (1870).

[211]State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871)—a unanimous decision by a Court composed of five Republicans.

[212]Ohio Laws 34 (1887).

[213]Ore. House J. 26 (1866).

[214]Ore. Sen. J. 35 (1866); Ore. House J. 77 (1866).

Amendment.[215] Although there is no evidence that Oregon law contained any provisions for segregation, separate schools existed in Portland in 1867 and were not discontinued until 1871.[216]

There is no evidence that Oregon considered the Fourteenth Amendment as requiring discontinuance of separate schools.

Pennsylvania

Pennsylvania ratified the Fourteenth Amendment upon the recommendation of the governor who stated that the Amendment would secure "just and equal political privileges".[217] In the same message he suggested that special schools be provided for the orphans of colored soldiers.[218]

The Pennsylvania Senate ratified on January 17, 1867 by a vote of 21 to 11,[219] and the House on February 6, 1867 by a vote of 62 to 34.[220]

The debates in Pennsylvania are preserved in full.[221] One legislator opposing the Amendment stated that

> "* * * all the legal barriers theretofore existing between the white and the black races would be removed * * *."[222]

One senator who favored the Amendment stated:

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[215]Ore. Sen. J. 32, 131 (1868); Ore. House J. 271 (1868).
[216]Reynolds, *Portland Public Schools* (1875), 33 ORE. HIST. Q. 344 (1932).
[217]Pa. Sen. J. 18 (1867).
[218]*Id.* at 19.
[219]*Id.* at 125.
[220]Pa. House J. 278 (1867).
[221]II Pa. Legislative Records, App., *Passim* (1867).
[222]*Id.* at 52.

> "If [the Negro] fills our pulpits, our school-houses, our academies, our colleges, and our Senate Chambers, I bid him God Speed."[223]

Another proponent thought it advisable to give the Civil Rights Act of 1866 further force by putting it in the Constitution of the United States.[224] The Senate floor leader who introduced the resolution calling for ratification, referred to a Mississippi statute requiring segregation on railroads and said the Amendment was needed to prohibit State legislation of that kind.[225] Indeed, while ratification of the Amendment was pending, a bill outlawing segregation on public conveyances was introduced. It later became law.[226]

At the same time that the Pennsylvania legislature which ratified the Fourteenth Amendment was abolishing segregation in public transportation it was continuing existing segregation in the public schools. The school authorities in Pennsylvania had been, since 1854, not merely "authorized" as appellants say (Br. 166), but *required* to establish separate schools for Negroes when 20 or more pupils were available.[227] In 1870, the Superintendent of Common Schools noted that this statute established a mandatory requirement and that Negro pupils could not be admitted to the white schools unless the requisite number of pupils were not available.[228] In 1873, a Pennsylvania court held that segregated schools were not affected by the

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[223]II Pa. Legislative Records, App. 84 (1867).

[224]*Id.* at App. XVII.

[225]II Pa. Legislative Records, App. 3 (1867).

[226]*Id.* at 84; Pa. Laws, Act No. 21 (1867).

[227]Pa. Laws, Act No. 610, § 24 (1854).

[228]The Common School Laws of Pennsylvania and Decisions of the Superintendent 81 (1870). In 1869, the Pennsylvania legislature passed an act providing that "one or more district and separate schools for the exclusive education of children of color" should be established in the City of Pittsburgh. Pa. Laws Act No. 133 (1869).

Fourteenth Amendment.[229] School segregation was not abolished in Pennsylvania until 1881.[230]

In Pennsylvania segregated schools were required before and for a substantial period following ratification of the Fourteenth Amendment.

Rhode Island

The governor of Rhode Island recommended ratification of the Fourteenth Amendment on January 15, 1867, and the Senate passed a resolution for ratification on February 5, 1867, by a vote of 26 to 2, the House following two days later by a vote of 60 to 9.[231]

Separate schools for Negroes were established in Providence in 1828 and continued in operation until 1865.[232] Similar schools existed in Bristol and Newport. Segregation was permitted under "general regulation" by a law enacted in 1845.[233] Segregation of Indians was upheld as late as 1864,[234] but all school segregation was abolished by statute in January 1866 before the Fourteenth Amendment was proposed.[235]

As school segregation was outlawed in January 1866, before the Fourteenth Amendment was reported to Congress out of the Joint Committee on Reconstruction, the statement in appellant's brief that "the same legislature which ratified

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[229]Commonwealth v. Williamson, 30 Legal Int. 406 (1873).

[230]Pa. Laws, Act No. 83 (1881).

[231]25 J. of the R. I. Sen., Feb. 5, 1867 (1865-8); 41 J. of the R. I. House, Feb. 7, 1867 (1866-9); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5, 107 (1949).

[232]CARROLL, PUBLIC EDUCATION IN RHODE ISLAND 157-8 (1918).

[233]*Ibid.*; R. I. Acts and Resolves, App., § 21 (June 1845).

[234]Ammons v. School District No. 5, 7 R. I. 596 (1864).

[235]R. I. Acts and Resolves c. 609 (1866). But the prohibition of miscegenation was not repealed until 1881. R. I. Acts and Resolves c. 846 (1881).

the Amendment enacted a law prohibiting racial segregation in public schools" is likely to mislead (Br. 159-60).

South Carolina

The proceedings in South Carolina in respect of the ratification of the Fourteenth Amendment and the public school system of that State are set forth in detail in Appendix C, to which the Court is respectfully referred.

Tennessee

The Republican governor called the legislature in special session on July 4, 1866, to consider the Fourteenth Amendment. His address, though strongly in favor of ratification, does not mention the school system.[236] In the Senate a member who opposed the Amendment proposed that there should be added to the ratifying resolution a proviso that the Amendment not be construed to confer suffrage, or the right to hold office or to sit on juries, or certain other stated rights. But again no reference was made to Negro attendance in the public schools.[237] His proviso was defeated and the Amendment was approved by a vote of 14 to 6.[238] The minority then filed a formal protest of some length, and again no mention was made of schools.[239]

The Tennessee House could not obtain a quorum until two members had been arrested and brought to the House floor. They refused to vote, but they were nonetheless counted as present in order to make a quorum. The Amendment was then ratified by a vote of 43 to 11.[240] Again the

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[236]Tenn. Sen. J. 3-4 (Called Sess. 1866).
[237]*Id.* at 23.
[238]*Id.* at 24.
[239]*Id.* at 41.
[240]Tenn. House J. 25 (Called Sess. 1866).

minority filed a formal protest, but schools were not referred to in it.[241]

The same legislature that ratified the Fourteenth Amendment amended the school law on March 5, 1867, to require segregated education in Tennessee.[242] This act was described by the Republican governor in his second inaugural address as "the wise and desirable School Law".[243]

Appellants seek to create the impression that Tennessee deferred enacting a school segregation law until after its reinstatement by Congress (Br. 155-57). They themselves point out, however, that on May 26, 1866 the legislature of that State enacted a measure to protect the rights of Negroes, containing a proviso that the act "shall not be construed as to require the education of white and colored children in the same school" (Br. 155, n. 286). Since this statute was enacted two months before Tennessee was reinstated (Br. 157), Congress was clearly on notice of the intention of the State to establish a policy of segregated schooling. Appellants also admit that Tennessee was readmitted under its constitution of 1834 which provided merely for a "common school fund" for the support "of common schools throughout the State, and for the equal benefit of all the people thereof".[244] These provisions clearly permitted the State to continue to operate separate but equal schools. Indeed, it was under this constitution that the 1867 compulsory segregated school law was enacted.

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[241]Tenn. House J. 37 (Called Sess. 1866).

[242]Tenn. Laws, Public Acts of Nov. 1866, c. XXVII, § 17 (1866-7).

[243]Inaugural Address of the Governor of Tenn., Oct. 8, 1867.

[244]TENN. CONST. Art. XI, § 10 (1834).

The requirement for school segregation was written into the Tennessee constitution of 1870,[245] and re-enacted in a further amendment to the school law in 1873.[246] Schools remain segregated by law in Tennessee to this day.[247]

Tennessee continued to operate separate schools after ratifying the Fourteenth Amendment. In fact, the same Reconstructionist legislature of Tennessee, which ratified the Fourteenth Amendment, established a mandatory segregated school system, described by the provisional governor as "wise and desirable".

Texas

The governor of Texas expressed his unqualified disapproval of the Fourteenth Amendment when he addressed the legislature in 1866, but he did not discuss the relation of the Amendment to public schools.[248] The House and Senate Committees on Federal Relations both returned long reports opposing ratification in which it was stated that the proposed Amendment might give the Negro the right to vote, to serve on juries, to bear arms, and other rights not enumerated. The possible effect of the Amendment on the schools was not mentioned.[249] Each report viewed with concern the provisions of Section 5, expressing the belief that the right given to Congress under this section was likely to destroy the very existence of the State governments.[250] The House rejected the Amendment by 70 to 5, and the Senate by 27 to 1.[251]

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[245]TENN. CONST. Art. XI, § 12 (1870).
[246]Tenn. Stat. c. XXV, § 30 (1873).
[247]Tenn. Code §§ 2377, 2387 (Williams 1932).
[248]Tex. House J. 73, 92-3 (1866).
[249]*Id.* at 578; Tex. Sen. J. 421 (1866).
[250]Tex. House J. 580 (1866; Tex. Sen. J. 421-2 (1866).
[251]Tex. House J. 584 (1866; Tex. Sen. J. 471 (1866).

The reconstructed Texas legislature ratified the Amendment on February 18, 1870.[252] There is no record of any reference to school segregation in these proceedings.

The State constitution of 1866 provided that school taxes levied on Negroes should be appropriated for the use of Negro schools,[253] but this constitution was not acceptable to Congress. Therefore, another constitution was drafted in 1869 which required the legislature to establish "a system of public free schools, for the gratuitous instruction of all the inhabitants" of school age in the State.[254] These provisions neither required segregation nor forbade it.

Texas was restored to representation in Congress by an act approved March 30, 1870 which provided that the Texas constitution should not be amended

> "to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the Constitution of said State."[255]

But the same legislature that ratified the Fourteenth Amendment enacted the following statute as to schools:

> "All difficulties arising in any of the public free schools of this State shall be reported by the trustees to the proper board of directors, and said board shall have power to settle same. In order to do this, they may remove teachers or expel students for insubordination; and when, in their opinion, the harmony and success of the school require it, they may make any separation of the students or school necessary to insure success, so as not to deprive any student

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[252]The vote was 72 to 1 in the House and 34 to 3 in the Senate. Daily State Journal (Austin, Tex.), Feb. 19, 1870, V, I, No. 19.

[253]TEX. CONST. Art. X, § 7 (1866).

[254]TEX. CONST. Art. IX, § I (1869).

[255]Tex. House J. 5 (1870).

> or students of scholastic benefits, except for such misconduct as demands expulsion."[256]

The report of the committee that recommended adoption of the statute makes its purpose clear:

> "2. They [the Committee] were perfectly aware of the conflicting views in relation to free schools, and the difficulty of harmonizing those views on a constitutional basis.
>
> 3. They felt constrained to avoid extreme views —mixed schools on the one hand, and separate schools on the other—by legislative enactment.
>
> 4. They concluded that, as all philanthropists and patriots desire the education of all the citizens of the State, without distinction of sex or race, color or previous condition, that our whole citizenship may be elevated, so essential to a republican government, that we might adopt a system based on a compromise of views, in order to [reach] an agreement on some system, as, that without some concession and compromise, we will adjourn and return to our constituents without redeeming our pledges on this subject, to their great disappointment. We have therefore agreed on the following basis, comprehensive and equal, yet plain, simple and economical, essential as we think to a successful inauguration of our system * * *.
>
> * * * * *
>
> We provide that teachers may be removed for sufficient cause, and students expelled or separated when necessary for the promotion of peace, success and harmony of the institution, so as none shall be

[256]Tex. Gen. Laws c. LXVIII, § 3(7) (1870).

deprived of scholastic benefits, except when expelled * * *".[257]

The committee, though unwilling to require segregated schools, wished to give the local authorities the right to segregate schools as local conditions might require. We conclude, therefore, that this legislature, the same one that ratified the Fourteenth Amendment, did not consider that the ratification made segregated schools unconstitutional.

Segregated schools were required by the constitution of 1876[258] and schools have remained segregated in Texas ever since.

The Reconstructionist legislature of Texas which ratified the Fourteenth Amendment established permissive school segregation on the basis of local option within the State.

Vermont

Governor Dillingham on October 12, 1866, strongly recommended ratification of the Fourteenth Amendment which, he said, was designed to secure "equal rights and impartial liberty."[259] The Vermont Senate unanimously voted to ratify on October 23, 1866.[260] The vote in the House, taken a week later, was 196 to 11 in favor of ratification.[261]

Vermont apparently never had segregated schools. Its Negro population in 1870 was 924 out of a total population of 330,551.

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[257]Tex. Sen. J. 482-3 (1870).
[258]Tex. Const. Art. VII, § 7 (1876).
[259]Vt. Sen. J. 28 (1866).
[260]*Id.* at 75.
[261]Vt. House J. 140 (1866).

Virginia

When the Virginia legislature convened late in 1866, Governor Pierpont discussed the Fourteenth Amendment at length, pointing out that the State was not likely to get better terms for the readmission of its senators and representatives to Congress and stating that acceptance of the Amendment was not dishonorable.[262] The legislature, however, refused to ratify the Amendment, unanimously in the Senate and 74 to 1 in the House.[263] There was no mention of school segregation in these proceedings.

The government of Virginia was then reorganized under the Reconstruction Acts and a new constitution of 1869 was adopted. It made provision for "a uniform system of public schools".[264] This was the school provision which emerged after efforts to insert terms alternatively requiring and forbidding segregation had been successively defeated.[265] As adopted, the constitution permitted the establishment of separate schools. The Virginia constitution, as thus adopted, met with the approval of the Congress which reinstated Virginia as a member of the Union on January 26, 1870 (16 Stat. 62).

When the first legislature met on October 5, 1869, Governor Walker urged ratification,[266] which was subsequently accomplished by a vote of 132 to 0 in the House and 36 to 4 in the Senate.[267] The resolution of ratification contains no reference to the school system.[268]

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[262] Va. House J., Doc. No. 1, pp. 37, 39 (1866-7).

[263] Va. House J. 108 (1866-7); Va. Sen. J. 101 (1866-7); Va. Acts c. 46 (1866-7).

[264] VA. CONST. Art. VIII, § 3 (1869).

[265] Journal of the Virginia Constitutional Convention 269, 299, 301 (1867-8).

[266] Va. House J. 28 (1869-70).

[267] *Id.* at 36; Va. Sen. J. 27 (1869-70).

[268] Va. Acts c. 2 (1869-70).

However, the same legislature that ratified the Fourteenth Amendment established a public school system by a statute which provided that:

> "* * * white and colored persons shall not be taught in the same schools, but in separate schools * * *".[269]

In the course of the debates on the bill which became this statute, a motion in the Senate on June 7, 1870 to strike out the provision requiring segregation was defeated by a vote of 23 to 6.[270] On the next day an amendment to substitute permissive segregation for the mandatory segregation provided for in the bill was also defeated by a vote of 27 to 3.[271] Similarly, on June 29, 1870, a motion to strike out the segregation provision was defeated in the House by a vote of 80 to 19.[272] The bill was passed by the Senate by a vote of 23 to 3 and by the House by a vote of 72 to 33.[273]

The Reconstructionist legislature that ratified the Fourteenth Amendment established segregated schools in Virginia and specifically refused to permit amalgamation.

West Virginia

The governor recommended ratification of the Fourteenth Amendment in his message of January 15, 1867.[274] He referred to the "moderation" of the Amendment, and did not mention any effect it might have on schools. The Senate without discussion voted to ratify on the day of the

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[269]Va. Acts c. 259, § 47 (1869-70).
[270]Va. Sen. J. 485 (1869-70).
[271]*Id.* at 489.
[272]Va. House J. 606-7 (1869-70).
[273]*Id.* at 615; Va. Sen. J. 507 (1869-70).
[274]W. Va. Sen. J. 19 (1867).

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[274]W. Va. Sen. J. 19 (1867).

governor's address and the House on the next day, January 16, 1867.[275]

On February 27, 1867, six weeks after ratifying the Fourteenth Amendment, the same legislature adopted a statute providing:

> "White and colored persons shall not be taught in the same schools * * *".[276]

This Act was merely a continuance of earlier policy. Although the constitution of 1863 required the establishment of a school system, segregation was not required.[277] But the legislature, in establishing the school system in 1863, required segregation of the races.[278] The new State constitution of 1872 made the requirement of segregation a part of the basic law of the State where it remains to this day.[279]

Segregated schools and the Fourteenth Amendment were approved by the same legislature in West Virginia.

Wisconsin

The governor of Wisconsin recommended ratification of the Fourteenth Amendment in a message to the legislature of 1867. He discussed the Amendment and its purposes in some detail, but made no mention of its possible effect on public schools.[280] A resolution for ratification was referred to a Senate committee which returned both majority and minority reports. Neither report mentions schools,

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[275]W. Va. Sen. J. 19 (1867) at 24; W. Va. House J. 10 (1867).
[276]W. Va. Acts c. 98, § 19 (1867).
[277]W. Va. Const. Art. X, § 2 (1863).
[278]W. Va. Acts c. 137, § 17 (1863); see also W. Va. Acts c. 59, § 1 (1865).
[279]W. Va. Const. Art. XII, § 8 (1872).
[280]Wis. Ass. J. 33-5 (1867).

although that of the minority[281] is quite detailed. The Senate adopted a resolution ratifying the Amendment on January 23, 1867.[282] The Assembly, after a three day debate, followed by taking affirmative action on February 7, 1867.[283]

Wisconsin had at least since 1848 provided a public school system,[284] and never had segregated education, nor indeed a racial problem. The Negro population in 1870 was 2,113 out of a total population of 1,054,670.

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281 Wis. Sen. J. 96 (1867).
282 *Id.* at 119. The vote was 22 to 10.
283 Wis. Ass. J. 224 (1867). The vote was 69 to 10.
284 WIS. CONST. Art. X, § 3 (1848).

APPENDIX C

APPENDIX C: History of the Fourteenth Amendment and Separate Schools in South Carolina

The Fourteenth Amendment was considered in South Carolina on three separate occasions.

Upon its receipt from Secretary of State Seward, the Amendment was transmitted to the General Assembly by Governor James L. Orr[1] on November 27, 1866 together with a message which recommended its rejection. Both the Governor and the General Assembly were functioning under the State Constitution adopted in 1865 which had abolished slavery, and it was this General Assembly which had ratified the Thirteenth Amendment.

The message of Governor Orr was published at length in the Charleston Daily Courier of November 28, 1866. After referring to the abolition of slavery and the fact that "the General Assembly of the State, has by solemn enactment, accorded to the black race all the rights of

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[1]James Lawrence Orr was born in Claytonville, S. C., May 12, 1822, and died in Saint Petersburg, Russia, May 5, 1873. He was graduated from the University of Virginia in 1842, admitted to the bar in 1843, and practiced law and edited the weekly *Gazette* in Anderson, S. C. He was elected to the State legislature in 1844, serving two terms, and in 1848-59 was a member of Congress, officiating as Speaker of the House in the 35th Congress. A strong opponent of secession, he opposed it as long as possible, and presented his views so forcibly to the Southern Rights Convention held in Charleston in 1851 that the convention refrained from passing a secession ordinance. He joined his State in war, raising and commanding one of the first Confederate rifle regiments. In 1862 he entered the Confederate Senate, of which he was a member until the close of the war. He was the first Governor of South Carolina after restoration of her rights as a State of the Union, serving from 1866-68. In 1872 he was appointed United States Minister to Russia, where he died in the following year. 21 ENCYCLOPEDIA AMERICANA 10 (1940); JOHN S. REYNOLDS, RECONSTRUCTION IN SOUTH CAROLINA 25 (1905).

person and property enjoyed by the white race," the message continued:

> "Eleven of the Southern States, including South Carolina, are deprived of their representation in Congress. Although their Senators and Representatives have been duly elected, and have presented themselves for the purpose of taking their seats, their credentials have, in most instances, been laid upon the table without being read, or have been referred to a Committee, who have failed to make any report on the subject. In short, Congress has refused to exercise its constitutional functions, and decide either upon the election, the return or the qualification of these selected by the States and people to represent us. Some of the Senators and Representatives from the Southern States were prepared to take the test oath, but even these have been persistently ignored, and kept out of the seats to which they were entitled under the Constitution and laws. Hence this amendment has not been proposed by two-thirds of both Houses of a legally constituted Congress, and is not, constitutionally or legitimately, before a single Legislature for ratification.
>
> Waiving this point, however, is it compatible with the interest, or consistent with the honor of this State, to ratify that amendment? Do not its first and last sections, if adopted, confer upon Congress the absolute right of determining who shall be citizens of the respective states, and who shall exercise the elective franchise, and enjoy any and all of the rights, privileges and immunities of citizenship? The sections referred to not only do this, but they subvert the theory and practice of the Government since its foundation, by abrogating the right of fixing the elective franchise conferred upon the respective State Governments, and by giving the representa-

> tives of Oregon, or California in Congress the power to declare what shall constitute the measure of citizenship within the limits of South Carolina or Georgia. Who is most likely to exercise this power judiciously—the citizens of the State wherein the regulation is to be made, or non-residents, who are entirely ignorant of the population, the intelligence, necessities and resources for which legislation is undertaken? With this amendment incorporated in the Constitution, does not the Federal Government cease to be one of 'limited powers' in all of the essential qualities which constitute such a form of government? Nay, more, does not its adoption reverse the well-approved doctrine, that the United States shall exercise no powers, unless expressly delegated by the Constitution?"

There was no mention of schools or education in the message.

The Journal of the 1866 Session of the General Assembly shows the action taken by it, but does not set forth its debates. Contemporary press accounts show with certainty that there was no debate in either House on the Amendment. The Charleston Daily Courier of December 15, 1866 contains a dispatch from Columbia which, with reference to the House report on the constitutional amendment, says in part:

> "The Committee report 'that they have considered the same and recommend that the proposed amendment be not adopted.' Upon this point they were unanimously agreed, nor did they regard it essential that any recitation of the reasons inducing their opinion should be made. It was properly thought that our people were sufficiently apprised of the enormity of the scheme which the Radical Con-

> gress is attempting to foist upon the South as a precedent condition to political restoration, and they therefore preferred to make a simple expression of their dissent, confidently relying upon the adoption of their report without being called upon for explanations which are within easy reach of every intelligent man in the State."

South Carolina rejected the Amendment. Every other ex-Confederate State but Tennessee took similar action, and Congressional reconstruction began the following year.

Southern leaders soon realized their helpless position. Early in 1867, prominent Southerners, including Governor Orr, conferred in Washington in a futile effort to undo the blunder. They proposed a virtually identical substitute for the Fourteenth Amendment, except that it would only penalize a State for denying suffrage on account of race or previous servitude, and would not prohibit compensation for loss of slaves. But the opportunity was gone. The Reconstruction Bill, framed in anger on the rejection of the Fourteenth Amendment, was already in process of passage with the Radicals determined to construct governments in the South which would ratify the Fourteenth Amendment, and more.[2]

Pursuant to the Reconstruction Act of 1867—passed over the President's veto—the South Carolina Convention met in January 1868 to draft a State Constitution. Its proceedings were ordered to be edited and published.[3]

Governor Orr addressed the Convention at its invitation.

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[2]DAVID DUNCAN WALLACE, 3 THE HISTORY OF SOUTH CAROLINA 245 (The American Historical Society, Inc., New York, 1934).

[3]*Proceedings of the Constitutional Convention, etc.* (Denny & Perry, Charleston, S. C., 1868).

Describing himself as one of the "disfranchised class," he observed that he had nevertheless urged the white people of the State who could vote for delegates to the convention to do so. He thought that "a great mistake has been committed by the great majority of whites of South Carolina in refusing to go to the polls and participate in any respect whatever in the election of delegates," an action he attributed to the harshness of the more stringent voting restrictions imposed by Congress the preceding July. The result was that the members of the Convention represented "almost exclusively the colored element of South Carolina," wherefore "the very high duty is devolved upon you of discharging the important trusts confided to your care in such a manner as to commend your action to the confidence and support, not only of those by whom you were elected, but of those who refused to go to the polls and vote in the election."[4] Among other things, Governor Orr recommended "earnest attention" to the education of both the black and the white population, urging at the same time that taxes should not be levied exclusively on property. "There is no taxation which is so universal, just and equitable as that upon the person or poll, for educational purposes, since all are interested in having an intelligent and virtuous population."[5]

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[4]*Id.* at 45-55.

Forty-eight delegates were white, 76 colored; 82 were from South Carolina, 42 from other States or foreign countries (including England, Ireland, Prussia, Denmark, and Dutch Guiana); 120 were Republicans, and the white men classed as Republicans were about equally divided between natives and newcomers, or in the vernacular of the times, "scalawags" and "carpetbaggers". REYNOLDS, *op. cit. supra* note 1, at 78-79.

[5]*Proceedings of the Constitutional Convention, etc., op. cit. supra* note 3, at 51.

The Constitutional Convention wrote into the 1868 Constitution sections which provided that:

(a) the first General Assembly convened under the Constitution shall ratify the Fourteenth Amendment immediately after its permanent organization;[6]

(b) distinction on account of race or color in any case shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal and political privileges;[7]

(c) a "liberal and uniform system of free public schools throughout the State" shall be provided, as soon as practicable and "one or more schools in each school district" shall be kept open at least six months of the year;[8]

(d) the General Assembly shall be under the duty "to provide for the compulsory attendance, at either public or private schools, of all children between the ages of six and sixteen years," after "a system of public schools has been thoroughly and completely organized and facilities afforded to all the inhabitants of the State for free education of their children;[9] and

(e) "All the public schools, colleges and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths in the State, without regard to race or color.[10]

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[6]S. C. Const. Art. IV, § 33 (1868).
[7]*Id.*, Art. I, § 39.
[8]*Id.*, Art. X, § 3.
[9]*Id.*, Art. X, § 4.
[10]*Id.*, Art. X, § 10.

The brief debate in the Convention on the section requiring adoption of the Fourteenth Amendment contained no reference to schools, education, race or color. Members opposed to the requirement contended that the General Assembly should not have its hands tied on the issue, while the view which prevailed was well summarized by the statement that "until that amendment has become a portion of the supreme law of the land, we cannot get back into the Union"; the argument was that putting the requirement of ratification in the State Constitution would bind the members of the General Assembly to ratify, since they had to swear to support the State Constitution in order to qualify as members.[11]

The provision prohibiting distinction on account of race or color (Art. I, Sec. 39) was added by amendment from the floor. The committee had thought it well to avoid suggesting distinctions by introducing the word "color" into the Bill of Rights (Article I), and reasoned that it was not necessary to do so since "all citizens duly qualified are entitled to equal privileges." The proponents of the provision favored it "to settle the question forever by making the meaning so plain that a 'wayfaring man, though a fool,' cannot misunderstand it."[12]

The subject of compulsory attendance was debated at great length, as was the provision for mixed schools. There were those who objected to compulsory attendance because of the mixed schools provision,[13] while the latter provision was attacked the more vehemently because of the earlier adoption of the compulsory attendance provision.[14]

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[11]*Proceedings of the Constitutional Convention, etc., op. cit. supra* note 3, at 904-06.

[12]*Id.* at 353-56.

[13]*Id.* at 687, 691.

[14]*Id.* at 889-94.

E. L. Cardozo, a Negro who operated a private school in Charleston and was later State Treasurer, was the floor leader on the educational sections. In the debate on compulsory attendance, he observed:

> "We only compel parents to send their children to some school, not that they shall send them with the colored children; we simply give those colored children who desire to go to white schools, the privilege to do so."[15]

In later pressing successfully for passage of the mixed schools provision, Cardozo said:

> "We have carefully provided in our report that every one shall be allowed to attend a free school. We have not said there shall be no separate schools. On the contrary, there may be separate schools, and I have no doubt that there will be such in most of the districts. In Charleston, I am sure such will be the case. * * * In sparsely settled country districts, where perhaps there are not more than twenty-five or thirty children, separate schools may be established; but for ten or fifteen white children to demand such a separation, would be absurd; and I hope the convention will give its assent to no such proposition."[16]

There was no mention in any of these debates of the Fourteenth Amendment, or any of its provisions. The Constitution was adopted on March 17, 1868 and remained in force until superseded in 1895 by the present Constitution.

The Fourteenth Amendment was ratified by the Senate on July 6, 1868,[17] and by the House of Representatives on

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[15]*Id.* at 691.
[16]*Id.* at 901.
[17]Charleston Daily Courier, July 7, 1868.

July 9.[18] Governor Orr's message of July 8 to both Houses discussed the issue of schools thus:[19]

> "It must not be supposed that a school system, fashioned upon the basis which prevails in New England, or of the more densely settled regions of the older Western States, will answer the purpose sought in South Carolina. To save an unnecessary expenditure of public money, therefore, it is recommended that a system be thoroughly digested and matured upon all the information which can be obtained from the experience of the other States of the Union, modified by existing circumstances here, and be then submitted to the General Assembly, before appropriation of money be made for the public schools.
>
> The Constitution provided that 'there shall be kept open at least six months in each year one or more schools in each school district.' Gentlemen of intelligence, who were members of the Convention, believe that the fair construction of this section will authorize, when the system is matured, the establishment of separate schools for the white and coloured children of the State. Another section however, declares that 'all the public schools, colleges and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or colour.'
>
> If it shall be attempted to establish schools where both races are to be taught, no provision being made for their separation, the whole system will result in a disastrous failure. The prejudices of race, whether just or unjust, exist in full force not more in South Carolina than in New England and the West. In the last named localities separate schools are provided for white and coloured children, and

[18]Charleston Daily Courier, July 10, 1868.
[19]Charleston Daily Courier, July 8, 1868.

> in a community where these prejudices prevail in so strong a degree, how unreasonable it is to attempt the organization of mixed schools. * * * I therefore earnestly recommend that in adopting an educational system, care be taken to provide for the white and coloured youths separate places of instruction. At the same time, in the name of peace and of the happiness of the people I protest against this amalgamation."

Ratification of the Fourteenth Amendment was completed in the forenoon of July 9, and the inauguration of Governor Robert K. Scott[20] occurred at noon.[21]

Dealing with education, his inaugural message stated:

> "Article 10, section 3, of the Constitution, provides that 'there shall be kept open at least six months in each year, one or more schools in each school district.'
>
> I respectfully recommend that the General Assembly will provide by law for the establishment of at least two schools in each school district when necessary, and that one of said schools shall be set apart and designated as a school for colored children, and the other for the white children, the school fund to be distributed equally to each class, in proportion to the number of children in each between the ages

[20]Robert Kingston Scott was born in Armstrong County, Pa., July 8, 1826, and died in Napoleon, Ohio, August 13, 1900. He studied medicine and engaged in practice in Henry County, Ohio, in 1851-57, later entering the mercantile business. In 1861 he was commissioned lieutenant-colonel in the 68th Ohio Regiment, and in 1862 he was promoted colonel. He took part in the campaigns in Tennessee and Mississippi, and was commissioned brigadier-general of volunteers in 1865. He was assistant commissioner of the Freedman's Bureau in South Carolina 1865-68 and was elected Governor in 1868 and 1870. He moved to Napoleon, Ohio, upon retiring from office. 24 ENCYCLOPEDIA AMERICANA 441 (1940).

[21]Charleston Daily Courier, July 10, 1868.

of six and sixteen years. I deem this separation of the two races in the public schools as a matter of the greatest importance to all classes of our people.

While the moralist and the philanthropist cheerfully recognize the fact that 'God hath made of one blood all nations of men,' yet the statesman in legislating for a political society that embraces two distinct, and in some measure, antagonistic races, in the great body of its electors, must, as far as the law of equal rights will permit, take cognizance of existing prejudices among both. In school districts, where the white childen may preponderate in numbers, the colored children may be oppressed, or partially excluded from the schools, while the same result may accrue to the whites, in those districts where colored children are in the majority, unless they shall be separated by law as herein recommended. Moreover, it is the declared design of the Constitution that all classes of our people shall be educated, but not to provide for this separation of the two races, will be to repel the masses of the whites from the educational training that they so much need, and virtually to give to our colored population the exclusive benefit of our public schools. Let us, therefore, recognize facts as they are, and rely upon time and the elevating influence of popular education, to dispel any unjust prejudices that may exist among the two races of our fellow-citizens."

An Act "to Provide for the Temporary Organization of the Educational Department of the State" was passed on September 15, 1868.[22] A Massachusetts Negro, Justus K. Jillson, was appointed Superintendent of Education to operate the Department of Education under the temporary

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[22]S. C. Laws No. 18 (1868).

law until the act establishing a system of public schools, which was approved February 16, 1870,[23] became effective.

Prior to passage of the Act of 1870, Jillson had instructed the School Commissioners in the various counties of the State to survey the situation as to the number of pupils, the number of schools, etc. Jillson submitted a report to the Legislature on January 24, 1870,[24] which contained the Commissioners recommendations for the establishment of a public school system. Of the 31 counties, 13 submitted no recommendations, and 5 submitted reports which made no mention of the subject of separate or mixed schools. Of the other 13 counties, 12 submitted reports which recommended the establishment of separate schools for the two races, and only one advised against such action. The following are typical reports:

> PICKENS COUNTY: "* * * I would most respectfully urge an entire separate school system for the two races, without which the Common Free School system in this State will never prosper, or be of any value to either race. As far as my observation extends, neither of the races desire a system which will compel both to attend the same school. The colored citizens in my county are as much adverse to sending their children to the same school, as the white, and would take much more interest in a school set apart for them, than they ever will in one to the contrary. The whites would take more interest in instructing, helping and advising them, and without a separate system, the whites will never send to a Free School; they will have private schools entirely. But by having a separate system, in my opinion, both

[23]S. C. Laws No. 238 (1870).

[24]Reports and Resolutions of the South Carolina General Assembly, 403-87 (1870).

races would support it freely and thoroughly, and make of it what it should and would be—a blessing to all.

Very truly yours,

D. F. BRADLEY
School Commissioner of Pickens County, S. C."[25]

SPARTANBURG COUNTY: "* * * In my opinion no plan will succeed in this County which contemplates mixing the two races in the same schools under the same teachers. The blacks are generally as much opposed to such a course as the whites. * * * I think, then, the schools in the various Townships ought to be located and organized with a view to educating the races in separate schools.

This feeling grows out of no prejudice or unkindness in the bosom of the whites towards the blacks. The people are not prepared as yet for social equality. Nor does it spring from unwillingness to have them educated. I think they are willing to aid them in every reasonable way, and will cheerfully pay the school taxes, if they can see that they are wisely, economically and judicially applied.

* * * Let us have separate schools for the races, and I believe the peace, harmony and best interests of all will be thereby promoted.

R. H. REID
School Commissioner of Spartanburg County, S. C.
March 2d, 1869."[26]

UNION COUNTY: "* * * I would also state that it is the universal desire of both races to have sepa-

[25] *Id.* at 481-82.
[26] *Id.* at 483, 485.

rate schools. In every district in the County there would be scholars sufficient to make a school for each class. I am satisfied it would be far better for both classes.

A. A. JAMES
School Commissioner of Union County, S. C.
January 12th, 1869."[27]

On March 6, 1871, Governor Scott signed the second general school law of the State, which in its title purported to be an amendment of the 1870 Act but actually superseded it.[28] In the new law (as in the 1870 Act), the State Superintendent of Education was required to report each year on the number of persons of school age in the counties; the number of each sex; the number of white; the number of colored; the whole number of persons that attended the free common schools of the State during the year ending the thirtieth day of the last preceding September, and the number in each county that attended during the same period; and the number of whites of each sex that attended, and the number of colored of each sex that attended those schools.

Also as in the 1870 Act, the County Commissioner and the district trustees were required to provide for records distinguishing between white and colored children.

In addition, the 1871 Act provided:

"Sec. 44. That it shall be the duty of each school teacher to make out and file with the Clerk of the Board of Trustees, at the expiration of each school month, a full and complete report of the whole

[27] *Id.* at 486.
[28] S. C. Laws No. 346 (1871).

> number of scholars admitted to the school during each month, distinguishing between male and female, the average attendance, the branches taught, the number of pupils engaged in said branches, and such other statistics as he or she may be required to make by the County School Commissioner; * * *"

It will be noted that, although this Act required the State Superintendent of Education and the district trustees to distinguish between white and colored pupils, and although it required school examiners to designate color on teachers' certificates, it did not require the teachers, in making their attendance reports, to designate as to color as well as number and sex. This acquires significance because it appears that the pupils in each school were all white or all colored. Historians tell the story thus:

> "The hopes of the constitution-makers that progress would be made in the direction of compulsory interracial schools ended in failure. Governors Orr and Scott and the school commissioners advised against the mixture of the races in the common schools and the Negroes never demanded that this be done. No attempts were made in this direction by either Jillson or the Legislature. But such an attempt was made at the Institution at Cedar Springs for the Deaf, Dumb and Blind and at the State University.
>
> September 17, 1873, Jillson informed the Cedar Springs faculty that 'colored pupils must not only be admitted into the institution on application, but that an earnest and faithful effort must be made to induce such to apply for admission.' The colored pupils, he commanded, 'must be domiciled in the same building, must eat at the same table, must be taught in the same classrooms and by the same teachers, and must

receive the same attention, care and consideration as white pupils.' The effect of this order was the resignation of the faculty and the closing of the school for three years. Efforts to get a new faculty failed. The institution was reopened, however, in 1876 under its former teachers. But separate quarters were provided for the two races.

Against the advice of Orr, the legislature reorganized the University without making distinctions of race. Under an Act of March 3, 1869, provision was made for the election of a new and smaller board of trustees, and the faculty was prohibited from making 'any distinction in the admission of students, or the management of the University on account of race, color, or creed.' To stimulate the ingress of students, one was to be admitted from each county free, the fees of others were reduced, and a preparatory school was authorized for those unfit to enter the college classes. * * *

* * * But the whites, with the Act hanging over them and with the board of trustees made up of black and white radicals, became more and more distrustful and gradually withdrew their patronage. There distrust was increased when, on the resignation of additional professors, Northerners were appointed in their places. The final blows came when Henry E. Hayne, the colored secretary of state, was accepted as a student on October 7, 1873. Immediately the native white students resigned and native professors resigned or were dismissed. * * *

* * * The whites never became reconciled to co-education of the races, and when they recovered power in 1877 they dismissed the colored students and imported professors, and reconstituted the institution along traditional lines in 1880."[29]

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[29]SIMKINS AND WOODY, SOUTH CAROLINA DURING RECONSTRUCTION 439, 441, 442 (Univ. of North Carolina Press, 1932).

It would seem, therefore, that the Cedar Springs School for the Deaf, Dumb and Blind and the State University were the only educational institutions in which mixing of the races was attempted. Our research has revealed nothing to the contrary.

In 1870 the General Assembly did enact legislation "to Enforce the Provisions of the Civil Rights Bill of the United States Congress, and to Secure to the People the Benefits of a Republican Government in this State."[30] That Act made it unlawful for common carriers and theatre operators and any parties engaged in any business, calling or pursuit for the carrying on of which a license or charter was required by any law, municipal, State or Federal, or by any public rule or regulation, to discriminate, assign special accommodations, or refuse admission on acount of race, color or previous condition. Although the legislature thus directed its attention to the problem of racial discrimination, no legislation then provided or has since provided for mixed schools in the State, or prohibited separate schools in the counties and school districts.

To summarize: there is no indication that the question of segregation by race in the public schools entered into consideration of either the South Carolina rejection (1866) or ratification (1868) of the Fourteenth Amendment. Nor is there any indication in the Proceedings of the 1868 Constitutional Convention that the members viewed the Fourteenth Amendment as prohibiting or even dealing with separate public schools for the two races, or segregation in any other respect. Indeed, the action taken at that Convention strongly suggests that the delegates regarded the question of separation or distinction based on race or

[30]S. C. Laws No. 279 (1870).

color as one to be dealt with on the State level, as to which State action was necessary.

Both Governors Orr and Scott after the adoption of the 1868 Constitution, and Governor Scott *on the same day* that the General Assembly had earlier ratified the Fourteenth Amendment, recommended to the General Assembly that separate schools for white and colored children be provided for in school legislation—irrefutable evidence that contemporary opinion did not regard the Fourteenth Amendment as interdicting separate schools.

The 1870 and 1871 public school legislation laid down no requirement of mixed schools, but on the contrary provided for separate statistics as to white and colored pupils on a State and district though not on an individual school basis. This circumstance, buttressed by historical reasearch demonstrates that the public schools were operating in practice on a separate basis.

Thus two Governors (by their messages), the General Assemblies (by their legislation), and the school authorities, State, county and local (by their administrative recommendations and practices), demonstrated their belief that the question of segregation in schools, far from being outlawed by the Fourteenth Amendment, was an open one for legislative determination by the State, both under the State and the Federal Constitutions.

Postlude

Thirty years later, in *Holler* v. *Rock Hill School District,* 60 S. C. 41, 38 S. E. 220 (1901), the Supreme Court of South Carolina stated that "the system of free public schools contemplated by the framers of the Constitution of

1868" was never inaugurated or provided for by the General Assembly. The Court observed:

> "The provisions of the Constitution of 1868 in regard to free public schools are not mandatory, inasmuch as no time was fixed for the establishment of such schools. Art. I., sec. 3, * * * merely required that such schools as were outlined in that article should be provided for as soon as practicable after the adoption of the Constitution. * * * For reasons no doubt satisfactory to themselves, the General Assembly has not found it practicable to provide for such schools. It is true, that we have in our State public schools, some of which have been organized and are conducted under the general law on that subject, and others, no doubt, have been organized and are conducted under special acts of the General Assembly; but an examination of the various sections of art. X., of the Constitution of 1868, relating to free public schools, will show plainly that our system of public schools is very different from the system contemplated and outlined by the framers of that Constitution."

Among other things, the Court pointed to the provision that the system of public schools outlined in Art. X of the 1868 Constitution should be "open to all the children and youths of the State, without regard to race or color" as evidence that such system had never been inaugurated by the General Assembly. With reference to the mixed schools provision, the Court stated:

> "This provision was to be adopted only in case the entire system as outlined in art. X. should, after time and trial, be adopted throughout the State."

Although the mixed school provision of the 1868 Constitution was never implemented by legislation, it had a paralyzing effect upon the development of public education

in the State. Dr. Edgar W. Knight, Professor of Education in the University of North Carolina, writing of this period in South Carolina, said:

> "Just how far the promoters of the mixed-school legislation expected it to extend is a matter for conjecture, but that it was perhaps the unwisest action of the period is a certainty, for it lent itself to a most unfortunate and damaging reaction for many years after the return to home rule. The principal objection raised to the school system during this time arose from the fear and hatred of mixed schools, which were not demanded by either race. On the contrary, both races were violently opposed to the scheme, and the friends of the schools constantly urged the adoption of separate schools. But the agitation in Congress of the Civil Rights Bill had the effect of aggravating a prejudice which had begun to develop with the State Constitutional provision for mixed schools."[31]

And finally:

> "Here, as in the other southern states, it has been difficult to recover from the ills inherited from the reconstruction practices following the close of the Civil War, and here, as elsewhere in that region, the stigma and the reproach of the indignities and the injustices of that period have been a deadly upas to the cause of public education. Only in recent years has recuperation been rapid enough to assure promise of a better day in public education."[32]

In 1895, South Carolina amended its Constitution to make separate schools mandatory.[33]

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[31]Edgar W. Knight, *Reconstruction and Education in South Carolina.* XIX THE SOUTH ATLANTIC QUARTERLY 61 (January, 1920).

[32]*Id.* at 66.

[33]S. C. Const. Art. XI, § 7 (1895).