Nos. 1, 2, 4, 8, 10

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 1

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

No. 2

HARRY BRIGGS, JR., ET AL., APPELLANTS

v.

R. W. ELLIOTT, ET AL.

No. 4

DOROTHY E. DAVIS, ET AL., APPELLANTS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

No. 8

SPOTTSWOOD THOMAS BOLLING, ET AL., PETITIONERS

v.

C. MELVIN SHARPE, ET AL.

No. 10

FRANCIS B. GEBHART, ET AL., PETITIONERS

v.

ETHEL LOUISE BELTON, ET AL.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 1[1]

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

On June 8, 1953, the Court ordered these cases restored to the docket for reargument, and requested counsel in their briefs and on oral argument to discuss certain questions. The order also invited the Attorney General of the United States to take part in the oral argument and to file an additional brief if he so desires.[2]

[1] Together with No. 2, *Briggs, et al.* v. *Elliott, et al.;* No. 4, *Dorothy E. Davis, et al.* v. *County School Board of Prince Edward County, Virginia, et al.;* No. 8, *Spottswood Thomas Bolling, et al.* v. *C. Melvin Sharpe, et al.;* and No. 10, *Francis B. Gebhart, et al.* v. *Ethel Louise Belton, et al.*

[2] The full text of the Court's order is as follows (345 U. S. 972–973):

"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In

Since the United States is not a party to any of these cases and is participating herein solely as an *amicus curiae,* it submits this brief as an objective non-adversary discussion of the questions stated in the Court's order of reargument. No attempt has been made to reexamine other questions briefed and argued at the last term.

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their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

"1. 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?

"2. 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 such 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?

"3. 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 public schools?

"4. 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 geographic 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

I and II

THE CONTEMPORARY UNDERSTANDING OF THE FOURTEENTH AMENDMENT WITH RESPECT TO ITS EFFECT ON RACIAL SEGREGATION IN PUBLIC SCHOOLS

The first two questions asked by the Court are as follows:

> 1. 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?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance

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from existing segregated systems to a system not based on color distinctions?

"5. 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 the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

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 such 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?

Since the historical materials examined are relevant to both questions, they are here treated together.[3]

A. INTRODUCTORY

1. The reconstruction period

Abolition of slavery by national action began while the Civil War was in progress, with Congressional abolition in the District of Columbia (12 Stat. 376) and the territories (12 Stat. 432) in 1862, and President Lincoln's Emancipation Proclamation in 1863. The Thirteenth Amendment, abolishing slavery everywhere within the United States, was proposed by Congress on February 1, 1865, and declared adopted on December 18, 1865.

After the termination of hostilities, new governments were established in the Southern states under Presidential authority. Negroes were not

[3] The Appendix, which is contained in a separate volume, consists of detailed factual summaries of the materials on the various aspects of the historical questions which are dealt with in this brief.

allowed, however, to participate in the elections held in these states, and in December 1865 Congress refused to seat members chosen in such elections. At the same session Congress created a Joint Committee on Reconstruction, to which all matters concerning the South were referred and which originated the various measures which formed the program of Congressional reconstruction.

During 1866 Congress, over the opposition of President Johnson, extended the functions of the Freedmen's Bureau, which had been created in 1865 to promote the welfare of the freed Negroes and to protect their civil rights. In April of the same year it enacted over a veto the Civil Rights Act (14 Stat. 27), which was designed to enforce by Federal authority the civil rights of Negroes, including their right to "full and equal benefit of all laws and proceedings for the security of person and property * * *."

Two months later, on June 16, 1866, Congress proposed the Fourteenth Amendment. By March 1867 most of the Northern states had ratified the Amendment. Three border states had rejected it, however, and of the Southern states only Tennessee had ratified it, making a total of less than the required three-fourths. The elections of 1866 had returned to Congress a clear majority in favor of the program of Congressional reconstruction. Accordingly, in March 1867 Congress enacted the Reconstruction Act (14 Stat. 428)

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under which the Southern states (except for Tennessee) were divided into five military districts and the existing state governments were declared to be provisional only. The Act provided that military supervision would be withdrawn, and a state's representatives readmitted to Congress, after it had (a) framed a new constitution "in conformity with the Constitution of the United States in all respects," (b) adopted universal male suffrage, and (c) ratified the Fourteenth Amendment. By June 1868 seven states had met all of these conditions and were restored to representation. On July 21, 1868, the Amendment, having been ratified by the legislatures of thirty of the thirty-seven states to which it was submitted, was declared adopted. Subsequently, the other three Southern states ratified the Amendment, and their representatives were readmitted to Congress.

The impeachment of President Johnson in 1868, arising out of his differences with Congress on reconstruction policy, was unsuccessful, but the election of Grant that year brought into office a President who was in agreement with the Congressional program. To assure the Negroes the right to vote, protected by the national government, a third constitutional amendment, the Fifteenth, was proposed by Congress in February 1869 and came into effect in March 1870. In the latter year the Enforcement Act (16 Stat. 140)

reenacted the Civil Rights Act of 1866 and imposed civil and criminal sanctions for violation of rights secured by the Fourteenth and Fifteenth Amendments.

Congress in 1875 enacted a new Civil Rights Act (18 Stat. 335)[4] declaring that all persons within the jurisdiction of the United States shall be entitled to the "full and equal enjoyment" of the accommodations of inns, public conveyances, theatres, and other places of public amusement, and providing civil and criminal penalties for violations. That Act marked the end of attempts during the reconstruction period to enforce by federal legislation equality of treatment for the emancipated Negroes.

After the determination in 1877 that Hayes had been elected President, the use of Federal authority to support the reconstruction governments in the Southern states ceased.[5]

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[4] This Act was held unconstitutional in 1883 in the *Civil Rights Cases*, 109 U. S. 3.

[5] An historian has described the settlement of the Hayes-Tilden election dispute as follows: "Generalized, this famous bargain meant: Let the reforming Republicans direct the national government and the southern whites may rule the Negroes. Such were the terms on which the new administration took up its task. They precisely and consciously reversed the principles of reconstruction as followed under Grant, and hence they ended an era." Dunning, *Reconstruction, Political and Economic*, 1865–1877 (1907), p. 41; see also Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951); Buck, *The Road to Reunion*, 1865–1900 (1937).

2. Public education in the United States in 1866

The quarter-century before the Civil War witnessed the initial efforts to establish free, tax-supported public schools throughout the United States.[6] By 1861 the principle of free public education had become accepted in almost all of the Northern states. Common schools open to all, and supported by general taxation, existed in most of the cities and towns, and in a large number of rural areas.[7]

In the South, however, different conditions prevailed. The essentially rural and sparsely settled character of the region made communication slow and community cooperation difficult. The institution of slavery and the acceptance of class and social distinctions were formidable barriers to the growth of public education. In addition, religious influences tended to encourage the view that education was a parental obligation and not one which the state should assume. Consequently, education in the South prior to the Civil War was left largely to private groups.[8]

Outside of some of the larger cities, such public schools as existed in the South were generally

[6] Cubberley, *Public Education in the United States* (1919), p. 119 *et seq.;* Knight, *Public Education in the South* (1922), pp. 196–198.

[7] Cubberley, *supra*, p. 211. A survey of the public school systems in many cities and towns during this period may be found in Barnard, *Special Report of the Commissioner of Education*, H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871), pp. 77–130.

[8] Knight, *supra*, pp. 264–265.

maintained for the benefit of only the children of the poor.[9] Even these were disrupted by the war. Teachers and students were called away to other tasks, and the state school funds were diverted to other purposes. At the close of the war the Southern states were faced with the task of completely rebuilding their educational systems.[10] The development of the present-day system of public education did not really begin in the South until the post-war period.[11]

Although public education was far more advanced in the North than in the South, the conditions in the former region hardly approximated those existing today. The schools were often small one-room affairs where, in rural areas at least, not much more than the three R's was taught. In many states the school term was only three months of a year. Compulsory school attendance was scarcely known. Ungraded schools were common in rural areas, and public high schools were rare. The quality of instruction was generally low, judged by modern standards.[12]

B. THE HISTORICAL ORIGINS AND BACKGROUND OF THE FOURTEENTH AMENDMENT

1. The anti-slavery origins of the reconstruction amendments

The constitutional changes of the Reconstruction period, and the civil rights legislation which

[9] *Ibid.*

[10] *Id.*, pp. 306, 313–317.

[11] Cubberley, *supra*, p. 251.

[12] Cubberley, *supra*, ch. VIII, Knight, *supra*, p. 294 *et seq.*

accompanied them, were the culmination of more than thirty years of controversy engendered by the anti-slavery movement. The growth of that movement and the formation of its constitutional philosophy, particularly in relation to the Fourteenth Amendment, have been the subject of several recent historical and legal studies.[13] These studies show that the conception of the principles incorporated in the Constitution by the Reconstruction Amendments, and the line of their development and growth, are to be found in the long and bitter political and ideological conflict over slavery that preceded the Civil War.

The abolitionists propounded a philosophy of equality expressed most frequently in terms derived from the Declaration of Independence, an equality which implied a duty of government to apply laws impartially to protect the "natural and fundamental" rights of all persons, white and black alike.[14] "Just as the great objection to slavery was its lack of legal protection for slaves, as well as the concomitant, invidious, and discriminatory treatment of free Negroes

[13] Nye, *Fettered Freedom* (1949); ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Dumond, *Antislavery Origins of the Civil War in the United States* (1939); Jenkins, *Pro-Slavery Thought in the Old South* (1935); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, (1950) Wis. L. Rev. 479, 610; Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830–1860*, 40 Calif. L. Rev. 483 (1953).

[14] ten Broek, *supra*, pp. 7, 96; Nye, *supra*, p. 177 *et seq.*; Dumond, *supra*, pp. 71–73.

and the wholesale public and private invasion of the rights of abolitionists, so the first object of the abolitionists was to gain legal protection for the basic rights of members of all three classes."[15] To gain that legal protection from the governments of the states where slavery existed was a practical impossibility; so the full impetus of the movement was directed towards securing national protection.[16]

Against the philosophy of absolute equality before the law, pro-slavery advocates posed the concept of "classified equality among equals."[17] To them, slavery was not a necessary evil but a "positive good," for by relegating a class in society naturally incapable of self-direction to a position legally subordinate to that of a class which was naturally superior and dominant, true equality was possible within each class.[18]

The agitation of the anti-slavery forces for absolute equality stimulated numerous efforts to eradicate from the laws of Northern states distinctions based on color; these were regarded as badges of servitude irreconcilable with the equality which was the natural right of all men.[19] An example was the campaign to open the Massachusetts common schools to all, without regard to color. Those schools were tax supported and free,

[15] ten Broek, *supra*, p. 97; see Dumond, *supra*, p. 43.

[16] ten Broek, *supra*, ch. III, IV, *passim*.

[17] Jenkins, *supra*, ch. III *passim;* Nye, *supra*, pp. 185–189.

[18] *Ibid.*

[19] Nye, *supra*, pp. 81–84; ten Broek, *supra*, pp. 42, 54, note 17.

and governed by local boards.[20] Some boards yielded to local pressure to abolish segregation; others did not, and efforts were made after 1844 to obtain remedial legislation.[21] In 1849, after failure of these efforts, an attempt was made to secure judicial invalidation of school segregation. In that year, in *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, Charles Sumner argued before the Supreme Judicial Court that segregation in the Boston common schools was a violation of the state constitutional guarantee of equality, because segregation was in itself a denial of equality.[22] He lost the case, but in 1855 the Massachusetts legislature forbade school segregation.

In *Van Camp* v. *Board of Education of Logan,* 9 Ohio 406 (1859), it was held that mulatto children were not entitled to enter the white common schools. The basic philosophy of the anti-slavery movement was expressed in the dissenting opinion, which declared that "caste-legislation" was inconsistent with the theory of a free and popular government "that asserted in its bill of rights the equality of all men" (p. 415). Twelve years later, Senator Wilson, a leader in the Congressional program of reconstruction, referred to these struggles for Negro access to common schools as an integral

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[20] Cubberly, *Public Education in the United States* (1919), p. 163 *et seq.*

[21] Wilson, *Rise and Fall of the Slave Power in America* (1872), vol. I, pp. 495–498.

[22] ten Broek, *supra,* p. 54, note 17.

part of the "contest of forty years between liberty and equality on the one side and slavery and privilege on the other" for securing "perfect and absolute equality in rights and privileges" for the Negro.[23]

This application of the philosophy of absolute legal equality to invalidate distinctions based on race or color in the Northern states was, however, a side issue. The main objective was complete abolition of slavery, and to accomplish that purpose it was necessary to secure political control of the national government.[24] These efforts produced a new national political organization—the Republican Party—established in 1854, and formed specifically to promote anti-slavery objectives.[25] Control of the national government by that party after the election of 1860 was the occasion for assertion by the South of the right of sovereign states to secede from the Union to protect their domestic institutions; [26] and control of the national government by that party after the Civil War was the occasion for amendment of the Constitution to embody the principle of "perfect and absolute" equality before the law for which the anti-slavery advocates had so long agitated.

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[23] Congressional Globe, 41st Cong., 3d Sess., p. 1061.

[24] ten Broek, *supra*, ch. VI.

[25] Wilson, *supra*, vol. II, p. 406 *et seq.;* Curtis, *The Republican Party* (1904), vol. I, ch. VI.

[26] Dumond, *supra*, pp. 123–126.

2. The status of Negroes (legal, economic, and educational) at the close of the Civil War

By 1865 slavery had been ended in fact. In that year it was constitutionally abolished. Emancipation did not, however, make the former slave a free man in all respects. Abolition of slavery did not wipe out at a stroke the "badges of servitude" which had existed for so many generations. The Negro "freedmen" were still commonly regarded as an inferior race. Legally, economically, and educationally, the free colored population was still subject to disabilities not imposed on white citizens, both in the Southern states and, to a lesser extent, in some of the Northern states.

Before the Civil War the states had varied in their treatment of free colored people. Some slave states had required freed Negroes to emigrate; where permitted to remain, they were limited in their rights to contract, hold property, sue, appear as witnesses, and to vote or serve on juries. In some Northern states immigration of free Negroes was prohibited; in many more, the right of suffrage was denied.[27]

[27] Hurd, *Law of Freedom and Bondage in the United States* (1862), vol. 2, pp. 1–218, contains a complete compilation and digest of these laws; and see Barnard, *Special Report of the Commissioner of Education*, H. Ex. Doc. No. 315, 41st Cong., 2d Sess., Appendix, Legal Status of the Colored Population etc., pp. 301–400; Wilson, *Rise and Fall of the Slave Power in America* (1874), vol. II, p. 181 *et seq.;* Stephenson, *Race Distinctions in American Law* (1910), ch. IV. Only in the states of Maine, New Hamp-

At the close of the war, so-called "Black Codes" designed to restrict the freedom of the newly freed colored people were enacted in the Southern states. These Codes contained provisions discriminating against Negroes with regard to such matters as employment and the right to engage in business.[28] They were regarded by the majority in Congress as "an attempt on the part of Johnson's reorganized governments to reestablish virtual slavery and thus reverse the result of the war."[29]

Despite emancipation, the Negroes remained on the lowest economic level. Cut adrift without money or property, they generally remained dependent upon their former owners for employment. The Black Codes only reinforced that dependence.

In the field of education the opportunities of the Southern Negro were far inferior to those of his brother in the North. Long before the war, most of the Southern states had enacted legislation prohibiting the education of all Negroes, free or slave, because of the widespread belief that such education was conducive to rebelliousness.[30]

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shire, Vermont, Massachusetts, and Rhode Island had Negroes received the full right of suffrage.

[28] Stephenson, *supra*, ch. IV.

[29] Randall, *The Civil War and Reconstruction* (1937), p. 724.

[30] Nye, *Fettered Freedom* (1949), pp. 70–71. See the speech of Senator Wilson (Mass.) on April 12, 1860, reviewing these laws, Congressional Globe, 36th Cong., 1st Sess., p. 1685.

The few Negro schools were operated clandestinely. It has been estimated that ninety-five per cent of the colored population of the South was illiterate at the time of the Civil War.[31]

After the war ended, the provisional legislatures in the Southern states began to show great interest in the establishment of systems of public school education; yet, with few exceptions, they showed no disposition to extend its benefits to Negroes.[32] This reflected the hostility of many people in the South towards the principle of Negro education. The establishment of schools for Negroes was left largely to northern charitable societies, in cooperation with the Freedmen's Bureau. However, the effectiveness of these schools was impaired by the opposition of a considerable portion of the local white population—an opposition which frequently expressed itself in violence, with Negro schools being burned and their teachers, white and colored alike, beaten and expelled from the community.[33]

In the North the situation was far different. Nowhere were there prohibitions against Negro education,[34] although in five states Negroes were

[31] Bond, *The Education of the Negro in the American Social Order* (1934), p. 21.

[32] *Id.*, p. 41.

[33] *Id.*, pp. 28–32.

[34] The only border state which had had such prohibitions was Missouri. By 1865, this prohibition was not only abolished, but Negroes were admitted to public schools. Barnard, *supra*, pp. 359–360. All the following references to

excluded from public schools.[35] In some Northern states they were admitted to the same public schools as white children; in others, they were either provided with separate schools, or admitted to the white schools, depending principally upon the number of children involved;[36] in still others, they were provided only with separate schools.[37] In individual communities in many of the states the practice varied from the state-wide pattern, either by legislative permission or common practice, without legal sanction.[38]

C. THE LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT AND IMPLEMENTING LEGISLATION

1. The Thirteenth Amendment

The legislative history of the Fourteenth Amendment in Congress must begin with a brief account of the Thirteenth Amendment. Both amendments had a common origin and purpose, and were con-

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the educational status of the Negro are taken from Appendix, Legal Status of the Colored Population, etc., pp. 301–400, of the Barnard report.

[35] Delaware, Maryland, Kentucky, Indiana and Illinois.

[36] Pennsylvania and California are examples.

[37] See p. 90, footnote 93, *infra*.

[38] For example, the Ohio state statutes provided only for separate schools; in the greater part of the state, however, with the exception of Cincinnati, colored children were admitted to the same schools as white children. In Illinois, where there was no provision for Negro public education, the city of Chicago, after an unsuccessful experiment with separate schools during 1861–1865, maintained under its own ordinances a fully integrated system of public schools. On the other hand, New York City and some towns in New Jersey maintained separate schools for colored children. See Barnard, *supra*, pp. 96, 104.

sidered in Congress as related components of an integral plan of reconstruction.

The Thirteenth Amendment originated in the 38th Congress in the form of a joint resolution introduced by Senator Henderson in January 1864. (Congressional Globe, 38th Cong., 1st Sess., p. 145.) The resolution proposed that the Constitution be amended to provide that "Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."[39] The proposal was made only after Congressional and executive action had been taken which effectively emancipated the slaves in the Southern states.[40] In reporting the resolution, Senator Trumbull, chairman of the Senate Judiciary Committee, noted that fact. He stated that the amendment would not only end the institution of slavery but would remove from the Constitution the inconsistency of the founding fathers, who, while proclaiming the equality of all men, nevertheless denied all rights to an entire race (Globe, 38th Cong., 1st Sess., p. 1313). The resolution passed the Sen-

[39] Globe, 38th Cong., 1st Sess., p. 1313. The Thirteenth Amendment, as adopted, provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[40] The Confiscation Act of 1861, 12 Stat. 319; the Captured and Abandoned Property Act of 1863, 12 Stat. 820; Proclamation (No. 16) of September 22, 1862, 12 Stat. 1267.

ate, but failed of passage in the House (Globe, 38th Cong., 1st Sess., pp. 1490, 2995); and it became one of the principal issues in the 1864 national election.[41]

The overwhelming Republican victory that year led President Lincoln in December 1864 to recommend to the lame-duck session of the 38th Congress that the House reconsider its vote (Globe, 38th Cong., 2d Sess., Appendix, p. 3). In January 1865 the resolution was passed by the House by slightly more than the required two-thirds vote (Globe, 38th Cong., 2d Sess., p. 531). It was submitted to the states for ratification in February 1865, and by December of that year a sufficient number of states had ratified. (13 Stat. 567, 774.)

The Congressional debates on the Thirteenth Amendment indicate that its purpose was to make the Negro, so far as law could do so, an indistinguishable element of the general population.[42] It was the belief of its proponents that by abolishing the institution of slavery they were establishing the constitutional principle of full equality before the law. (Globe, 38th Cong., 2d Sess., pp. 154, 177.) To these men, freedom and equality were coextensive; the one necessarily implied the other. (Globe, 38th Cong., 1st Sess., pp. 1482, 2957; Globe, 38th Cong., 2d Sess., p. 154.) Simi-

[41] McPherson, *Political History of the United States, 1860–65* (1865), pp. 406, 419, 422.

[42] See, for example, the remarks of Rep. Orth (Globe, 38th Cong., 2d Sess., p. 143).

larly, those who opposed the Amendment did not doubt that the freedom conferred upon the Negro slave included more than "mere exemption from servitude." (Globe, 38th Cong., 1st Sess., p. 2962.) To them, that freedom was a reversal of the "natural and divine" order under which the colored race was inferior and unequal. (Globe, 38th Cong., 2d Sess., p. 150.) This argument proceeded on the basis of their understanding that the Amendment would merge the Negro into the general mass of people on a basis of full legal equality. Those who favored the Amendment did not deny that such was its purpose. (Globe, 38th Cong., 1st Sess., pp. 2957, 2960, 2989; Globe, 38th Cong., 2d Sess., pp. 154, 202, 237.)

2. Implementing legislation: The Freedmen's Bureau bills and the Civil Rights Act of 1866

In the period between the adjournment of the 38th Congress in March 1865 and the convening of the 39th Congress in December of that year, the provisional governments in the Southern states, which had been set up by President Johnson under his "restoration" policy, enacted a series of laws discriminating against Negroes in various ways, the so-called Black Codes discussed *supra,* p. 15. The first session of the 39th Congress, over the veto of President Johnson, enacted two bills to nullify the discriminations created by the Black Codes: (1) the Civil Rights Act of 1866, 14 Stat. 27, and (2) the law which extended the life of the Freedmen's Bureau and enlarged its powers,

14 Stat. 173. It also passed another bill dealing with the Freedmen's Bureau which failed of enactment after it had been vetoed by President Johnson. (S. 60, 39th Cong., 1st Sess.; Globe, p. 943)[43] These three bills were expressly intended to give content to the freedom conferred upon the Negro by the Thirteenth Amendment by guaranteeing to him all of the civil rights to which free men were entitled.

These measures were related to the Fourteenth Amendment by more than mere coincidence of time [44] and subject matter. As will appear *infra,* pp. 40–45, the latter was proposed after members of the Congress stated that the civil rights guaranteed by statute were vulnerable to future political changes or might possibly be stricken down as unconstitutional. Because the rights intended to be secured to Negroes by these measures were the same as those subsequently embodied in the Four-

[43] All references to the Globe in this section are to the Congressional Globe, 39th Cong., 1st Session.

[44] The Supplementary Freedmen's Bureau bill (S. 60) was debated in Congress from January 11, 1866, through February 20, 1866; the Civil Rights bill, from January 29, 1866, through April 9, 1866; and the second Supplementary Freedmen's Bureau bill (H. R. 613), from May 22, 1866, through July 2, 1866. Meanwhile, the two precursors to the Fourteenth Amendment, the Stevens "apportionment" amendment and the Bingham "equal rights" amendment, *infra*, pp. 33–41, were debated from January 23, 1866, through March 9, 1866, and February 26 through 28, 1866, respectively. Debate on H. J. Res. 127, containing the Fourteenth Amendment as finally proposed, extended from May 8, 1866, to June 13, 1866.

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teenth Amendment, it is appropriate to include their legislative history as a relevant part of the background of the Fourteenth Amendment.

(a) Immediately following President Johnson's message of December 5, 1865, stating that existing state law furnished adequate protection for civil rights, the 39th Congress established a Joint Reconstruction Committee to serve as the principal agency for developing the program of "Congressional reconstruction." (Globe, pp. 6, 30, 47.) Senator Wilson immediately brought up for consideration a bill (S. 9)[45] to nullify the Black Codes. (Globe, p. 39.) He urged Congress to strike down these Codes without delay, so that the Negro freedman

> can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. (Globe, p. 111.)

The chief opposition to Wilson's bill came from those Senators who considered all civil rights proposals as an unwarranted effort "to confer on former slaves all the civil or political rights that white people have." (Globe, p. 113.) The

[45] All bill numbers hereafter cited in this section refer to bills in the 39th Cong., 1st Session.

bill was, however, withdrawn by Wilson because of the evident view of the majority that measures of such a nature required more careful formulation. Senator Trumbull undertook this task. He subsequently introduced two bills which, he stated, would effectively protect all men in those basic rights without which they would not be free. (Globe, p. 43.)

(b) One of the Trumbull bills (S. 60) proposed to extend the life of the Freedmen's Bureau and to enlarge its authority; the second (S. 61) was intended to protect all persons in the exercise of their civil rights and to furnish a means by which those rights might effectively be vindicated. (Globe, p. 129.)

The purpose of S. 60, as stated by Senator Trumbull, was to restrain by military measures any attempt to enforce the Black Codes. (Globe, pp. 319–323.) The bill passed the Senate by a wide majority. (Globe, p. 421.) The opposition centered their attack on the basic concept of equality underlying the bill, and on its military enforcement provisions. (*E. g.*, Globe, pp. 318, 319, 342.) The debate in the House emphasized much the same issues, with the additional matter of education for the freedmen. (*E. g.*, Globe, pp. 513, 585.)

There was little difference in the majority and minority views concerning the bill's scope. Its proponents expressed their understanding that the equality to be enforced did not mean "that all

men shall be six feet high," but rather that they were to have "equal rights before the law," so that it "operates alike on both races" and without "discrimination against either in this respect that does not apply to both." (Globe, pp. 322, 343.) Nor did the opposition indicate any disagreement on that score. They objected, rather, to the general philosophy of the bill. Representative Dawson of Pennsylvania observed that the bill constituted only a part of a broad policy to enforce absolute equality for Negroes so that they

> should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and national Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. (Globe, p. 541.)

Several Congressmen objected to entrusting the Freedmen's Bureau with the responsibility of educating the freedmen because it appeared that the Bureau had taken over certain white schools in the South for the use of Negro children. The charge was made that "unless they mix up white children with black, the white children can have no chance in these schools for instruction."

(Globe, App. pp. 71, 82.) There is no other evidence that any particular thought was given to the question of racial segregation in the existing schools. The bill was passed by the House, but was vetoed by President Johnson in February 1866. (Globe, pp. 688, 915.) The Senate sustained his veto. (Globe, p. 943.)

(c) After the Senate passed S. 60, it turned immediately to consideration of the second of Senator Trumbull's bills, S. 61, the so-called "Civil Rights" bill. (Globe, p. 421.) S. 61 provided (1) that there was to be no discrimination in "civil rights or immunities" among the inhabitants of the United States on account of color, race, or previous servitude, and (2) that all persons, regardless of race or color, were to have the "same" rights to make and enforce contracts, to sue and be sued, to inherit and own property, and to have the full and equal benefit of all laws for the security of person and property. (Globe, p. 474.) Violation of any of these rights "under color of law" was to carry both civil and criminal penalties. (Globe, p. 475.)

The purpose of the bill was stated to be the nullification of all state laws which, on grounds of color or race, deprived "any citizen of civil rights which are secured to other citizens." (Globe, p. 474.) The Senate proponents of the bill explained that the freedom conferred upon Negroes by the Thirteenth Amendment was of little value, unless they were given "some means

of availing themselves of their benefits." (Globe, p. 474.) So long as there were state laws discriminating against the colored people, they remained in part slave. Any statute

> which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. (*Ibid.*)

To the objection that the bill's purpose was "revolutionary", its supporters answered that the country was "in the midst of revolution." (Globe, p. 570.)

The opposition, recognizing that the bill was intended to accomplish "the abolition of all laws in the States which create distinctions between black men and white ones" (Globe, p. 603), objected to this attempt to "place all men upon an equality before the law." (Globe, p. 601.) They claimed that the Thirteenth Amendment did not confer the power on Congress to erase distinctions between Negroes and whites created by state law. (Globe, p. 476.) For them, the Amendment had merely abolished the "status or condition of slavery", and there was no justification for attempting to use it "to confer civil rights which are wholly distinct and unconnected" with such a status. Senator Cowan of Pennsylvania, opposing the bill, referred to the system of racially-segregated schools provided for by Pennsylvania

law as an example of the kind of legal distinction which would be eradicated by the bill:

> In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous. (Globe, p. 500.)

No member of the Senate rose to differ with Senator Cowan's view of this objective of the bill. The attacks on the bill failed, however, and it was passed by the Senate in February 1866. (Globe, p. 606.)

In the House the bill was reported favorably by the Judiciary Committee, of which Congressman Wilson of Iowa was chairman. (Globe, p. 1115.) The debate in the House followed the same general pattern as in the Senate.

Mr. Wilson took a more limited view of the objectives and scope of the bill than had his colleagues in the Senate. To him, the general language of the bill did not mean that "all citizens shall sit on the juries, or that their children shall attend the same schools." These, to him, were not such "civil rights or immunities" as were intended to be protected by the bill.[46] (Globe, p. 1117.)

Those in the House who opposed the bill on its merits vigorously disagreed with Wilson's view that the bill had a limited application, particularly with respect to state laws concerning racial segregation in the schools. (Globe, pp. 1120, 1121, 1270). Congressman Kerr of Indiana argued that the bill would invalidate the school laws of his state:

> Again, the constitution of Indiana has dedicated a munificent fund to the support of common schools for the education of the children of the State. But negro and mulatto children are by law excluded from

[46] Mr. Wilson later pointed out that this view depended not on any general definition of "civil rights or immunities" but upon the form of the bill itself, which, under general rules of construction, would in his opinion have limited the general declaration to the specific and limited rights actually enumerated. (Globe, pp. 1291, 1294.) He thought that the bill could only be construed as relating to matters within the control of Congress, and he had doubt that Congress could constitutionally provide such general protection of civil rights. (Globe, p. 1294.)

> those schools. Negroes and mulattoes are exempt by law from school tax. They are denied a civil right, on account of race and color, and are granted an immunity, (from school taxation,) but are taxed for all other purposes. Now, a negro or mulatto takes his child to the common schoolhouse and demands of the teacher that it be admitted to the school and taught as the white children are, which is refused. The teacher then becomes a wrong-doer and is liable to the same punishments, to be administered in the same way; because all the persons referred to would be acting under *color* of some law, statute, ordinance, regulation, or custom. (Globe, p. 1271.)

Congressman Rogers of New Jersey, of the minority, argued similarly with reference to the Pennsylvania schools:

> In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes and the local regulations of a State, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise to the same ex-

> tent that it is accorded to the white men in that State, * * *. (Globe, p. 1121.)

To Rogers, there was no authority under the Thirteenth Amendment for Congress to interfere in such "domestic" matters; but he plainly understood that the bill under consideration would prohibit segregated schools in the states.

There were some members of the majority who, although supporting the merits of the bill, agreed with the minority that there was doubt that the Thirteenth Amendment empowered Congress to enact such legislation. (Globe, pp. 1290, 1293, 1266.) Led by Congressman Bingham of Ohio, later a principal draftsman of the Fourteenth Amendment, they clearly expressed their understanding that the general language of the bill would "strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen." (Globe, p. 1291.) Congressman Delano of Ohio, a member of this group, pointed out that the bill would clearly apply to state school laws; he cited his own state as an example:

> we once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the funds raised for the support of those schools. That law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under

> the terms of this bill be void, and those attempting to execute it would be subjected to punishment by fine or imprisonment. (Globe, App. 158.)

Mr. Bingham stated that all laws making distinctions on the basis of color should be eliminated, for the law "should be just"; but he saw the proper remedy for those abuses, "not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future." (Globe, p. 1291.) He agreed that without such amendment the "protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States." (Globe, p. 1293.)

The bill was recommitted against Wilson's wishes, largely because of the defection of Bingham and his followers. (Globe, p. 1296.) It was amended in committee to strike out the general language guaranteeing "civil rights or immunities." (Globe, p. 1366.) As Wilson said, that language had been taken by some as warranting a "latitudinarian construction not intended." (*Ibid.*) In this form the bill passed the House, and was concurred in by the Senate. (Globe, pp. 1367, 1416.)

The President vetoed the measure on March 27, 1866. (Globe, p. 1679.) The Senate, after two days' discussion, passed the bill over the veto; the House held no debate, and the veto was immediately overridden. (Globe, pp. 1809, 1861.)

In sum, the Thirteenth Amendment had been proposed as a means of attaining the equality of all men before the law, not as conferring mere exemption from servitude. To its proponents, and to most of its opponents, it would establish the principle that all men should be treated equally. The Civil Rights and the Freedmen's Bureau bills were considered necessary to enforce the equality of freedom guaranteed by that Amendment by forbidding differences in legal treatment on account of race or color. These bills were aimed at striking down state laws which were viewed as restricting the freedom of Negroes by creating or continuing legal distinctions based on race or color. The debates on these bills show that some legislators, on both the majority and minority sides, expressed the view that this principle of equality under law would, if enforced, destroy racial segregation in state schools.

D. THE FOURTEENTH AMENDMENT IN CONGRESS

During the same period that the Civil Rights Act and the first Freedmen's Bureau extension bill were occupying the attention of the 39th Congress, the Joint Committee on Reconstruction was engaged in the study of plans to "reconstruct" the Union on principles that would prevent a recurrence of the recent war.[47] In the course of that study the Committee originated two

[47] Journal of the Joint Committee on Reconstruction, Senate Doc. 711, 63rd Cong., 3rd Sess. (hereinafter "Committee Journal").

separate proposals for constitutional amendments which it reported to the floor of Congress. These proposals were: (1) a constitutional amendment reducing the congressional representation of any state which denied citizens suffrage on the basis of race or color (the Stevens "apportionment" amendment)[48]; and (2) a constitutional amendment empowering Congress to enact legislation to guarantee equal rights to all persons (the Bingham "equal rights" amendment).[49] Both proposals failed. However, after some modification, and with the addition of other proposals, they were included in the "plan of reconstruction" reported by the Joint Committee in April 1866. That plan included the Fourteenth Amendment. (Globe, pp. 2265, 2286.) The discussions of these preliminary proposals in the Congress illumine the scope and purpose of that Amendment and constitute an integral part of its legislative history.

(1) *The Stevens "apportionment" amendment.* The first proposal to be reported was the apportionment amendment. A brief report to the House was delivered by Congressman Thaddeus Stevens on January 22, 1866. (Globe, p. 351.) The amendment had a direct political purpose. It proposed to reduce the congressional representation of a state which excluded any group of citizens from the elective franchise on account of race or color.

[48] Committee Journal, p. 13; Globe, p. 351.

[49] Committee Journal, p. 17; Globe, pp. 813, 1033.

The opponents of reconstruction united to condemn this proposal (e. g., Globe, pp. 353, 381, 387). However, the usual supporters of reconstruction were divided. To many of the latter, a constitutional provision for apportionment where suffrage was denied on the basis of color might imply that the Constitution permitted legal distinctions to be made on such a basis. (Globe, pp. 405, 408.)

Congressman Bingham argued that while the measure was necessary, it was not sufficient standing alone. (Globe, p. 429.) It should be accompanied, he said, by

> another general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guaranteed to him from the beginning * * *.

Bingham urged that the American people should adopt both of these proposals in order

> to declare their purpose to stand by the foundation principle of their own institutions, the absolute equality of all citizens of the United States politically and civilly before their own laws. (Globe, p. 431.)

The split among the majority led to recommittal of the apportionment proposal. (Globe, p. 508.) However, the following day it was again reported with an amendment concerning apportionment of

direct taxes, and in this form it passed the House with little discussion. (Globe, p. 538.)

Senator Sumner opened the Senate debate on February 6 with an attack on the proposal. (Globe, p. 673). He said that the freedmen must be fully protected, not by indirection, but by directly "maintaining him in the equal rights of citizenship," including suffrage; and this was impossible "so long as you deny him the shield of *impartial laws.*" (Globe, p. 675.) Sumner proposed, instead, a joint resolution to declare, by statute and not by constitutional amendment, the abolition of all distinctions based on color, including those relating to the franchise. (Globe, p. 684.) This was proposed as an exercise by Congress of the authority which he thought it had under the Thirteenth Amendment. Senator Fessenden, Chairman of the Joint Committee on Reconstruction, opposed Sumner and argued the necessity of the apportionment amendment, although admitting his own preference for

> a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be held unconstitutional, inoperative, and void, or words to that effect. (Globe, p. 704.)

But he thought that a direct suffrage amendment would probably be too extreme to secure ratification by the states. Senator Yates of Illinois stated that the equality of freedom guaranteed by

the Thirteenth Amendment included both civil and political rights. (Globe, App., pp. 100–101.) By that Amendment, he said, the Negro "became a part of the people" and as such "entitled to the same rights and privileges with all the other citizens of the United States."

Although the proposal received a majority vote in the Senate, it lacked the necessary two-thirds. (Globe, p. 1289.)

(2) *The Bingham "equal rights" amendment.* The second precursor of the Fourteenth Amendment is more directly related to section 1 of that Amendment. It had its origin in two proposals of a similar nature which were placed before the Joint Committee on Reconstruction at its third meeting in January 1866.[50]

The first of these proposals, by Congressman Bingham, provided:

> The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.[51]

The second, by Congressman Stevens, chairman of the House group of the Committee, was a simpler declaration that

> All laws, State or national, shall operate impartially and equally on all persons without regard to race or color.[52]

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[50] Committee Journal, p. 9.

[51] *Ibid.*

[52] *Ibid.*

Both were referred to the subcommittee on the apportionment of representatives in Congress, which included Bingham and Stevens.

The following week the subcommittee approved a new draft combining the Bingham and Stevens proposals:

> Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.[53]

The Committee kept it under consideration until after the apportionment amendment had passed the House. The matter was then referred to a special subcommittee, consisting of Bingham, Boutwell of Massachusetts, and Rogers of New Jersey. The subcommittee reported back a draft very similar to Bingham's original proposal:

> Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges.[54]

The Committee by a tie vote failed to approve this draft, and Bingham proposed a modification which the Committee adopted:

[53] Committee Journal, p. 12.

[54] Committee Journal, p. 14.

> The Congress shall have power to make all laws 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.[55]

Bingham reported the proposed amendment to the House on February 26. (Globe, p. 813.)

The proposal was debated for three days and was then postponed. In his report, Bingham stated that the amendment "stands in the very words of the Constitution"; it had theretofore been "the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State * * * to enforce obedience to these requirements of the Constitution." (Globe, pp. 1033, 1034.)

Rogers of New Jersey, a member of the Joint Committee, expressed the view of the minority that the "protection, security, advancement, and improvement, physically and intellectually, of all classes," should be left to the states:

> Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property. * * * (Globe, App., p. 134.)

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[55] Committee Journal, p. 17. It may be observed that each of the proposals, except that of Stevens, provided for exclusive Congressional enforcement.

They should be permitted by the states to do everything white men could do, except to vote and hold office. However, according to Rogers, the amendment would take from the states the power to regulate such personal rights as education:

> In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States. (Globe, App., p. 134.)

Bingham took the floor again for his proposal, stating:

> that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is

> the perfection of human reason, and which is impartial, equal, exact justice * * *. (Globe, p. 1094.)

Congressman Hotchkiss of New York, however, said that the provision which authorized Congress to legislate guarantees of equal protection would mean that the degree of protection given could vary as the Congress changed. (Globe, p. 1095.) Equal protection should instead be made a

> constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress * * *. [T]he very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override.

Following this three-day debate, further consideration of the proposal was postponed. (Globe, p. 1095.) This postponement was apparently attributable to the reluctance of the moderate Republican group to give Congress the power to determine the measure of equal protection. The objection that the proposal placed upon Congress the direct responsibility not merely of enforcement but of declaring what rights were to be protected was also voiced by members of the majority in the debates on the Civil Rights bill: what a Republican Congress could give, they feared, a Democratic Congress could take away. The guarantees

of legal equality, to be permanent, therefore had to be made an explicit part of the Constitution.

The majority were determined that the Constitution should not permit any distinctions of law based on race or color, and that it should include express guarantees of equal protection which could not be repealed by any future Congress. The debates on both Stevens' "apportionment" proposal and Bingham's "equal rights" proposal echo the same determination to abolish legal differences based on color or race which had been manifested throughout the debates on the Thirteenth Amendment and its implementing legislation. In the debates on the "equal rights" proposal, the minority repeated their previous argument that to protect equally the civil rights of all persons would destroy racial segregation in state schools. The majority, as before, did not deny that charge but instead continued to discuss equal protection in general terms, without any attempt to enumerate its specific applications.

(3) *H. J. Res. 127: the Fourteenth Amendment.* After the failure of these two proposals, Stevens laid before the Joint Committee in April 1866 a "plan of reconstruction," the core of which was a proposed amendment to the Constitution, containing five sections. Section 1 read as follows:

> No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.[56]

[56] Committee Journal, pp. 28, 29.

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[56] Committee Journal, pp. 28, 29.

Bingham immediately moved to amend this by adding:

> Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.

The committee rejected Bingham's amendment and retained the original form.[57] Subsequently, Bingham secured committee agreement to a new section in these words:

> No State shall make or enforce any law which shall abridge the privileges and 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.[58]

This section, which contains the wording of the Fourteenth Amendment as eventually adopted, was substituted for the original section 1, and in that form was reported to both Houses on April 30. (Globe, pp. 2265, 2286.) In the House, as H. J. Res. 127, the proposed amendment was made a special order of business. (Globe, p. 2286.)

(a) *The House debate.* There were but three days of discussion in the House under a rule limiting debate, and much of that time was devoted to Reconstruction generalities and to portions of the

[57] *Ibid.*
[58] Committee Journal, p. 39.

proposal other than section 1. (Globe, p. 2433.) From the opening statement by Stevens on May 8, 1866, until he closed May 10, 1866, with the declaration that the Southern states should not return except "as supplicants in sackcloth and ashes," nearly all the radical Republicans in the House echoed his disappointment that suffrage for the Negro was not directly included in the proposed amendment. (Globe, pp. 2459, 2544.) However, Stevens remarked that what was proposed "is all that can be obtained in the present state of public opinion." (Globe, p. 2459.)

The discussion of Section 1 commenced with some brief remarks by Stevens on behalf of the Joint Committee. He affirmed the justice of its provisions:

> They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies the defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court

> shall allow the man of color to do the same. (Globe, p. 2459.)

Stevens referred to discriminatory state laws which disqualified Negroes from testifying in courts, and provided different methods of trial or different punishments for them. He did not wish, however, to "enumerate these partial and oppressive laws" at length. But, he said,

> Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. (Globe, p. 2459.)

He anticipated that it would be contended that the "civil rights bill secures the same things." That was only "partly true." Moreover,

> a law is repealable by a majority. * * * This amendment once adopted cannot be annulled without two thirds of Congress. That they will hardly get. (*Ibid.*)

The arguments which Stevens made for this section of the Amendment do not indicate that, apart from the suffrage provision, he considered there was any difference in substance between the new proposal and his own earlier one (*supra*, p. 36) that "All laws, State or national, shall operate impartially and equally on all persons without regard to race or color."

Congressman Finck of Ohio was opposed to the amendment, but all he said about section 1 was that—

> if it is necessary to adopt it, in order to confer upon Congress power over the mat-

> ters contained in it, then the civil rights bill * * * is clearly unconstitutional. (Globe, p. 2461.)

Congressman Garfield of Ohio, later President, rose to support the proposal:

> The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arises when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. (Globe, p. 2462.)

The first section, he said, would hold "over every American citizen, without regard to color, the protecting shield of law."

Congressman Raymond of New York, publisher of the New York Times and a conservative Republican who had voted against the Civil Rights bill, undertook to explore the "somewhat curious history" of the "principle" of the first section, "which secures an equality of rights among all the citizens of the United States":

> It was first embodied in a proposition introduced by the distinguished gentleman from Ohio, [Mr. Bingham,] in the form of an amendment to the Constitution, giving to Congress power to secure an absolute

> equality of civil rights in every State of the Union. It was discussed somewhat in that form, but, encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer and to provide for enforcing against State tribunals the prohibitions against unequal legislation. (Globe, p. 2502.)

Even though Raymond had voted twice against the civil rights bill, the principle of which was embodied in the proposed amendment, he stated that he was supporting the latter because he was "heartily in favor of the main object which that bill was intended to secure." All that he wanted was to have this accomplished by constitutional means. (*Ibid.*)

Congressmen Randall of Pennsylvania and Rogers of New Jersey were among the few opponents of the amendment who registered specific objections to section 1. (Globe, pp. 2530, 2538.) Although most of the others objected to reconstruction generally, or to other sections of the proposal, Randall objected because:

> The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They

> relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States. (Globe, p. 2530.)

Rogers insisted that "the first section of this programme of disunion" was "most dangerous to liberty." (Globe, p. 2538.) It was, he said,

> no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which * * * was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation. (Globe, p. 2538.)

The speeches of Congressmen Bingham and Stevens closed the debate. To Bingham, the need for the first section was "one of the lessons that have been taught * * * by the history of the past four years of terrific conflict." (Globe, p. 2542.) It was to supply the absence in the Constitution of a

> power in the people, the whole people of the United States, * * * to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

This amendment would not take rights properly reserved to the states, for

> No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. (Globe, p. 2542.)

Section 1 would carry out the great objectives of the Constitution in protecting persons "by national law from unconstitutional State enactments." (Globe, p. 2543.)

After Stevens' speech, which candidly outlined the partisan political aims of the entire amendment, a vote was taken, and on May 10, 1866, it passed by more than the necessary two-thirds. (Globe, p. 2545.)

(b) *The Senate debate.* In the Senate, the amendment received more extended consideration. It was first brought up May 23, nearly two weeks after it passed the House. (Globe, p. 2763.) Senator Howard of Michigan made the report for the Joint Committee in place of the chairman, Senator Fessenden, who was ill.

Howard explained section 1 in great detail. He said:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. * * * It estab-

> lishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining. (Globe, p. 2766.)

The fifth section of the proposal, he stated, would enable the Congress,

> in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment. (Globe, p. 2768.)

Senator Stewart of Nevada spoke generally on the amendment as a plan of reconstruction. (Globe, p. 2798.) He discussed the purposes of section 1 in terms of the conflict between the Congress and the President. Mere restoration of the Southern states on their pre-war footing would, he said, permit them to continue "to apply the theories of slavery to a condition of freedom":

> They were educated to believe that a negro was a slave, possessing no rights that a white man was bound to respect, and they believed it still, and they are astonished

> at the inconsistencies of the world and its tendency to recognize the rights of man. (Globe, p. 2799.)

However, he did not believe the amendment sufficed in its present form, for to him Negro suffrage was the only definite answer to "slavery and inequality of human rights." (*Ibid.*)

Up to this point, on May 24, the debate had produced a number of proposed revisions, for the most part concerned with other sections of the amendment. (Globe, pp. 2768, 2770, 2804.) With Stewart's speech, it was plain that the majority party was not united on all the aspects of the amendment. Further consideration was postponed for five days, until Tuesday, May 29. Friday, Monday, and Tuesday morning were devoted to a caucus of the Republican members of the Senate.[59] What was discussed in the caucus, or who proposed the changes agreed to by the caucus, cannot be determined; it is clear, however, that there was great unity thereafter. In fact, opponents found it "hard work to speak" when they knew in "advance that no argument, however just and forcible, and no appeal, however patriotic, can influence a single vote." (Globe, p. 2938.)

Senator Howard, as floor leader, took up the amendment Tuesday, and offered the changes which had been agreed to in caucus. (Globe, p. 2868.)

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[59] James, *The Framing of the Fourteenth Amendment* (1939), pp. 171–172 (an unpublished thesis in the library of the University of Illinois).

The only section 1 change was the addition of a declaration of citizenship as its first sentence:

> All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. (Globe, p. 2869.)

The purpose of this change was to settle the "great question of citizenship" and to remove "all doubt as to what persons are or are not citizens of the United States." (Globe, p. 2890.)

All of the caucus changes were adopted. (Globe, pp. 2897, 2921.) The renewal of the debates showed marked unity not only in the majority party but also in the opposition. Most of the Senators in that group undertook active opposition—Hendricks of Indiana, Davis of Kentucky, McDougall of California, Reverdy Johnson of Maryland, Democrats; and Cowan of Pennsylvania and Doolittle of Wisconsin, dissident Republicans.

The pattern of opposition was set by Hendricks. (Globe, p. 2938.) To him, the amendment was a matter of partisan politics, a mere "party programme." The whole proposal would centralize "absolute and despotic power" in the Federal government. (Globe, p. 2940.) Senator Davis likewise accused the majority of a "bold and desperate political game." (Globe, App., p. 238.) As to the first section, he said, its

> real and only object * * * is to make negroes citizens, to prop the civil rights bill,

> and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. (Globe, App., p. 240.)

None of the opposition Senators devoted any discussion to specific illustrations of "equality"; they, along with the majority, were more concerned with its general and political implications.

After the caucus, only four of the proponents of the amendment found it necessary to make major speeches, Poland of Vermont, Howe of Wisconsin, Henderson of Missouri, and Yates of Illinois. (Globe, pp. 2961, 3031, 3037, App., p. 217.) Senator Poland was first, and he argued the necessity and justice of reconstruction generally. (Globe, p. 2961.) As to section 1, he declared that its provisions were largely a restatement of those in the original Constitution. Nevertheless,

> we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the

> power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States * * *. (Globe, p. 2961.)

Senator Howe, arguing the necessity of radical reconstruction policies, directed attention to section 1. (Globe, App., p. 217.) His is an important speech, because it went beyond generalities and dealt expressly with the amendment's application to public schools. Howe attacked Senator Hendricks' argument that state rights were invaded by the amendment, for no state had a right to have an "appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws." (Globe, App., p. 219.) But for Federal intervention, the Southern states would have continued to deny "to a large portion of their respective populations the plainest and most necessary rights of citizenship." As a result of such intervention, he acknowledged that most of those states had granted some basic rights, such as contract, ownership, suit, and the like; but

> these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (Globe, App., p. 219.)

The single instance of continuing inequality which Senator Howe cited to illustrate the need for section 1 was "a statute enacted by the Legislature

of Florida for the education of her colored people." He analyzed for the Senate the details of the inequality of that statute: First, there was unequal taxation, for

> They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men. (Globe, App., p. 219.)

Moreover under the statute there was an insufficient sum provided for Negro education, only about twelve thousand dollars, of which all but $2,200 was to pay the superintendent of colored schools and the assistant superintendents. Finally, the Negro schools in Florida, he said, could not be satisfactory, since their administration would be subject to the uncontrolled discretion of the superintendents:

> Into that school, however, it is worthy of remark that no child can go without permission of the superintendent or his assistant, * * * and the teacher who has paid five dollars for the permission to teach cannot hold that permission a day longer than the superintendent or assistant superintendent see fit to allow * * *. (Globe, App., p. 219.)

Since legislation of this degree of inequality, touching "one of the great interests not only of

this colored population but of the State itself," had been already enacted, Senator Howe asked if there could possibly be hesitation in amending the Constitution to place a "positive inhibition upon exercising this power of local government to sanction such a crime * * *." His speech thus clearly reflects an understanding that school legislation which discriminated against Negroes would be invalidated by the amendment.

Following Howe, Senator Henderson, draftsman of the Thirteenth Amendment, defended the new proposal. (Globe, p. 3031.) He said that the South, after the adoption of the Thirteenth Amendment,

> saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave. (Globe, p. 3034.)

He referred explicitly to the anti-slavery origins of the new amendment; to him, the Southern position that the Negro was "inferior to the white man" had caused the war because it came into irreconcilable conflict with the "opposite idea of man's equality * * *, carrying with it equal rights and equal privileges." After the war, it

had become necessary "to consider whether the cause of disease should be removed entirely or be left in the system to fester again." The amendment, he said, was the only way to remove the cause of disease.

Senator Yates likewise expressed the belief that as a result of the Thirteenth Amendment the freed Negro had in law become "one of the people, one of the body-politic, and entitled to be protected in all his rights and privileges as one of the citizens of the United States." (Globe, p. 3037.)

Following some unsuccessful attempts by the opposition to have the sections of the amendment submitted as separate propositions, and to strike out the privileges and immunities clause because it was too vague, the final vote was taken on June 8. (Globe, p. 3042.) The amendment was adopted by a vote of 33–11, more than the necessary two-thirds. (*Ibid.*)

In the House, the amendment was called up by Stevens on June 13, with the statement that the Senate amendments were so slight that there was no purpose in having lengthy discussion. (Globe, p. 3144.) There was a brief debate of a general nature not directed at any specific provisions of the amendment. (Globe, pp. 3144–3148.) That same day, the amendment, in the form in which it had passed the Senate, was approved by the House by a vote of 120 to 32.[60]

[60] (Globe, p. 3149.) The Fourteenth Amendment, as thus submitted, reads as follows:

E. RATIFICATION OF THE FOURTEENTH AMENDMENT BY THE STATES

In contrast to the abundance of materials relating to the legislative history of the Fourteenth Amendment in Congress, the available records concerning its ratification by the state legislatures

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"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 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

are scanty and incomplete.[61] State legislative debates for the period were not reported, except in Pennsylvania and, in digest form, in Indiana. Official records of state action are limited to the messages of the Governors transmitting the proposed Amendment to the legislatures, often as merely a minor item in the annual message, occasional committee reports, and items entered in the legislative journals.

The Fourteenth Amendment was proposed by Congress on June 16, 1866. It was declared adopted on July 28, 1868, after thirty states had ratified it. During the years 1866 and 1867 it was ratified by twenty-two states, including only Tennessee of the eleven former Confederate states.[62]

"SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

[61] Our research in the state materials has necessarily been limited to those available in the Library of Congress, including its Microfilm Collection of Early State Records prepared under the supervision of Professor W. S. Jenkins, of the University of North Carolina. Detailed accounts of the ratification proceedings in all of the states appear in the Appendix to this brief.

[62] In three of these states—Ohio, New Jersey and Oregon—resolutions were passed by the state legislature in 1868 to withdraw the prior consent to the Amendment. In each in-

It was rejected by three border states and the other Southern states. In 1868, as a condition of restoration under the Reconstruction Act, seven Southern states ratified the Amendment, along with Iowa, and it came into effect. Subsequently, in compliance with the Reconstruction Act, the other three Southern states ratified.

Ratification by the Northern states in 1866 and 1867 was on the basis of party lines, with the Republican legislatures approving the Republican plan of reconstruction for the South. Rejection by the Southern and the border states was based on opposition to that plan of reconstruction. In both cases the emphasis was upon the political clauses.[63]

The Fourteenth Amendment as "a plan for reconstruction for the South" was a highly controversial party issue in the elections of 1866. Interest centered on its political clauses: the redistribution of representation under section 2 and the related question of Negro suffrage; the disqualification of Southern leaders under section 3; and the war debt provisions of section 4. References to the first section during the election campaigns were, as a rule, brief and general in nature, such as, for instance, that this section made the Civil Rights Act of 1866 a part of the Constitution, that

stance the attempted "rescission" came after a change in the party control of the legislature. See Flack, *The Adoption of the Fourteenth Amendment* (1909), pp. 165–168, 170.

[63]A more detailed review is in Flack, *supra*, chs. III, IV.

it meant Negro equality, or that it centralized power in Congress.[64]

With emphasis during the campaign of 1866 on the political clauses and with little need after the election to do more than carry out the decision of the voters, there was little occasion to analyze the Amendment in detail, and still less occasion to discuss the specific applications of the first section. The Governors' messages to the state legislatures were in general terms, as were the committee reports recommending ratification.[65]

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[64] See Flack, *supra*, pp. 140–160.

[65] Governor Morton of Indiana, for example, said little more than that

"No public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no arguments in its behalf before this General Assembly. Every member understands it. * * *" (Indiana Senate Journal 1867, p. 42.)

Governor Crawford of Kansas submitted the Amendment with this comment:

"Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I believe the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood." (Kansas Senate Journal 1867, p. 45.)

Governor Fenton of New York, in recommending adoption of "a proposition so moderate and so just" stated that

"I need not discuss the features of this amendment; they have undergone the ordeal of public consideration since the adjournment of Congress in July last, and they are understood, appreciated and approved. * * *

There were sufficient references to the first section to show an understanding that it guaranteed to the Negroes full rights as citizens, but the exact content of those rights was not spelled out. It was to provide "civil equality before the law,"[66] "equal protection of all citizens in the enjoyment of life, liberty and property,"[67] "all the political and civil rights citizenship confers,"[68] and "to destroy all legal caste within our borders."[69]

The first section was intended

> to destroy every distinction founded upon a difference in the caste, nationality, race or color * * * which has found its way into the laws of the Federal and State Governments which regulate the civil relations or rights of the people. * * * In all matters of civil legislation and administration there shall be perfect legal equality in the advantages and securities guaranteed by each State to everyone here declared a citizen.[70]

In the debates in Pennsylvania, where school segregation existed, Senator Landon expressed this idea more forcefully:

"There is no other plan before the people, and the verdict of the ballot-box implies that no other plan is desired. * * " (New York Assembly Journal 1867, vol. 1, pp. 13–14.)

[66] Governor Bullock, Massachusetts Acts and Resolves 1867, p. 820.

[67] Governor Brownlow, Tennessee Senate Journal, Called Session, 1866, p. 4.

[68] Governor Oglesby, Illinois Senate Journal, 1867, p. 40.

[69] Taylor in the Pennsylvania debates. Pennsylvania Legislative Record, 1867, App., p. XXII.

[70] Jenks, opposing ratification, in the Pennsylvania debates, *id.* p. XLI.

> * * * You ask me: what do you want for the colored man? I reply, do you let the white rebel go to school? I claim that the colored man shall go to school; do you protect the white man before the law, you shall protect the colored man before the same law; do you punish a crime in a colored man, you shall punish the same in a white man in the same way; and a virtue that will reward a white man shall be rewarded in the colored man. Do you let the white rebels of Carolina or Florida vote, then in the name of Heaven command that the colored man in the same State shall vote.[71]

Opposition to the amendment, in so far as it referred to the first section, was based on its transfer of power to the Federal Government.[72]

In the South, where the Amendment was at first rejected, emphasis was given to the political clauses, particularly those dealing with representation and with disqualification of the former

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[71] *Id.*, p. IX.

[72] Thus, the minority report of the Wisconsin Senate Committee on Federal Relations commented that

"The first section, in connection with the fifth, will give to the federal government the supervision of all the social and domestic relations of the citizens in the state and to subordinate state governments to federal power." (Wisconsin Senate Journal 1867, p. 98.)

The minority report in New Hampshire characterized the Amendment as

"* * * a dangerous infringement upon the rights and independence of all the States, North as well as South, assuming, as it does, to control their legislation in matters purely local in their character." (New Hampshire House Journal 1866, pp. 176–177.)

leaders of the South.[73] The validity of the procedure by which the Amendment was submitted was also attacked, the argument being that a Congress from which representatives of the Southern states were excluded could not properly propose an amendment.[74]

The first section was attacked, not so much on the ground that it extended rights to the Negroes, but that it, together with the fifth section, enlarged the powers of the Federal Government to such an extent as to destroy the rights of the states.[75]

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[73] See Flack, *supra*, p. 159.

[74] See, for example, the report of the Georgia Joint Committee on the State of the Republic, Georgia Senate Journal, 1866, pp. 65–71.

[75] For example, Governor Patton of Alabama, in recommending rejection of the Amendment, stated as an objection to the first section that:

"It would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity. It would give to the United States courts complete and unlimited jurisdiction over every conceivable case, however important, or however trivial, which could arise under the State laws. Every individual dissatisfied with the decision of a State court, might apply to a Federal tribunal for redress." (Alabama Senate Journal 1866, p. 33.)

Governor Walker of Florida, referring to the first and fifth sections, stated that:

"These two Sections taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely

The later messages of the Southern Governors recommending ratification of the Amendment because such ratification was a condition precedent to readmission into Congress contained no analysis of the Amendment. The ratification of the Amendment by the Southern states was perfunctory, without any discussion of its meaning or effect.[76]

In our review of the records of the ratification proceedings, the specific references to the possible effect of the Amendment on education consist of three brief statements: that of Senator Landon of Pensylvania, quoted *supra,* p. 62; a statement by Representative Ross in the Indiana debates that under the Amendment "The blacks would sit with us in the jury-box, and with our children in the common schools";[77] and a report

changing the form of government." (Florida Senate Journal 1866, p. 8.)

[76] A typical example was Governor Murphy's message to the Arkansas legislature in which he remarked that:

"As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention to the importance of early attention to the ratification of the same." (Arkansas House Journal 1868, p. 19.)

The record of House action is equally typical.

"On motion of Mr. SIMS, the rules were suspended by a two-thirds vote, and the joint resolution was placed on its second reading; after which it was engrossed, and read a third time and put upon its final passage by calling of ayes and nays." (*Id.*, p. 22.)

[77] Brevier Legislative Reports, 1867, p. 80.

from a Kentucky contributor to a newspaper that the Democrats in Kentucky say "That amendment admits * * * their children to the public schools. * * *" [78]

The paucity of the available materials on the ratification of the Fourteenth Amendment by the states is such as to preclude any definite conclusion as to the existence of any general understanding of the effect which the Amendment would have on racial segregation in public schools. Apart from the few scattered references given above, we have found no manifestations of an awareness in the state legislatures that the Amendment would affect public education, as this Court later held in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, and related cases (see pp. 143–149, *infra*), by imposing on a state the duty of furnishing such education to all its citizens, if furnished to some, on a basis of equality of right. The available materials do show that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates (pp. 20–56, *supra*), namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color.

[78] McPherson's *Scrap Book*, *Fourteenth Amendment*, p. 84 (name of paper not given).

F. CONTEMPORANEOUS ACTIONS, FEDERAL AND STATE, BEARING ON SCHOOL SEGREGATION

The Reconstruction period, during which the Fourteenth Amendment was adopted, also witnessed other actions, both in Congress and the states, which are relevant to an inquiry into the contemporaneous understanding of the Amendment's effect on school segregation. The 39th Congress in 1866 also passed laws concerning (a) the schools maintained by the Freedmen's Bureau, and (b) the public schools in the District of Columbia. In the proceedings in Congress in 1868 and 1870 on the readmission of the Southern states there were some references to the matter of public school education for Negroes. In later Congresses, repeated efforts were made, particularly under the leadership of Senator Sumner, to provide specific enforcement of the rights secured by the Fourteenth Amendment. These efforts culminated in the Civil Rights Act of 1875. At one stage in its legislative history that Act contained a provision forbidding racial segregation in public schools. In the states, various actions were taken to provide public education for Negroes. In some states, particularly in the North, existing laws for segregated schools were continued; in other states, particularly in the South, school segregation laws were enacted shortly after the Fourteenth Amendment was adopted; in still other states, provisions for mixed schools were enacted. In this section of the brief

we shall summarize these actions, both federal and state, and attempt to evaluate them as evidence of a contemporary understanding as to the Fourteenth Amendment's effect on racial segregation in public schools.

1. Federal legislation in the 39th Congress

(a) *The Freedmen's Bureau Extension Act.* In May 1866 there was again raised in the House the question of extending the life of the Freedmen's Bureau and providing it with the authority to safeguard the welfare and civil rights of the freedmen. (Congressional Globe, 39th Cong., 1st Sess., p. 2743.) Representative Eliot reported from his Select Committee on Freedmen a bill (H. R. 613) similar to the one vetoed by President Johnson in February 1866 (*supra*, pp. 23–25), and it passed the House without any particularly significant discussion. (Globe, p. 2878). In the Senate, it was referred to the Military Affairs Committee, of which Senator Wilson was chairman, and was favorably reported with substantial amendments. (Globe, p. 3409). It passed the Senate in June, but was vetoed by the President. (Globe, pp. 3413, 3838.) With no discussion, the veto was overridden in both House and Senate, and the bill became law July 16, 1866. (Globe, pp. 3842, 3850; 14 Stat. 173.)

The House version of the bill had made provision for the maintenance of schools for the freedmen, with equipment and teachers to be supplied

by private societies.[79] The Senate kept that provision, and added a provision for financing the schools from the property of the Confederate States. (Globe, pp. 3409, 3410.) After the termination of the Freedmen's Bureau, the remaining proceeds of such property were to be distributed proportionately to those southern states "which have made provision for the education of their citizens without distinction of color." There was also resolved a long-standing dispute as to the disposition of certain islands off Georgia and South Carolina, which General Sherman had devoted to the freedmen's use. (Globe, p. 2809.) One provision in resolution of that dispute distributed the proceeds of a certain portion of those lands to "the support of schools, without distinction of color or race, on the islands in the parishes of St. Helena and St. Luke." (Globe, p. 3409.)

These two provisions are the only instances in which the 39th Congress legislated directly to establish schools that were financed in whole or in part from Federal funds, and it is noteworthy that in these provisions it expressed a policy

[79] The educational societies concerned were the successors of the former abolitionist groups and adhered to their concepts of equality in civil rights. Thus, the American Freedmen's Union Aid Commission, a central organization of these societies, had in its constitution a provision that "no schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color." *American Freedman* (1866), p. 18.

favoring schools making no distinctions on grounds of race or color.

(b) *School Legislation for the District of Columbia.* A month after the 39th Congress submitted the Fourteenth Amendment to the states, it provided that an earlier school act for the District of Columbia (the Act of June 25, 1864, 13 Stat. 187) should be construed to require the authorities of Washington and Georgetown to pay over certain moneys for the support of the separate colored schools in those cities (Act of July 23, 1866, 14 Stat. 216). A week later, on the final day of the session, Congress passed a bill authorizing a grant of three lots in Washington for colored schools (Act of July 28, 1866, 14 Stat. 343).

Separate schools for colored children had been established for Washington County by the Act of May 20, 1862, 12 Stat. 394, and for the cities of Washington and Georgetown by the Act of May 21, 1862, 12 Stat. 407. When Congress in the Act of June 25, 1864, *supra,* provided a reallocation of taxes for the support of the various District school systems, it left unchanged the existing provisions for separate colored schools. It is to be noted that none of the foregoing measures received much attention in Congress. There were no written committee reports. All were considered perfunctorily as part of routine District business, and were passed with scarcely any debate or division in vote. (Globe, 37th Cong., 2d Sess. pp.

1544, 2037, 2157; Globe, 38th Cong., 1st Sess., pp. 2814, 3126.)[80]

It is contended that the 1866 school legislation for the District of Columbia evidences an understanding by the 39th Congress, which proposed the Fourteenth Amendment, that the Amendment did not prohibit racially-segregated schools. We believe that no persuasive inference can be drawn of any connection between these acts and the Amendment. In the first place, separate schools in the District for colored children had been established by Congress four years before the Fourteenth Amendment was proposed. The 1866 Acts were only implementations of the existing legislation. The legislative history of those measures contains no indications that they were regarded as having any relation to the Fourteenth Amendment. The latter was the product of the Joint Committee on Reconstruction; the District schools bills were reported by the Senate and House District Committees, none of whose members was on the Joint Committee. (Globe, 39th Cong., 1st Sess., pp. 11, 21, 57, 106.) The Amendment was passed by Congress only after prolonged and searching debate, while the school measures were considered perfunctorily, amid a welter of routine District business. There were no committee

[80] Cf. *Metropolitan Rd.* v. *District of Columbia*, 132 U. S. 1, 5, on the limited extent of interest and interference by Congress in the internal affairs of the District prior to the Organic Act of 1871, 16 Stat. 419.

reports, no debate or noteworthy comment. There was no roll call vote in either House or Senate on these bills. (Globe, 39th Cong., 1st Sess., pp. 2719, 3906, 4278.)

The Act of July 23, 1866, dealt with a question raised in a local controversy regarding the allocation of school funds. It merely provided that there would be made available for the Negro schools, newly-created under the legislation of 1862, the funds which the Congress had previously committed for their support, but which had been locally withheld. Similarly, in the Act of July 28, 1866, the question was merely one of easing the financial burden of supporting the Negro schools by the donation of building sites. In the debates on these bills, characterized by their sponsor, Senator Morrill of Maine,[81] as "very small measures * * * which will take no great time anyway" (Globe, 39th Cong., 1st Sess., p. 2716), there is no evidence that any member of Congress thought that its action on these measures would constitute a legislative interpretation of the Fourteenth Amendment, or indeed that the Amendment was in any way relevant. Congress was exercising its exclusive jurisdiction over the District, to which the Fourteenth Amendment in terms did not apply. Moreover, the conditions prevailing in the District during this period

[81] Senator Morrill, in the debates during this same session on the Civil Rights Act, expressed the conviction that the Constitution forbade distinctions based on race or color. (Globe, 39th Cong., 1st Sess., pp. 570–571.)

were such as to make the question of mixed or separate schools relatively unimportant. Throughout the entire period the overriding problem was to make a beginning in providing some schools for Negroes. Prior to the war, the problem of Negro education had been completely disregarded by the Congress; and at each step taken after 1860, attention was focussed on the need of creating educational facilities for a race that theretofore had received no public educational benefits. Details of school organization were subordinated to that need, and were not considered and discussed in Congress.

2. Legislation in Congress after 1866

(a) *Readmission of the Southern States.* Under the Reconstruction Act of March 2, 1867 (14 Stat. 428) the Southern states, as a condition of representation in Congress, were required to form "a constitution of government in conformity with the Constitution of the United States in all respects" which was to be submitted to Congress "for examination and approval." In 1868, the new constitutions were submitted to Congress by Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, and South Carolina, and those states were readmitted (15 Stat. 72, 73). None of these state constitutions provided for separate schools for colored children; in at least three of them (Louisiana, South Carolina, and Florida) a provision for mixed schools was expressed or implied. (See *infra,* pp. 97–98.)

In the House debates, opponents of the reconstruction program unsuccessfully objected to provisions in the constitutions of Alabama (Congressional Globe, 40th Cong., 2d Sess., pp. 1937, 2197), Arkansas (Globe, p. 2395), Louisiana (Globe, p. 2449), and South Carolina (Globe, p. 2447), which they thought required mixed schools.

In the Senate debates on the readmission of Arkansas, Senator Drake of Missouri proposed the following condition:

> That there shall never be in said State any denial or abridgment 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. (Globe, p. 2748.)

Senator Henderson of Missouri offered as a substitute:

> * * * the further condition that no person on account of race or color shall be excluded from the benefits of education, or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State.

In the ensuing colloquy it appeared that Senator Henderson feared that the term "or of any other right" in Senator Drake's proposal might be construed as requiring mixed schools. Accordingly, his substitute was intended explicitly to permit separate schools. (Globe, p. 2748.)

In answer to a question from Senator Henderson, Senator Frelinghuysen of New Jersey (not a member of Congress when the Fourteenth Amendment was proposed) stated his view that neither the Drake proposal nor the Amendment "touches that question, as to what school they shall be educated in * * *." (Globe, p. 2748.) Senator Henderson explained that:

> I desire that the negroes shall have an equal right in the school moneys, but that the State may require them to be educated in different schools from the whites. * * * But I would not provide here by a condition that the States should extend the same rights to the negroes in regard to office-holding, marrying, or anything else, that they do to the whites * * *

His amendment was defeated, however, by a vote of 30 to 5 (*ibid*). The Drake amendment was agreed to,[82] but subsequently the Senate accepted the House version of the bill not containing that amendment.

In 1870 Virginia (16 Stat. 62), Mississippi (16 Stat. 67) and Texas (16 Stat. 80) were read-

[82] The omnibus bill for the admission of other Southern states, reported from the Judiciary Committee the next day (Globe, p. 2759), contained the Drake amendment with the words "or any other right" omitted. Senator Trumbull explained that their insertion "might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri did not intend; and as the committee thought there was no importance in the words they are left out of the amendment." (Globe, p. 2858.)

mitted. Each act of admission contained a condition:

> That the constitution * * * shall never be so amended or changed as 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.

The bill for the admission of Virginia as reported by the Committee on Reconstruction (H. R. 783, 41st Cong., 2d Sess., Globe, p. 362) contained an express prohibition on amending the state constitution:

> * * * to prevent any person on account of race, color, or previous condition of servitude from * * * participating equally in the school fund or school privileges provided for in said constitution * * *

Its inclusion was explained as required by the bitter hostility to the common-school system expressed by the newly elected Governor of Virginia. (Globe, pp. 402, 442, 546.) It was justified as essential to a republican form of government. (Globe, pp. 485, 500.) Similarly, the provision concerning school rights in the bill for the admission of Mississippi was justified as a means of preserving a republican form of government. (Globe, pp. 1253, 1255.) The view was also expressed that under the Fourteenth Amendment the colored man was entitled to "the same rights and privileges of schools that the white man has * * *." (Globe, p. 1329.) The debates are concerned, however, with the guarantee of education to

the Negroes rather than with the question of separate schools.

Georgia was "reconstructed" a second time (16 Stat. 59, December 22, 1869) and readmitted in July 1870 (16 Stat. 363). The bill for admission of Georgia (H. R. 1335, 41st Cong., 2d Sess.; Globe, p. 1702) contained a condition on school rights similar to that in the Virginia, Mississippi, and Texas acts, but the final act contained no conditions. The debates indicate the same view that opportunity of education for the Negroes was an element of a republican form of government (Globe, p. 1704).

In sum, therefore, the debates on the readmission of the Southern states into the Union fail to disclose any definite understanding as to the effect of the Fourteenth Amendment on school segregation, but it is of some significance that none of the state constitutions submitted to and approved by Congress as being "in conformity with the Constitution of the United States in all respects" provided for segregated schools (see *nfra,* pp. 97–98).

(b) *Legislative Attempts to Abolish School Segregation in the District of Columbia.* In 1871 the issue of public schools of the District of Columbia came squarely before the 41st Congress. On January 23, 1871, a bill was introduced in the Senate, S. 1244, to regulate the organization and conduct of the public schools in the District of Columbia. (Globe, 41st Cong., 3d Sess., p. 663.) The bill was reported by the District Committee

with an amendment which would abolish racial segregation in the District schools. (Globe, p. 1054.[83]) The amendment was vigorously supported on the floor of the Senate by Senator Sumner, a member of the District Committee, and several other Senators on the ground that it was required by the principle of equality underlying the Fourteenth Amendment. (Globe, pp. 1055, 1056, 1058.) Sumner stated that "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on his color". (Globe, p. 1055.) Senator Carpenter of Wisconsin agreed:

> Mr. President, we have said by our Constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before the law. Now, Mr. President, that principle covers this whole case. (Globe, p. 1056.)

None of the opponents of the bill explicitly controverted the view that the Amendment's broad

[83] This and succeeding references to the Congressional Globe are, until otherwise noted, to the 41st Cong., 3d Sess.

principle applied to racial segregation in the schools. (See Globe, pp. 1054, 1056, 1057, 1059, 1060.) The bill, however, was dropped without any vote, in favor of more pressing business, and was not taken up again. (Globe, p. 1061.)

Another bill was introduced by Senator Sumner in the next Congress on December 12, 1871. (S. 365, Globe, 42d Cong., 2d Sess., p. 68.) This bill, "to secure equal rights in the public schools of Washington and Georgetown," would also have abolished racial segregation in those schools. Like its predecessor, it was put aside, after a brief debate containing nothing of significance here, without any vote, in favor of other business. (Globe, 42d Cong., 2d Sess., pp. 2539, 2542, 3057, 3058, 3099–3100, 3122–3125.)

(c) *Civil Rights Act of 1875.* The issue of racial segregation in public schools came before the Congress for extended but indecisive consideration between 1870 and 1875 in connection with the efforts of Senator Sumner and others for further civil rights legislation.

Sumner, advocate of the 1871 proposals to abolish racial segregation in the District public schools, had in 1870 introduced a bill to secure the right of all citizens throughout the United States to "full and equal enjoyment" in respect of theaters, conveyances, inns, and public schools. (S. 916, 41st Cong., 2d Sess., Globe, p. 3434.) In substantially its original form, it was reintroduced

in each subsequent Congress until 1873, but without success. In 1872, it was twice attached to amnesty bills in the Senate. (H. R. 380, H. R. 1050, 42d Cong., 2d Sess., Globe, pp. 919, 3268.) Both of these amnesty bills (with the civil rights rider) failed because they did not receive in the Senate the two-thirds vote required under section 3 of the Fourteenth Amendment, although they did receive majority approval. Similarly, efforts during the same session to suspend the House rules to bring up the House counterpart of Sumner's bill failed of the two-thirds vote necessary, despite clear majorities. (Globe, 42d Cong., 2d Sess., pp. 1956, 3383, 3932, 4321–4322.) The debates in Congress on these bills proceeded on the understanding that they would require non-segregated schools throughout the country, and this was one of the most controversial points in issue. (Globe, 42d Cong., 1st Sess., App., p. 216; Globe, 42d Cong., 2d Sess., pp. 241–243, 384; 2 Cong. Rec. 4088.)

In 1873, in the first session of the 43d Congress, Sumner again introduced a bill prohibiting segregation generally, including segregation in the schools. Civil and criminal penalties were provided for violation. (S. 1; 2 Cong. Rec. 10.) In March 1874, a month after Sumner's death, the bill was reported favorably by the Senate Judiciary Committee. (2 Cong. Rec. 3053.) An attempt on the floor to amend the bill by adding a provision permitting "separate but equal" schools

failed (2 Cong. Rec. 4167), and in May the bill passed the Senate (2 Cong. Rec. 4176). However, several efforts to bring the bill up for consideration in the House failed because of dilatory tactics on the part of the minority. (2 Cong. Rec. 4242, 4439, 4691, 5162.)

In 1874, in the second session of the 43d Congress, the House Judiciary Committee reported a civil rights bill similar to Sumner's, but containing a provision expressly permitting "separate but equal" schools. (H. R. 796; 3 Cong. Rec. 116.) Consideration on the floor was again impeded by the tactics of the minority, which forced one continuous three-day session. (3 Cong. Rec. 786–829.) A compromise was finally reached (see *infra*, pp. 82–84), and the bill passed the House on February 4, 1875, after deletion not only of the provision for segregated schools, but also of any reference whatever to schools. (3 Cong. Rec. 1010, 1011.) Senate approval of the bill, in the compromise form, followed shortly thereafter. (3 Cong. Rec. 1870.) The bill, which has come to be known as the Civil Rights Act of 1875, became law on March 1, 1875, 18 Stat. 335.[84]

The members of Congress who throughout this period persisted in their advocacy of unsegregated schools included many who had been prominent

[84] This Act was declared unconstitutional in 1883 in the *Civil Rights Cases*, 109 U. S. 3, the Court holding that the Fourteenth Amendment's prohibitions extended only to state and not to individual actions.

in the passage of the Fourteenth Amendment in 1866.[85] Sumner was their leader until his death. His view, frequently expressed, was that the Reconstruction Amendments had established the sweeping principle that

> all persons without distinction of color shall be equal before the law. Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. Notoriously, the hotel is a legal institution, originally established by the common law, subject to minute provisions and regulations; notoriously, public conveyances are in the nature of common carriers subject to a law of their own; notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color. (Cong. Globe, 42d Cong., 8d Sess., p. 242; see also, *supra,* p. 77.)

To Sumner, public schools[86] established by law could not be maintained on a segregated basis:

[85] For example, in 1874 when the Senate passed Sumner's bill (S. 1) prohibiting racial segregation in the public schools, by a vote of 29 to 16, the majority included nine former members of the 39th Congress—Allison, Boutwell, Conkling, Edmunds, Howe, Morrill of Vermont, Stewart, Washburn and Windom. No Senator who had participated in the framing of the Fourteenth Amendment voted with the minority. 2 Cong. Rec. 4176.

[86] Sumner agreed to provisions permitting segregation in private schools, as proposed by Frelinghuysen. (Globe, 42nd Cong., 2d Sess., 435, 487, 3267.)

> The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. (Globe, p. 384.)

Senators Conkling, Boutwell and Justin Morrill, all members of the Joint Committee on Reconstruction in 1866, apparently shared Sumner's views. (See, e. g., 2 Cong. Rec. 4151, the vote rejecting the "separate but equal" amendment.) Others of the majority likewise rejected the contention that separate school facilities were permissible under the Fourteenth Amendment. To Morton of Indiana, the Senate majority leader, segregation was a violation of the principle of equality embodied in the Fourteenth Amendment, which had taken "from the States the power to make class legislation." (Cong. Globe, 42d Cong., 2d Sess., p. 847.) Senator Pease of Mississippi agreed that there could be no real equality in "equal advantages in separate schools." (2 Cong. Rec. 4154.) See also footnote 40, *infra,* p. 103.

The opposition in the Senate was led by Senator Thurman of Ohio, of the minority party, who argued that equal protection of the laws, with

regard to public schools, required only that school funds should be applied so that "each citizen shall have an equal advantage from its application." (Globe, 42d Cong., 2d Sess., App. p, 26; see 2 Cong. Rec. 4083–4089.) Other members of the minority expressed the view that the requirement of equality was satisfied if the separate facilities were equivalent. (See, e. g., Globe, 42d Cong., 2d Sess., p. 241.)

As discussed *supra,* p. 79, the Sumner bill was not reached in the House, which took up instead a similar bill that contained a provision permitting schools to be "separate but equal". (H. R. 796, *supra.*) The school issue proved a stumbling block, and a compromise was reached on the bill, striking all reference to schools, only a short time before its passage. Congressman Cain of South Carolina, a Negro, indicated that for the sake of unity within the majority party, the Negroes would accede to the elimination of all reference to schools. (3 Cong. Rec. 957, 981–982.) As Congressman Monroe of Ohio stated, the Negroes thought that "their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this [the "separate but equal" provision]." (3 Cong. Rec. 998.) Moreover, the fear was expressed that if the provision requiring mixed schools was insisted upon "then in certain States of the South schools will be abandoned altogther." (3 Cong. Rec. 981.)

The controversy in the House and the reasons for the compromise effected were fully summarized by Congressman Butler of Massachusetts, Chairman of the Judiciary Committee, who himself had also been a member of the 39th Congress:

> There are two kinds of opinion in the republican party on this question. I myself would legislate equal privileges to white and black in the schools, if I had the power, first, to legislate, and secondly, to enforce the legislation. But the difficulty I find in that is, that there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up if we put that provision into the bill. Then comes the provision of the committee that there shall be separate schools wherever schools are supported by taxation. There are some difficulties with an unwilling people in carrying out that provision, and there is an objection to it on the part of the colored people, because they say they desire no legislation which shall establish any class distinction.
>
> Then comes the proposition * * * to strike out all relating to schools. I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools. (3 Cong. Rec. 1005–1006.)

It would appear, therefore, that the compromise form of the bill as enacted represented mutual concessions by the opposing groups, not as to the

substantive issue of the power of Congress to prohibit school segregation, but solely in recognition of the impossibility of securing from the Congress at that time any decision between the conflicting views on this question.

The Congressional actions subsequent to 1866, which have been summarized above, have relevance as early interpretations of the scope of the Fourteenth Amendment. However, as evidence of contemporaneous understanding, their value is doubtful. Although only a few years had elapsed since the adoption of the Amendment, there had occurred a substantial change not only in the membership of the Congress, but in the intensity of the movement, which had reached its high point in 1866 with the proposal of the Fourteenth Amendment, for securing through national action full protection of the Negro's right to equal treatment.

Throughout this period there were consistent legislative attempts to implement the principles of equality embodied in the Fourteenth Amendment. One such attempt, remarkable for its persistence, was the attempt to end segregation in the public schools. While it ended in failure, the consideration and the support it received in Congress indicate that a substantial group in the Congress, at times a majority, regarded it as necessary and appropriate in carrying out the broad principles established in the Fourteenth Amendment. The failure of this effort resulted in part from the use

of dilatory parliamentary tactics by the opposition. Another contributory factor was the belief of a substantial number of Congressmen that legislation to prohibit school segregation would destroy the public school system in the South, then in its infancy, and would thus completely deprive Negroes in that section of the benefit of public education.

The failure to include a provision in the Civil Rights Act of 1875 specifically forbidding public school segregation does not appear to represent a legislative judgment that the Fourteenth Amendment permitted such segregation, or that it could not be judicially construed, in the light of future conditions, to require invalidation of state segregation laws. As has been shown, some members of Congress may have accepted the compromise form of the bill because it would preserve the question of equal educational treatment of Negroes for later judicial determination. No conclusive inferences can be drawn, therefore, from the legislative history of the 1875 Act to show an understanding either that the Amendment precluded or permitted state laws providing for segregation in public schools.

3. State legislation and decisions

At the time when the Fourteenth Amendment was before the states for ratification and during the period immediately after ratification, there was widespread interest and concern in the extension of public education. Prominent in the

discussions was the question of education for the Negroes not merely in the South, where four million freedmen had to be educated to meet their new responsibilities as citizens, but also in the North, where the events of the preceding years had called attention to the status of the Negroes in those states as well.

The movement for general public education, which had begun in the 1830's, took on new impetus in both the North and South after the Civil War. Nearly every Governor's message in the postwar period dealt with the problem of public education in the state, making suggestions for improvement and justifying larger expenditures in the interest of general enlightenment. In the South the Reconstruction constitutional conventions were all concerned with public education. Each of the Constitutions specified that it was the duty of the legislature to make provision for education of all the children of the state, and the first legislatures elected under them passed comprehensive common school laws.

Although the governors, both in the Northern and Southern states, in urging education for the Negroes made their recommendations contemporaneously with submission of the Fourteenth Amendment for ratification, and frequently in the same message, there was no reference to the Amendment as relevant to the question. Education of the Negroes was said to be required

by state constitutional provisions, by natural justice, and by the desirability of educating the citizens of a republic. The question was dealt with not in the framework of federal constitutional requirements, but as a matter of determining state policy.

Congress also regarded education as important for the protection of the Negroes in their new status. As has been noted *supra*, pp. 74–75, in the acts restoring Mississippi (16 Stat. 67), Texas (16 Stat. 80) and Virginia (16 Stat. 62) to representation, Congress specified that the state constitutions should never be amended to deprive any citizen of "the school rights and privileges secured by" those constitutions. Similar provisions were considered and rejected in consideration of the readmission of Arkansas (Congressional Globe, 40th Cong., 2d Sess., p. 2748) and Georgia (Congressional Globe, 41st Cong., 2d Sess., p. 4796). These debates are inconclusive, however, on the relevance of the Fourteenth Amendment to this question, with greater attention being given to education as an element in a republican form of government.

Furthermore, there was no apparent awareness in the states that the Fourteenth Amendment required that education for colored children be furnished on a basis of equality. Thus, the laws

of California,[87] Indiana,[88] and Ohio[89] at the time did not provide schools for colored children in areas where they were insufficient in number to warrant a separate school. Those of Delaware and Maryland allotted to Negro education only taxes raised among the colored population.[90] In New York in 1869 the Supreme Court in *Dallas* v. *Fosdick*[91] sustained the validity of segregated schools in Buffalo, saying that

> The right to be educated in the common schools of the state, is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment.

As is more fully discussed *infra*, pp. 104–110, this failure to appreciate the applicability of the Fourteenth Amendment to the subject of public education appears to have been widely shared at the time, and conceivably may explain the ratification of the Amendment by legislatures in states where school segregation then existed or was established shortly thereafter.

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[87] Cal. Laws 1866, c. 342, sec. 57.

[88] Ind. Laws 1869 (Special Session), p. 41, sec. 3.

[89] 51 Ohio Laws, p. 429, sec. 31 (1853), as amended, 61 Ohio Laws 31, sec. 4 (1864).

[90] Del. Laws 1875, c. 48; Md. Laws 1868, c. 407, c. ix.

[91] How. Prac. Rep. 249, 251 (Sup. Ct. 1869).

a. *Negro education in the North.* At the time of the adoption of the Fourteenth Amendment, Negroes had been given some share in the public school systems established in the great majority of the Northern and border states.[92] The form and extent of their participation varied greatly, from complete absence of segregation in the New England states to strict segregation in others. Some states made segregation mandatory; others left it to the discretion of the local school boards either by specific authority in the state legislation or under the general powers of the local boards; others prohibited the exclusion of colored children from public schools of their choice.[93] Historically, the usual sequence was the establishment of a public school system for white children, followed either by the admission of colored children or by the creation of separate schools for Negroes.

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[92] There were five states outside of the South (Indiana, Illinois, Kentucky, Maryland, and Delaware, the last three being slavery states), which in their laws, either directly or by implication, excluded colored children entirely from the public schools.

[93] The laws of eight states provided generally for separate schools for colored children: California, Kansas, Missouri, Nevada, New York, Ohio, Pennsylvania, and West Virginia. Thirteen states had either no segregation law or expressly prohibited segregation: Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and Wisconsin. The state laws are discussed in detail in the Appendix to this brief. A brief survey is contained in Barnard, *Special Report of the Commissioner of Education*, 41st Cong., 2d Sess., H. Ex. Doc. No. 315 (1871), p. 323 *et seq.*

Although in the North the emphasis was on improved public education for all, the emancipation of the Negroes focussed interest on their education. Governor Morton of Indiana, for example, in his message to the legislature in 1865,[94] urged that, as a matter of "natural justice" as well as "sound political economy" and as an example to the Southern states, the Negroes should be given educational opportunities in the public school system. He said:

> An ignorant and degraded element is a burden and injury to society, whatever may be its color. It therefore becomes a matter of sound political economy, as well as absolute justice, that whatever colored population we may have should be educated, and enabled to become intelligent, industrious and useful members of the community.[95]

Along with the question whether education for the Negroes should be provided, was the question of how they were to be educated, whether in mixed schools or in separate schools. This, too, was discussed without reference to the Fourteenth Amend-

[94] Brevier Legislative Reports 1865, pp. 31–32.

[95] Similarly, in 1869 the Superintendent of Public Instruction in Illinois pleaded with the legislature to extend public education to the 7,000 colored children who were excluded from "all the blessings of public education." (Ill. Doc. 1869, vol. 2, p. 557.) Compare the report of the School Superintendent of Indiana to the state legislature in 1867, in which he concluded that "the welfare of the government, i. e., the State **requires** the education of all the community, hence of the **colored** man. * * *" (Ind. Doc. 44th Reg. Sess. (1867), **Part I**, p. 338.)

ment, at least prior to 1872, when the decision of the Supreme Court of Ohio in *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198, directed public attention to the issue. (See *infra,* pp. 102–103). In 1870, Governor Bowie, in recommending modification of the Maryland school law to provide education for colored freedmen, made no reference to the Fourteenth Amendment:

> * * * If at a period, immediate or remote, they are to become citizens, possessed of the elective franchise, would not sound policy, then, dictate such education of the colored population as would prepare them intelligently to exercise the elective franchise, and as citizens to judge for themselves of the proper workings of our political system, and not be misled by the crafts and clamors of designing and unscrupulous politicians? Education among the colored people of the State would have a beneficial effect in rendering them more valuable in any position they may be destined to fill. It would doubtless render them, as a class, more virtuous and provident, and better members of the community in which they live.[96]

In the decade immediately following the ratification of the Fourteenth Amendment the established basic patterns of non-segregation or segregation in the Northern states continued with only slight changes. The changes in the school laws were, as a rule, directed not toward abolition

[96] Md. Docs. 1870, H. Doc. A, pp. 14–15.

of segregation but rather toward strengthening and equalizing the school rights of the colored children. Some states, such as Michigan (in 1867),[97] and Connecticut (in 1868),[98] declared by statute the right of all children to attend any public school in the district where they resided; others enacted penalties for school boards refusing admission of colored children into the common schools (*e. g.*, Kansas, 1867).[99]

Among the states which had, prior to the ratification of the Amendment, excluded Negroes from the public schools, Indiana admitted them on a segregated basis in 1869,[1] with an amendment enacted in 1877[2] which gave them access to "white" schools where no separate schools were provided or where the colored school did not offer the higher grades available at "white" schools. Illinois, while not expressly providing for segregation in its school law of 1872,[3] considered segregation an administrative matter in the discretion of the county and local school authorities,[4] but insisted that colored children be admitted to some school.[5] In Chicago, as early as 1867 more satis-

[97] Mich. Laws 1867, Act No. 34.

[98] Conn. P. L. 1868, p. 206. Similar laws were already in force in Minnesota (1864) and Rhode Island (1866).

[99] Kans. Laws 1867, ch. 125.

[1] Ind. Laws 1869 (Spec. Sess.), p. 41.

[2] Ind. Laws 1877, p. 124.

[3] Ill. P. L. 1872, p. 700.

[4] Report of Superintendent of Public Instruction, 1869–70. Ill. Doc. 1871, part 1, pp. 355–356.

[5] Ill. P. L. 1874, p. 120.

factory experience with mixed schools than with segregated schools was reported.[6]

Kentucky did not provide for a "common school system for the colored children" until 1874,[7] making it unlawful for children of any race to attend a school assigned to the other. Maryland in 1872, and Delaware in 1875, provided for separate public schools for Negroes.[8]

The contemporary discussions on segregated schools that are available do not show that the lawmakers and school administrators were aware of the relevance of the Fourteenth Amendment to the subject. The closest reference found is the remark of the Superintendent of Public Instruction of Indiana in 1868 that "whatever distinctions may have been previously made in the rights and privileges of citizens by our laws, they have been set aside by the emendations of our National Constitution and the 'Civil Rights Bill.'"[9] The context makes it clear that he was referring to the total exclusion of Negroes from the public school system; he pleaded for Negro education, but being aware of the "deeply-seated prejudice in the minds of many citizens," he suggested separate schools,[10] follow-

[6] Report of Superintendent of Public Instruction of Indiana, 1867–68, pp. 26–27, Ind. Doc. 1867–68, part 1.

[7] Ky. Laws 1873–74, ch. 521.

[8] Md. Laws 1872, c. 377, c. xviii (cf. Md. Laws 1868, c. 407, c. ix); Del. Laws 1875, ch. 48.

[9] Report of Superintendent of Public Instruction, 1867–68, p. 23. Ind. Doc. 1867–68.

[10] *Ibid.*; and see Report, 1865–66, Ind. Doc. 1867, Part 1, p. 339.

ing the lead which Governor Morton had taken as early as 1865.[11] The debates on the Indiana school law of 1869 dealt with the question whether the inferior treatment of Negroes in schools satisfied the state constitutional requirements of equality, but no reference was made to the Fourteenth Amendment.[12]

In Illinois, the Superintendent of Public Instruction insisted in strong terms on the Negroes' right to an "equal education" as required by the state constitution of 1870 and implemented by the school law of 1872.[13] In his view,[14] the equality required by the state constitution was satisfied by either separate or mixed schools.[15]

The rulings of the Commissioner of Common Schools in Ohio, in 1869 and 1870, emphasized that colored youths have "precisely the same right to school funds" that white youths have; where their number is too small for a separate school, the school board has discretion either to admit them to the white school or to "have them taught in

[11] Brevier Legislative Reports (1865), pp. 31–32.

[12] 10 Brevier Legislative Reports (1869), pp. 193 *et seq.*, 340 *et seq.*, 490 *et seq.*; 11 *id.* (1869 Extra Session), pp. 114 *et seq.*, 387 *et seq.*

[13] Report of Superintendent of Public Instruction, 1871–72, Ill. Doc. 1873, vol. 2, p. 231 *et seq.*

[14] *Id.*, 1869–70, Ill. Doc. 1871, p. 355, *et seq.*

[15] Subsequently, the Superintendent adopted the view sustained in *State ex rel. Garnes* v. *McCann*. 21 Ohio St. 198 (1872), that the Fourteenth Amendment permitted separate schools. *Id.*, 1873–74, p. 416.

some other way"; "but they must be taught till their funds are exhausted." [16]

In the Constitutional Convention in Ohio in 1873 and 1874 there was a brief discussion of school segregation.[17] A delegate unsuccessfully proposed a constitutional amendment providing for separate schools for the two races, "so as to give each the equal benefit of a common school education," but with local option for mixed schools.[18] He argued that education was a matter exclusively for the states and urged his amendment "in order to have the Constitution of Ohio stand up for its own citizens against Federal usurpation * * *" in the form of the Fourteenth Amendment.[19]

In a debate on segregation in 1867 in the Pennsylvania legislature, in connection with a law providing for homes for soldiers' orphans,[20] the sponsor of a proposal for nonsegregated homes emphasized the inequalities which resulted from segregation in the common school system. No mention was made of the Fourteenth Amendment.

b. *Negro Education in the South.* In the Southern states there had been no public education for Negroes, and in most states any education for Negroes was prohibited. In the immediate postwar period, schools were established by the Freedmen's Bureau and benevolent associations,

[16] 18th Annual Report, Ohio Doc. 1869, p. 885, *et seq.*

[17] Ohio Constitutional Convention, 1873–74, Debates, vol. 2, part 2, p. 2238, *et seq.*

[18] *Id.*, pp. 2238–2839.

[19] *Id.*, pp. 2240–2241.

[20] Pa. Legislative Record 1867, Appendix, p. CCCXLII.

but even for white children the public school systems had been disrupted by the war. (See pp. 8–9, *supra*.)

In the postwar period, education of the Negroes was regarded by the white leaders as a necessity arising out of emancipation, the changed status of the Negroes, and their obtaining the suffrage in the new state constitutions. Governor Smith of Alabama in 1868, for example, urged a common school system with provision for education for the colored people on the ground that

> With enlarged freedom and full opportunities for individual development should come the most ample facilities for obtaining that information that makes a man the peer of his fellows, and enables him to protect his own interests, at the same time that he is better fitted to discharge his duties as a citizen.[21]

Similar recommendations were made by the Governors of Arkansas,[22] Georgia,[23] Louisiana,[24] and North Carolina.[25]

During the years in which the Fourteenth Amendment was before the states for ratification, the question of separate or mixed schools was extremely controversial in the Southern states. In

[21] Alabama Senate Journal 1868, p. 14.

[22] Arkansas House Journal 1868, p. 296.

[23] Georgia House Journal 1870, p. 416.

[24] Louisiana Legislative Documents 1870, Message of the Governor, p. 7.

[25] North Carolina Public Documents 1867–68, Doc. No. 2, Sess. 1868, pp. 5–6.

most of the Reconstruction constitutional conventions, proposals were made to require or to prohibit separate schools.[26] In seven the constitution as adopted contained no specific provision on this point. In Louisiana [27] and South Carolina [28] the constitution required mixed schools, and in Florida [29] the requirement was implied. None required separate schools.[30]

The constitutions were submitted to Congress for approval in accordance with the requirement of the Reconstruction Act that they be "in conformity with the Constitution of the United States in all respects." [31] (See pp. 72–76, *supra.*) In addition to the provisions on education, these constitutions contained general provisions guar-

[26] Alabama Convention Journal, pp. 153, 237–8; Arkansas Convention Debates and Proceedings, p. 645, *et seq.;* Georgia Convention Journal, p. 151; Louisiana Convention Journal, pp. 60–61, 94, 200–2, 268–70, 277; Mississippi Convention Journal, pp. 316, 318, 479–80; South Carolina Convention Proceedings, pp. 71, 88, 100, 685–709, 889–894, 899–901; Texas Convention Journal, I, pp. 896, 898, 912; Virginia Convention Journal, pp. 67, 299, 308, 333, 335, 336, 339, 340.

[27] Louisiana Constitution of 1868, Arts. 135, 136.

[28] South Carolina Constitution of 1868, Art. X, sec. 10.

[29] Florida Constitution of 1868, Art. IX, sec. 1.

[30] The debates in Arkansas and South Carolina contain arguments on the policy of having mixed or separate schools, but do not show any specific reference to the applicability or inapplicability of the Fourteenth Amendment to the question, even though the members of the conventions were aware of the impact of the Amendment on other issues. The debates in the other conventions were not reported, except for the early stages of the Virginia convention.

[31] 14 Stat. 428, sec. 5.

anteeing "equal civil and political rights and public privileges,"[32] or "the same" rights and privileges,[33] or prohibiting "distinctions" on account of race or color.[34] There were instances of a prohibition on discrimination in places of business or public resort,[35] and a prohibition on distinctions in public institutions.[36] In no instance did the constitution submitted to Congress and approved by it state that inequality or segregation was permitted.

The available records in these states do not, however, show an awareness that the Fourteenth Amendment might be relevant in determining the basis on which public education was furnished. The recommendations made concerning education to the same Reconstruction legislatures which ratified the Amendment contained no reference to it. Segregation was not stated to be permitted by the Amendment, nor was equality in education for Negroes stated to be required by the Amendment.

Except for Arkansas and Florida, none of the ten Southern states had a statutory provision for a segregated public school system at the time it ratified the Fourteenth Amendment.[37] In five

[32] Alabama Constitution of 1867, Art. I, sec. 2.

[33] Louisiana Constitution of 1868, Art. 2.

[34] South Carolina Constitution of 1868, Art. X, sec. 10.

[35] Louisiana Constitution of 1868, Art. 13.

[36] Mississippi Constitution, 1868, Art. I, sec. 21.

[37] An Arkansas statute in 1867 required Negroes to attend separate schools. (Arkansas Laws 1866–67, No. 35, Sec. 5, p. 100.) The new state constitution adopted in

of these ten states, school segregation was established by laws enacted within a year after ratification of the Fourteenth Amendment.[38] In Louisiana, the city of New Orleans succeeded in maintaining separate schools despite the state constitutional prohibition.[39] Again, however, no specific references have been found to show that the advocates of separate schools in these states were aware of the relevance of the Fourteenth Amendment to the question.

c. *State judicial decisions on Negro education.* During the period from 1868 to 1882, the school rights of colored children were litigated in state courts in a number of cases. These cases may be divided into three distinct groups, so far as the relevance of the Fourteenth Amendment is concerned.

April 1868, shortly before the legislature ratified the Amendment, provided generally that free schools for "all persons" should be maintained. Some members of the constitutional convention regarded this as requiring mixed schools. (Arkansas Convention Debates and Proceedings, pp. 660, 666, 672.) In Florida, separate schools for Negroes were established under an 1866 statute. (Florida Laws 1865, No. 12, ch. 1475.) The new state constitution adopted in 1868, before the Amendment was ratified, provided for "the education of all the children residing within its borders, without distinction or preference". (Constitution of 1868, Art. IX, sec. 1.)

[38] Alabama Laws 1868, p. 148 (Act of the Board of Education); Arkansas Laws 1868, No. 52, Sec. 107, p. 163; Georgia Laws 1870, No. 53, Sec. 32; North Carolina Laws 1868–69, ch. 184, Sec. 50, p. 471; Virginia Laws 1869–70, ch. 259, Sec. 47.

[39] Louisiana House Debates 1869, pp. 209–10, 217–20, 246–7.

Some cases were argued and decided solely on the basis of state constitutional and statutory provisions. Thus, the Supreme Court of Iowa held in 1868 that the equality of school rights as guaranteed in the state constitution ("education of all the youths of the State") and as implemented by the school law denied school authorities any discretion to classify school children according to race or color. *Clark* v. *The Board of Directors, etc.,* 24 Iowa 267. Accord: *Smith* v. *The Directors, etc.,* 40 Iowa 518, and *Dove* v. *The Independent School District,* 41 Iowa 689, both decided in 1875. Similarly, in Illinois the state supreme court held in 1874 that school directors had no power under the state constitution and school law to make racial distinctions so as to deprive colored children of the benefits which white children received in the public schools. *Chase* v. *Stephenson,* 71 Ill. 383. A New York court in 1869 sustained the validity of a provision in a city charter requiring separate schools, on the ground that under state law there was no "right" to education. No reference was made to the Fourteenth Amendment. *Dallas* v. *Fosdick,* 40 How. Pr. Rep. 249 (Sup. Ct. 1869). (See pp. 88–89, *supra.*)

In other cases, although the Fourteenth Amendment was mentioned or considered, the decision was placed upon the narrower ground of state constitutional or statutory law. Thus, a Pennsylvania court in 1873 upheld the right of colored

children to be admitted to the white school in a district where no colored school was established. *Commonwealth ex rel. Brown* v. *Williamson,* 10 Phila. 490. In that case the judge applied what he regarded as the clear mandate of the school law, remarking that he failed to see that any right arising out of the Fourteenth Amendment was involved. The Supreme Court of Illinois, in *People ex rel. John Longress* v. *The Board of Education, etc.,* 101 Ill. 308 (1882), held that the state constitution and school law did not permit a school board to assign colored pupils to a school outside the district of their residence. It did not therefore reach the question of the applicability of the Amendment. The Supreme Court of Kansas, in deciding that a school board had no power under state law to establish segregated schools, left open the question whether state legislation authorizing segregated schools would violate the Fourteenth Amendment, pointing out that this question could be finally determined only by the Supreme Court of the United States. *Board of Education* v. *Tinnon,* 26 Kans. 1 (1881). See also *State ex rel. Stoutmeyer* v. *Duffy,* 7 Nev. 342 (1872), which held that the equality of rights guaranteed by the state constitution was violated by the exclusion of Negroes from the public schools, but that the state statute, while "probably" opposed to the spirit of the Fourteenth Amendment, did not violate its letter.

Finally, there is a group of cases in which the Fourteenth Amendment was the main issue and the principal ground of decision. The earliest of these is *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198 (Dec. Term 1871). The Supreme Court of Ohio held that the Amendment had no bearing on such exclusively domestic matters as school legislation, and that if it did, the classification of pupils according to color was not contrary to the Amendment, since all children were provided equal facilities. The *McCann* case became a leading precedent on the question of the validity of school segregation.[40] It was followed in New York (*People* v. *Easton,* 13 Abbott's Pr. R. (N. S.) 159, Sup. Ct., 1872) and Indiana (*Cory* v. *Carter,* 48 Ind. 327, 1874), although in the latter case the facilities for educating colored children were plainly unequal. In California, the Supreme Court reached the same conclusion in *Ward* v. *Flood,* 48 Cal. 36 (1874), relying exclusively upon *Roberts* v. *City*

[40] In the debates on the bill which became the Civil Rights Act of 1875, the minority Senators who unsuccessfully opposed a provision prohibiting school segregation expressly relied upon the *McCann* case, as well as *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, decided in 1850. See Congressional Globe, 42nd Cong., 2nd Sess., pp. 3257, 3261. Senator Frelinghuysen, in charge of the bill, distinguished both the *McCann* case and *Clark* v. *Board of Directors,* 24 Iowa 267, on the ground that they were based on state constitutional and statutory provisions and therefore "afford no precedent for the construction of this bill when enacted. The language of this bill secures full and equal privileges in the schools, subject to laws which do not discriminate as to color." 2 Cong. Rec. 3452. And see pp. 80–82, *supra.*

of Boston, 5 Cush. (Mass.) 198, decided eighteen years before the Amendment was adopted. On the other hand, a lower court in Pennsylvania held that classification of school children according to race or color violated the Fourteenth Amendment. *Commonwealth* v. *Davis,* 10 Weekly Notes 156 (1881).

These various groups of cases, taken in their entirety, thus fail to evidence any general and definite contemporaneous judicial construction of the Amendment as applied to school segregation.

d. *Significance of the contemporaneous state laws providing for school segregation.* The fact that a number of states had segregated school systems when the Fourteenth Amendment was adopted, or established them shortly thereafter, does not necessarily reflect a contemporaneous understanding that the Amendment permitted "separate but equal" schools for colored children. It is argued that this must have been the general understanding at the time, for otherwise these states could not consistently have ratified the Amendment.

The difficulty with this argument, however, is that the historical facts on which it is based do not support the conclusions which are drawn from them. The inquiry here must be, what was the state of mind—so far as their understanding of the scope and application of the Fourteenth Amendment is concerned—of those responsible for the simultaneous ratification of the Amend-

ment and enactment or continuation of school segregation legislation? As has been shown (*supra*, pp. 57–65), virtually no evidence is to be found in the available records of the ratification proceedings indicating that the question of school segregation was considered in connection with the debates on the Amendment itself. Moreover, as has also been shown (*supra*, pp. 86–100), there is little evidence that the state legislators and other officials responsible for the school laws considered the relevance of the Fourteenth Amendment and deliberately concluded that these laws were not in conflict with the Amendment.

This absence of evidence showing an awareness that the Fourteenth Amendment might have some relation to school segregation is consistent with at least five different views which might conceivably have been held on this subject at that time: (1) that the Amendment had no application whatsoever to public education furnished by a state; (2) that the Amendment did apply to public education, but only to the extent that if a state provided education for white children, it also had to provide some education (not necessarily equal) for colored children; (3) that the Amendment permitted a state to have separate schools for colored children, provided the facilities afforded them were substantially equal to the schools for white children; (4) that the Amendment was essentially a grant of power to Congress, and unless or until Congress should

prohibit it from doing so, a state could make such provision for the education of its children as it deemed proper; or (5) that, while the Amendment required that colored children be treated equally with respect to public education, that requirement was then satisfied, in view of the special circumstances existing in the period following emancipation of the slaves, by establishing separate schools for colored children.

It is submitted that, of these various possible conclusions which might be drawn, the one least supported by the available historical materials is that which finds in them a contemporaneous understanding that the Amendment permitted the states to establish separate schools for white and colored children, so long as the facilities furnished were substantially equal. We believe that, while each of these various possible understandings can summon some support, none can be demonstrated to be valid to the exclusion of the others. This question is one as to which historians can rely only on conjecture and speculation rather than on demonstrable fact. In the circumstances, such inferences as may be drawn from the available data are too tenuous and inconclusive to furnish a reliable basis for present-day judicial interpretation of the Amendment.

Because public education was regarded as a privilege conferred by the state, rather than as a right due the citizen, and was supported wholly by state taxation, it may well have been considered

that public schools were wholly within the domestic jurisdiction and discretionary control of each state and therefore unaffected by the Fourteenth Amendment. This possibility is given weight by early decisions of the state courts, e. g., *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198, 207–208 (Dec. Term, 1871); *Ward* v. *Flood,* 48 Cal. 36 (1874); *Cory* v. *Carter,* 48 Ind. 327, 360 (1874); cf. *Cumming* v. *Board of Education,* 175 U. S. 528, 545 (1899), and is perhaps the conclusion which most logically explains the silence of the available contemporary historical materials on the question of the relation of the Fourteenth Amendment to school segregation. As a valid interpretation of the Amendment, however, it has now been emphatically rejected by this Court's repeated holdings that although it is a "privilege," public education, if granted to some citizens, must be extended to all on a basis of equality of right. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629.

One paramount difficulty with the "separate but equal" hypothesis as to the original understanding of the Amendment is its failure to account for the fact that colored children were educated in schools which were not equal even in a physical sense. Patent inequalities were often sanctioned by requiring that schools be established for white children while colored schools were merely authorized or permitted, or

were provided only when a given number of colored children lived in the school district. Even where the laws did not discriminate, colored schools were still largely inferior when compared with white schools on a physical or pedagogical basis. This fact is more consistent with an understanding that the Amendment was satisfied if some provision, however unequal, was made for colored children than with a "separate but equal" understanding. But the former conception of the Amendment, if it existed, has been unequivocally rejected by this Court. *Missouri ex rel. Gaines* v. *Canada, supra; Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra.*

In 1868 public schools had been hardly begun in many states and were still in their infancy. School attendance was, as a general matter, not compulsory. The Negroes had just been released from bondage and were generally illiterate, poor, and retarded socially and culturally. To educate them in the same classes and schools as white children may have been regarded as entirely impracticable. It is possible that state legislatures—while recognizing in the Fourteenth Amendment a clear mandate of equality—may have considered separate schools for colored children as a temporary practical expedient permitted by the Amendment. Many proponents of Negro education regarded separate schools as a more effective means of extending the benefits of the public school system to the colored people; for, since school attendance was generally

not compulsory, fear of discrimination might well have deterred Negro children from attending existing "white" schools in many areas.[41]

It is not necessary to assume that these state legislatures considered their segregated schools as completely free from possible attack under the Amendment, nor does it necessarily follow that they were deliberately flouting its prohibitions. It was widely thought that the Amendment was primarily intended to remove constitutional doubts from the Civil Rights Act of 1866 and to give Congress the power to redress inequalities and discriminations imposed on the Negroes in the states. This is echoed in this Court's opinion in *Ex Parte Virginia,* 100 U. S. 339, 345, which hinted that the federal judiciary might have no power to enforce the Amendment except where expressly authorized by Congress, and also in Senator Sumner's attempts until his death to persuade Congress to use its power under Section 5 to prohibit separate schools. (*Supra,* pp. 76–86.) It is not unlikely that state legislators may have felt themselves free to exercise their judgment as to the desirability of school

[41] "* * * Previously, such [colored] children were received into any public school at which they presented themselves; but the prevailing prejudice against them was so great that many preferred rather to remain away from school altogether than to face it. The provision for separate schools was practically a boon to the colored people, although it probably grew out of an indisposition to permit their children to attend school with white children." J. P. Wickersham, *A History of Education in Pennsylvania* (1886), p. 506.

segregation until Congress should act. It may also have been thought, although not articulated, that the constitutional issue would ultimately be resolved by this Court, and that the states were not bound to observe any constitutional prohibitions against school segregation unless and until this Court should declare them.

All of these hypotheses are possible. None can be demonstrated to be true. We do not contend for the validity of any one above the others. We conclude only that the historical facts, as distinguished from assumptions, are too equivocal and inconclusive to furnish a solid basis upon which this Court can determine the application of the Amendment to the question of school segregation as it exists today, when school attendance is compulsory and when there are no considerations of an educational character which warrant separation of children of different races in public schools.

In striking down various forms of state legislation as unconstitutional racial discriminations, this Court has not been deterred by the existence of such legislation on the statute books during the period when the Fourteenth Amendment was ratified. Thus, in 1879, the Court held that state laws which excluded Negroes from juries denied them the equal protection of the laws. *Strauder* v. *West Virginia,* 100 U. S. 303. Such statutes were to be found in a number of states. *E. g.,* West Virginia (Acts of 1872–1873, p. 102, reenacting chapter 116 of the 1870 Code), Kentucky (Gen. St. 1873 (Bullock & Johnson), ch. 62, Art. III, § 2),

Missouri (Wagner's Mo. Stat. 1870 (2d ed.), ch. 80, § 2), and Oregon (Gen. Laws of Oregon, 1843–1872, Civil Code, § 918). The Court in the *Strauder* case observed (p. 306) that at the time the Fourteenth Amendment was incorporated into the Constitution "it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. *It was well known that in some States laws making such discriminations then existed, and others might well be expected.*" [Italics added.]

In the racial restrictive covenant cases (*Shelley* v. *Kraemer,* 334 U. S. 1; *Hurd* v. *Hodge,* 334 U. S. 24), there was a background of unbroken judicial enforcement of such covenants in nineteen states and the District of Columbia extending over a period of 33 years (No. 72, 1947 Term, Brief for the United States, pp. 40–45). In overturning the rule applied by these decisions, no reference was made either to their number, their uniformity, or their age. And when the Court held in *Nixon* v. *Herndon,* 273 U. S. 536, decided in 1927, that a state statute excluding Negroes from participation in primary elections was a "direct and obvious infringement" of the Fourteenth Amendment, the

prevailing view of the state courts, going back as far as 1887 (*Commonwealth* v. *Helm,* 9 Ky. L. Rep. 532), was that a primary election is "purely a legislative creation" as to which "the legislature was subjected to no constitutional inhibition" (*State ex rel. Hatfield* v. *Carrington,* 194 Iowa 785, 786).[42] Mr. Justice Holmes, speaking for the Court in *Nixon* v. *Herndon,* disposed of the matter in a few words (p. 541): "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

G. SUMMARY AND CONCLUSIONS

(*1*)

The Congressional history of the Fourteenth Amendment shows that the Amendment was proposed and debated as part of a broad and continuing program to establish full freedom and legal equality for Negroes. Many in the Congress which considered the Thirteenth Amendment understood it to abolish not only slavery but also its concomitant legal discriminations. This understanding rested on a belief that that Amendment had made the Negro an indistinguishable part of the population and hence entitled to the same rights and privileges under the laws as all others. The enactment of the Black Codes in

[42] The cases are collected in Mangum, *The Legal Status of the Negro* (1940) pp. 407–409.

the Southern states made it obvious, however, that additional protection by the national government was required.

The civil rights legislation enacted by the 39th Congress was designed to strike down distinctions based on race or color. From the debates on that legislation, however, there emerged the view that the Thirteenth Amendment alone did not afford a sufficient constitutional basis for such action, and that a further amendment was necessary. In the same debates there was also crystallized the view that only explicit constitutional embodiment of the principle of equality before the law could protect that principle from change by some future Congress.

The attempt in the 39th Congress, through the Bingham "equal rights" amendment, to provide a direct constitutional basis for national legislation guaranteeing equal treatment under the law failed because of the belief that it left the matter open to future congressional change and destroyed the balance between federal and state power. The Fourteenth Amendment was proposed to remedy these deficiencies. Section 1 of that Amendment, to both its proponents and opponents, was an express constitutional recognition of the doctrine of "absolute and perfect" equality under the law—the same doctrine which had underlain the Thirteenth Amendment, the civil rights legislation, and Bingham's unsuccessful "equal rights" amendment.

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Neither the majority nor the minority in the 39th Congress evidenced any substantial disagreement as to the broad scope of Section 1 of the Amendment. The majority repeatedly affirmed that it would firmly secure the principle that the "law which operates on one man shall operate equally upon all" and would prohibit all legisation by the states drawn on the basis of race and color. The opposition similarly understood its broad purpose; it was on that basis that they voiced their objections.

While the debates reflect a clear understanding as to the breadth of the principle of equality under law embodied in the Fourteenth Amendment, neither its proponents nor its opponents found it necessary or appropriate to catalog exhaustively the specific application of its general principle. Only a few such examples were given during the debates on the Amendment itself. It is noteworthy that one of the majority spokesmen, at a time when the majority was proceeding under the discipline of party caucus, illustrated the racial discriminations which the Amendment would reach by reference to a state law discriminating against Negroes in public schools. He did not, however, make specific mention of the system of racial segregation which the state law required.

In the debates on the civil rights legislation, which are an integral part of the immediate background of the Fourteenth Amendment, the minority expressed the view that existing state systems of racially-segregated public schools would be

stricken down by the broad principle of equal treatment under the law. This view was not disputed by the majority. A like objection was voiced to Bingham's "equal rights" amendment which sought to embody the same general principle. Again, the majority did not take issue with this understanding of its scope. It is also worthy of note that not only were Bingham's proposal and Section 1 of the Fourteenth Amendment alike in their general purpose; they were also similar in language.

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

(2)

There is a paucity of available evidence as to the understanding of the state legislatures which ratified the Amendment, in part because of the almost complete absence of records of debates, in part perhaps because their function was to accept or reject a proposal rather than to draft one.

In the states most attention was given to the political aspects of the Republican "plan of reconstruction," which received popular approval in the elections of 1866. It was frequently stated that the Amendment guaranteed to the Negroes full rights of equality as citizens, but the scope and content of those rights were not detailed. The opponents of the Amendment objected to the first section on the ground that it, together with the fifth section, expanded the powers of the Federal Government at the expense of the rights of the states. There were almost no references to schools during consideration of the amendment.

At the time of consideration and ratification of the Fourteenth Amendment, some of the Northern states had and continued segregated schools and some of the Southern states, in providing for the first time for public education for Negroes, established separate schools. In the historical context in which these actions were taken, however, they do not evidence an understanding as to the reach of the Fourteenth Amendment. The inferences to be drawn from these actions necessarily rest on conjecture and speculation. The scanty evidence available suggests that the

legislatures were probably unaware that the Amendment was relevant to education, even to the extent of requiring equal, though separate, schools. Proponents of education for Negroes based their arguments on grounds other than the Fourteenth Amendment, and made no reference to it.

In sum, the available materials are too sparse, and the specific references to education too few, to justify any definite conclusion that the state legislatures which ratified the Fourteenth Amendment understood either that it permitted or that it prohibited separate schools.

(3)

There is no direct evidence at the time of the adoption of the Amendment that its framers understood specifically that future Congresses might, in the exercise of their power under section 5, abolish segregation in the public schools. They clearly understood, however, that Congress would have the power to enforce the broad guarantees of the Amendment, and the Amendment was deliberately framed so as to assure that the rights protected by section 1 could not be withdrawn or restricted by future Congresses.

Subsequently, in the debates on the Civil Rights Act of 1875, some of the framers expressed an understanding that segregated schools were contrary to the Amendment and that Congress could and should abolish them. While an express prohibition against segregated schools was not con-

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tained in the Act in its final form, its omission did not spring from doubt of the power of Congress to enact such a prohibition; other types of segregation were barred by the Act. Since section 5 of the Fourteenth Amendment authorizes Congress only to enforce the provisions of the Amendment, the apparently prevalent understanding in Congress that it could prohibit school segregation is evidence of a tacit assumption that segregation in schools was in conflict with the broad principles declared in section 1.

No specific references have been found in the debates on the Fourteenth Amendment to show any expressed contemporary understanding of its framers as to the judicial power, in light of future conditions, to construe the Amendment as abolishing school segregation of its own force. Some evidence of such an understanding is, however, found in the debates on the Civil Rights Act of 1875.

(4)

In the *Slaughter-House Cases,* 16 Wall. 36, decided on April 14, 1873, less than five years after the Fourteenth Amendment was adopted, this Court was called upon for the first time to construe that Amendment. Six years later, in *Strauder* v. *West Virginia,* 100 U. S. 303, the Court first considered the application of the Amendment to a state law involving a racial discrimination. In each instance the opinion of the Court dwelt at length upon the history and purposes of the

Reconstruction Amendments. The studies which have been made in preparing this brief have only served to confirm the accuracy of the contemporary historical observations made in the *Slaughter-House* and *Strauder* opinions by the members of this Court who themselves had lived during the period when the Amendment was adopted. The great events of the Reconstruction period were still fresh in their minds, and required for them no elaborate investigation into recondite historical materials.

Mr. Justice Miller's opinion for the Court in the *Slaughter-House Cases* noted at the outset (pp. 67–68): "The most cursory glance at these articles [the Thirteenth, Fourteenth, and Fifteenth Amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. * * * Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt." After referring to the abolition of slavery by the Thirteenth Amendment, the Court pointed out (pp. 70–71):

> The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the

formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

* * * * *

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

The Court concluded its review of the history of the Amendments as follows (pp. 71–72):

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.
>
> We do not say that no one else but the negro can share in this protection. * * * But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accom-

formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

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These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

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> plished, as far as constitutional law can accomplish it.

In *Strauder* v. *West Virginia,* 100 U. S. 303, Mr. Justice Strong's opinion for the Court contains a similar exposition of the history and objectives of the Fourteenth Amendment (pp. 306–308):

> This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was

abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. * * * It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

> The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.
>
> * * * The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Decided the same day as the *Strauder* case were *Virginia* v. *Rives,* 100 U. S. 313, and *Ex parte Virginia,* 100 U. S. 339, which also involved questions under the Fourteenth Amendment as to exclusion of Negroes from juries. In *Virginia* v. *Rives,* the Court, referring to the civil rights statutes (now 8 U. S. C. 41 and 42) enacted by Congress pursuant to the Fourteenth Amendment, said (p. 318): "The plain object of these statutes, as of the Constitution which authorized them, was

to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Similarly, in *Ex parte Virginia,* the Court stated (pp. 344–345): "One great purpose of these [Thirteenth and Fourteenth] amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color."

Elsewhere in this brief (see pp. 139–141, *infra*) we have quoted at length from the opinions of this Court, extending over a period of more than three-quarters of a century, which show a consistent recognition that the Fourteenth Amendment is to be construed liberally so as to carry out the great and pervading purpose of its framers to establish complete equality for Negroes in the enjoyment of fundamental human rights and to secure those rights against enforcement of legal distinctions based on race or color.

(*5*)

As has been shown, no conclusive evidence of a specific understanding as to the effect of the Fourteenth Amendment on school segregation has been found in its legislative history. But this Court has neither declared nor applied any canon

of constitutional interpretation that a construction of an amendment which is warranted by its provisions and manifest policy cannot be adopted unless it is also affirmatively supported by specific evidence in the legislative history showing that its framers so "intended." See *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 63–64; *Breedlove* v. *Suttles*, 302 U. S. 277. To be sure, the Court will review "the background and environment" of the period in order to illuminate the broad purposes which an amendment was designed to achieve. *E. g., Everson* v. *Board of Education*, 330 U. S. 1, 8; *McPherson* v. *Blacker*, 146 U. S. 1, 27. In attempting to determine the application of the amendment to a specific issue, however, the Court will give scant regard to inconclusive excerpts from debates which are relied upon to show a "legislative intent." The Court's attitude on this subject was summarized in *Maxwell* v. *Dow*, 176 U. S. 581, 601–602, involving a claim that the Fourteenth Amendment was intended to make applicable to the states the jury requirements of the Sixth Amendment:

> Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, * * * and counsel has argued that this court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

* * * It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, * * * does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which members voted in adopting it. * * *

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.

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And see *United States* v. *Wong Kim Ark*, 169 U. S. 649, 699.[43]

The Court has emphasized in many cases that the process of interpreting and applying the provisions of the Constitution, which as Chief Justice Marshall said was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs,"[44] is not comparable to construing a contract or statute, where the judicial task is essentially to ascertain and give effect to the intended meaning of the words used. Constitutional provisions like "due process of law" and "equal protection of the laws" express broad principles of government the essence of which is their vitality and adaptability to the progressive changes and needs of the nation. The Court, speaking through Chief Justice Hughes, has said:[45]

> If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the

[43] Mr. Justice Frankfurter, concurring in *Adamson* v. *California*, 332 U. S. 46, stated (p. 64) that "Remarks of a particular proponent of the [Fourteenth] Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech." And see the concurring opinion of Mr. Justice Bradley in the *Legal Tender Cases*, 12 Wall. 457, 560.

[44] *McCulloch* v. *Maryland*, 4 Wheat. 316, 415.

[45] *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 442–443.

> framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407) * * *.

The opinions of the Court, particularly those which have come to be recognized as landmarks in the development of American constitutional law, are replete with expressions of a similar nature. They are familiar to the Court, and it is not necessary to repeat them here *in extenso.* A few examples will suffice to show how clearly and consistently the Court has articulated this rule of constitutional interpretation:

Weems v. *United States,* 217 U. S. 349, 373–374 (McKenna, J.):

> * * * Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which

> no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. * * *

Gompers v. *United States,* 233 U. S. 604, 610 (Holmes, J.):

> * * * But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. * * *

United States v. *Classic,* 313 U. S. 299, 316 (Stone, J.):

> * * * in setting up an enduring framework of government they [the framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of

> the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

Wolf v. *Colorado*, 338 U. S. 25, 27 (Frankfurter, J.):

> * * * basic rights do not become petrified as of any one time, even though as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.[46]

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[46] See also *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hurtado* v. *California*, 110 U. S. 516, 530–531; *Holden* v. *Hardy*, 169 U. S. 366, 385, 386–387; *South Carolina* v. *United States*, 199 U. S. 437, 448; *Helvering* v. *Davis*, 301 U. S. 619, 640–641; *Rochin* v. *California*, 342 U. S. 165, 169–172; and cf. *Browder* v. *United States*, 312 U. S. 335, 339–340. For non-judicial writings of the members of this Court, see Holmes, *The Common Law* (1881), pp. 35–36; *The Path of the Law*, 10 Harv. L. Rev. 457, 469, 472 (1897); Brandeis, *The Living Law*, 10 Ill. L. Rev. 461 (1916); Hughes, *Addresses* (1916), pp. 354–355; *The Supreme Court of the United States* (1928), pp. 142, 152, 196; Cardozo, *The Nature of the Judicial Process* (1921), pp. 71, 83, 88; *The Growth of the Law* (1924), pp. 73–74, 104, 105–106; *The Paradoxes of Legal Science* (1928), p. 99; Stone, *Law and Its Administration* (1924), pp. 142–143; *Fifty Years' Work of the Supreme Court* (1928), 14 A. B. A. Journ. 428; Reed, *Stare Decisis and Constitutional Law* (1938), No. 35 Penna. Bar Ass'n Quarterly, 131, 141, 142–143, 149; Frankfurter, *Mr. Justice Holmes' Constitutional Opinions* (1923), 36 Harv.

III

IT IS WITHIN THE JUDICIAL POWER, IN CONSTRUING THE FOURTEENTH AMENDMENT, TO DECIDE THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL

Question 3 reads as follows:

> On the assumption that the answers to questions 2 (a) and (b)[47] do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

In the cases at bar the plaintiffs seek an adjudication of their claim that rights secured to them by the Constitution are violated by the maintenance of separate schools for white and colored children. Question 3, as we understand it, requests counsel to consider whether this claim is of such a nature that it falls within the exclusive province of the political branches of government

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L. Rev. 909, 917, 920; *Mr. Justice Holmes and the Supreme Court* (1938), pp. 8, 75; *Law and Politics* (1939), pp. 13, 48, 91, 99, 192, 196; Douglas, *Stare Decisis* (1949), pp. 9, 12; Jackson, *The Struggle for Judicial Supremacy* (1941), pp. 23, 174; *Full Faith and Credit* (1945), pp. 42–43, 58.

[47] Question 2 is:

"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 such 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?"

and cannot properly be entertained and decided by the federal courts. In his opinion for the district court in the *Briggs* case, Chief Judge Parker stated that racial segregation in public schools of the states presents "not questions of constitutional right but of legislative policy * * *. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in the interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter." (No. 1, R. 186–187.)

1. It is respectfully submitted that the constitutional question before this Court is not the same as that before a state legislature considering whether, solely as a matter of educational and social policy, a system of racially separate or mixed schools should be established. If the Fourteenth Amendment leaves a state entirely free to choose whichever system it considers desirable and beneficial for its people, then, of course, no federal court can substitute its judgment for the choice made by the state. The question presented here, however, is whether the Amendment does give such a freedom of choice to a state. This is a question not of legislative

policy but of constitutional power—and it is a question which under our system of government must ultimately be determined by this Court on the basis of its construction of the Fourteenth Amendment.

The plaintiffs in these cases contend that the Amendment should be construed as withdrawing from a state, in providing public education to its citizens, the authority to make legal distinctions based solely on race or color. The defendants, on the other hand, argue that this Court's decisions interpreting the Amendment have established the right of a state to maintain separate schools for white and colored pupils, provided the facilities for education offered to all are substantially equal. The dispute in these cases thus centers on the proper construction to be given the Fourteenth Amendment. The judicial function here is not to review the wisdom of a state's policy favoring segregation in education but rather to determine its constitutional power to adopt such a policy. Such a task clearly falls within the traditional authority and competence of this Court.

The authority under which federal courts act in enforcing rights secured by the Constitution is derived from the Constitution itself. Article III of the Constitution vests the "judicial Power of the United States" in the Supreme Court and the lower federal courts established by Congress, and provides that the judicial power so vested

"shall extend to all Cases, in Law and Equity, arising under this Constitution * * *." The right asserted by the plaintiffs in these cases arises under the Constitution, and the relief prayed for (*i. e.,* decrees enjoining continuation of the defendants' allegedly unconstitutional practices) is of the sort which Anglo-American courts of equity have granted for centuries.

2. The judicial power is not lessened because the right invoked arises under the Fourteenth Amendment. Section 5 of the Amendment, which empowers Congress to enforce its provisions by appropriate legislation, neither expressly nor impliedly limits the independent power of this Court to vindicate, through appropriate judicial proceedings and remedies, rights guaranteed by the Amendment. In countless cases, too numerous for citation here, the Court has construed the Amendment of its own force, without any implementing act of Congress, as requiring judicial invalidation of state action found to infringe rights protected by the Amendment. In the vast majority of these cases no act of Congress was involved or even suggested. If it should now be held, for the first time since its adoption in 1868, that the power of this Court to enforce the Fourteenth Amendment depends on the enactment of implementing legislation by Congress, literally scores of decisions would have to be overruled. Among these would be the most recent applications of the Amendment to racial discrim-

inations in public education: *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337. If one who claims that his right to equality in the enjoyment of public educational benefits has been violated must present his claim to Congress rather than the courts, then all of these cases—in which violation of that right was found and appropriate judicial relief granted—were erroneously decided.

Congress has, of course, exercised to some extent its power to enforce the Fourteenth Amendment. It has provided criminal and civil sanctions for violation of rights secured by the Amendment (18 U. S. C. 241–243; 8 U. S. C. 41–48; cf. *Screws* v. *United States,* 325 U. S. 91; *Williams* v. *United States,* 341 U. S. 97), and it has conferred jurisdiction on the federal district courts to redress violations of such rights (28 U. S. C. 1343). Referring to the federal statute prohibiting disqualification of jurors in federal and state cases because of race, color, or previous condition of servitude (18 Stat. 336, 8 U. S. C. 44), the Court recently observed in *Fay* v. *New York,* 332 U. S. 261, 282–283 (the "blue ribbon" jury case):

> For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of illegal discrimination.

In the *Fay* opinion (p. 283) the Court noted that in *Ex parte Virginia,* 100 U. S. 339, 345, one of the earliest cases arising under the Fourteenth Amendment, it was "hinted that there might be no judicial power to intervene except in matters authorized by Congress." The question in *Ex parte Virginia,* however, was whether the Fourteenth Amendment empowered Congress to enact 18 Stat. 336, the Act cited above; no question was involved as to the independent judicial power to enforce the Amendment. It was decided on the same day as *Virginia* v. *Rives,* 100 U. S. 313, and the opinions for the Court in both cases were delivered by Mr. Justice Strong. In the latter case the opinion expressly stated (p. 322) that "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court." And the decisions of this Court have established beyond any possible doubt that its "revisory powers" to invalidate violations of the Fourteenth Amendment extend to every kind of state action, whether judicial, legislative, or executive, civil or criminal, substantive or procedural.

If any exception from this general principle is now to be carved out, so that this Court will decline to exercise its power to enforce the Amendment where the plaintiff is a Negro child complaining that his constitutional right to equal protection of the laws has been violated by a state law compelling him to attend a segregated school, such an exception could not be justified by precedent.

The "hint" in *Ex parte Virginia* was never followed in subsequent cases. It cannot today be regarded as raising any serious question as to this Court's power and obligation to enforce all rights arising under the Fourteenth Amendment, without awaiting exercise of the independent enforcement power granted Congress in Section 5. When a litigant claims that a state law denies him due process or equal protection, this Court does not remand the case to Congress for remedial action. If the claim is sustained, the Court grants appropriate judicial relief. Congress and the Court have concurrent power, each within its own proper sphere, to enforce the Fourteenth Amendment. Judicial remedies are specific and directed to particular cases and parties; legislative remedies are necessarily general. An available judicial remedy for violation of the Amendment cannot be, and has never been, withheld merely because Congress has not found it necessary to enact general remedial legislation.

3. Of the rights arising under the Amendment which this Court has enforced, none has received more consistent and solicitous judicial vindication than the right to equality before the law and to be free from governmental discriminations based on race or color. The familiar test of the constitutionality of a legislative classification is whether it has a reasonable basis. *Railway Express* v. *New York,* 336 U. S. 106, 110. But reasonableness is not measured in the abstract; the standard of rea-

sonableness is found in the provisions and policy of the Fourteenth Amendment. And that Amendment, as is demonstrated by its history (see pp. 112–116, *supra*) and by decisions of this Court extending from the *Slaughter-House Cases,* 16 Wall. 36, 81, to the *Sweatt* and *McLaurin* cases, 339 U. S. 629, 637,[48] has made it unreasonable and

[48] The consistency of the Court's position deserves fuller exposition:

Slaughter-House Cases, 16 Wall. 36, 71:

"[N]o one can fail to be impressed with the one pervading purpose found in * * * all [of the reconstruction amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited domination over him. * * *"

Strauder v. *West Virginia*, 100 U. S. 303, 306–307:

"This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. * * * It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *"

Virginia v. *Rives*, 100 U. S. 313, 318:

"The plain object of these statutes [the civil rights laws enacted by Congress under the Fourteenth Amendment], as

unconstitutional, at least in the absence of compelling reasons of national security, for a state to establish or enforce legal distinctions based on race or color. Even though other types of legislative classifications are valid if found to have a rational basis, the Court not only refuses to give laws imposing racial distinctions a presumption of constitutionality but regards them as at least *prima facie* unconstitutional. In *Korematsu* v. *United States*, 323 U. S. 214, 216, the Court said:

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of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Ex parte Virginia, 100 U. S. 339, 344–345:

"One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights * * *. They were intended to take away all possibility of oppression by law because of race or color."

Neal v. *Delaware*, 103 U. S. 370, 389:

"The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty, and property, and to the equal protection of the laws, was the primary object of the recent amendments to the national Constitution."

Plessy v. *Ferguson*, 163 U. S. 537, 544:

"The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law * * *."

Maxwell v. *Dow*, 176 U. S. 581, 592:

"[T]he primary reason for that [Fourteenth] amendment was to secure the full enjoyment of liberty to the colored race * * *."

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

The standard of reasonableness established by the Fourteenth Amendment is necessarily flexible

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Buchanan v. *Warley*, 245 U. S. 60, 76:

"[A] principal purpose of the * * * Amendment was to protect persons of color * * *."

Nixon v. *Herndon*, 273 U. S. 536, 541:

"That Amendment [the Fourteenth], while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. * * * States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case [to vote at a state primary election]."

Shelley v. *Kraemer*, 334 U. S. 1, 23:

"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

and dynamic. Changing conditions can make unjustifiable and unconstitutional today that which yesterday may have been entirely justifiable and constitutional. In *Wolf* v. *Colorado,* 338 U. S. 25, 27, the Court said of the due process clause of the Fourteenth Amendment:

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Cf. *Euclid* v. *Amber Realty Co.,* 272 U. S. 365, 387, where the Court observed that the application of constitutional guarantees "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

It would be idle, therefore, to speculate whether the principle of equality before the law was violated by the continuation or establishment shortly after the Civil War in many states of separate schools for the children of the newly-freed slaves. Had the issue been raised, constitutional justification for such action might conceivably have been found in the illiteracy and retarded social and economic status of a race so recently liberated from the bonds of slavery, as well as in the rudimentary and inadequate character of then-existing

public school systems, which might have made it impracticable to teach the two races in the same classes. Moreover, school attendance was not generally compulsory then, as it is now. (See pp. 9, 110, *supra*.) The question now before the Court is not whether conditions existing when these school systems began may have justified them, practically and legally. The question, rather, is whether, under the far different conditions existing today, a legal requirement that colored children must attend public schools where they are segregated solely because of their color deprives them of their constitutional right to equality in the enjoyment of public educational advantages and opportunities.

4. The judicial inquiry, it must be emphasized, is not simply to determine whether there is equality as between schools: the Constitution requires that there be equality as between *persons*. The Fourteenth Amendment compels a state to grant the benefits of public education to all its people equally, without regard to differences of race or color. This has not always been as clear as it is today. Prior to this Court's decision in 1938 in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, it could plausibly have been contended, in reliance on cases decided before then, that because public education is a "privilege" furnished at the pleasure of the state and maintained by local taxation, the Fourteenth Amendment does not impose any limitation (apart from a require-

ment that separate schools must be physically equal) on the state's discretion to prescribe the terms and conditions on which such privilege is granted. Thus, in the first case in this Court involving a claim under the Fourteenth Amendment that a state's public educational system was unconstitutional, *Cumming* v. *Board of Education,* 175 U. S. 528, decided in 1899, the Court in an opinion by Mr. Justice Harlan, who had dissented so vigorously in *Plessy* v. *Ferguson,* 163 U. S. 537, stated (p. 545):

> * * * while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people 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.[49]

[49] See also *Berea College* v. *Kentucky*, 211 U. S. 45, where the Court upheld a state statute making it unlawful for a state-chartered corporation to operate a private school where white and colored pupils are taught together. Harlan, J., dissented on the ground that the statute was inconsistent with "the great principle of the equality of citizens before the law." (p. 69.) He was careful to add, however: "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense. No such question is here presented and it need not be now discussed." (*Id.*)

Similarly, in *Gong Lum* v. *Rice,* 275 U. S. 78, decided in 1927, the Court dealt with the question "whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black" (p. 85). Answering this question in the negative, the Court, in an opinion by Mr. Chief Justice Taft, held that "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear" (*ibid.*), citing and quoting from the *Cumming* case.

Mr. Chief Justice Taft's opinion in *Gong Lum* stated (pp. 85–86): "Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has 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." In support of this statement were cited fifteen cases, none of them decided by this Court. Twelve were state cases, beginning with *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, decided in 1850, eighteen years before the Fourteenth Amendment was adopted. At least some of these cases expressed the view that control over public education is a subject-matter inherently within a state's police power, and that the Fourteenth Amendment imposes no limitation on its power in that regard.

E. g., State ex rel. Stoutmeyer v. *Duffy,* 7 Nev. 342, 346; *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198, 209; *Cory* v. *Carter,* 48 Ind. 327, 360.

In *Missouri ex rel. Gaines* v. *Canada, supra,* however, this Court unequivocally dispelled any notion that because public education is provided as a matter of "privilege" rather than of right, the state has full discretion to determine the terms and conditions on which such privilege is granted. The Court, speaking through Mr. Chief Justice Hughes, said (305 U. S. at pp. 349–350):

> The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. * * * That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up * * *.

As we read its opinion, the Court in the *Gaines* case made it clear that its function in cases of this type is not limited to appraising questions of fact concerning the physical equality of schools or facilities, and that its primary concern is whether the *individual* is being denied, because of

race or color, equality of treatment in the opportunities, advantages, and benefits offered by the state. In that case the Court decided that a legal education—assumedly equal in quality—offered in schools outside the state did not meet the required standard of personal equality of right when contrasted with the privilege, afforded only to white students, of legal education in a school within the state. That this was a departure from the approach taken in the *Cumming* and *Gong Lum* cases is indicated by the dissenting opinion of Mr. Justice McReynolds (305 U. S. at 353–354), who unsuccessfully invoked those cases to support his view that "'the settled legislative policy of the State'' for "separation of whites and Negroes in schools'' should not be upset by the Court.[50]

[50] In *Atkin* v. *Kansas*, 191 U. S. 207, 222, the Court had stated that "it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." This principle was applied in *Heim* v. *McCall*, 239 U. S. 175, to uphold the validity of a state law excluding aliens from employment on public works, the Court declaring (pp. 191–193) that regulations on this subject involve only considerations of public policy with which the courts have no concern. To the extent that these cases hold that the prohibitions of the Fourteenth Amendment do not apply at all to public employment because it is a "privilege" wholly subject to the discretion of the state, they have been limited by *Wieman* v. *Updegraff*, 344 U. S. 183, 191–192, and *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, as well as by the cases cited in the text.

Following the *Gaines* case came *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. Those cases emphasized the personal character of the right to equal protection of the laws. In *Sweatt* and *McLaurin,* the Court directed its attention to the individual plaintiff, and appraised the educational opportunities afforded by the state solely in terms of their value to him, considering all the conditions (tangible and intangible) on which they were offered. In those cases the Court, looking beyond any claimed physical equality of the facilities furnished, found a denial of the plaintiff's constitutional right to equal treatment. Thus, in the *McLaurin* case, a Negro graduate student was furnished an education not only equal but identical to that offered whites, but he was subjected to such segregated treatment because of his color that this Court, adverting to psychological and sociological considerations such as are urged here, ordered that he be treated completely without reference to his color (p. 642):

> We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See *Sweatt* v. *Painter, ante,* p. 629. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been

admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.

In one of the cases at bar, No. 1, the *Kansas* case, the district court found (R. 245–246) that racial segregation in public schools has a detrimental effect on colored children; that it affects their motivation to learn; and that it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system. The opinions in the *Sweatt* and *McLaurin* cases, 339 U. S. at 633–635 and 641–642, show that similar considerations were found persuasive by the Court in concluding that the plaintiffs in those cases were denied the equality of right secured them by the Fourteenth Amendment. In neither of those cases is there any suggestion that the question presented is not justiciable; or that it involves the determination of matters of educational or social policy outside the judicial power; or that the constitutional question of segregation in higher education is in any respect different from segregation in elementary and high schools.

5. Finally, it is clear that the cases at bar do not involve "political questions" beyond the authority and competence of federal courts to decide. The Court has clearly marked out the types of questions which it will not undertake to adjudicate because their nature is such as to make them

exclusively the concern of the political departments. Thus, the federal courts will decline to determine whether and when a state of war exists, leaving such questions to the legislative and executive branches of government. *The Protector,* 12 Wall. 700. Similarly, the constitutional responsibility of each house of Congress to be "the Judge of the Elections, Returns and Qualifications of its own Members" (Article I, section 5) implies a corollary lack of authority in the courts to deal with such "political" questions as apportionment. *Colegrove* v. *Green,* 328 U. S. 549; cf. *Giles* v. *Harris,* 189 U. S. 475. And, of course, it has long been settled that it is not part of the federal judicial function to enforce the guarantee of Article IV, section 4, that every state shall have a republican form of government. *Luther* v. *Borden,* 7 How. 1; *Georgia* v. *Stanton,* 6 Wall. 50; *Pacific States Telephone and Telegraph Co.* v. *Oregon,* 223 U. S. 118.

None of the considerations governing those cases is applicable here. Determination of the constitutional question presented in the instant cases would in no respect conflict with, or intrude upon, any power which the Constitution vests in the Congress or the President. Indeed, as is evidenced by the countless decisions of this Court enforcing the Fourteenth Amendment, the principal responsibility for vindicating rights secured by that Amendment has properly been assumed by the judiciary. A decision that racial segrega-

tion in public elementary and high schools is unconstitutional would be no more "political" or "legislative" than those which have ended segregation in higher levels of public education. *Sweatt* v. *Painter, supra; McLaurin* v. *Oklahoma State Regents, supra.*

In answer to any contention that this Court lacks the competence to decide the question of constitutional interpretation which has been placed before it in these cases, we call to mind its words in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638, 639–640:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. * * *
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. * * * [C]hanged conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

IV

IF THE COURT HOLDS THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL, IT HAS POWER TO DIRECT SUCH RELIEF AS IN ITS JUDGMENT WILL BEST SERVE THE INTERESTS OF JUSTICE IN THE CIRCUMSTANCES

Question 4 reads as follows:

> 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 geographic 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?

This question assumes that the Court will hold that the plaintiffs in these cases have a constitutional right not to be excluded, solely because of their color, from schools which they would otherwise be allowed to attend. The question is addressed solely to the Court's power to fashion an appropriate remedy. Is its power so limited that, if it finds that racial segregation in public schools is unconstitutional, it must necessarily enter decrees requiring immediate admission of the plaintiffs to nonsegregated schools—or can it direct some other form of relief? The alternative type of

relief suggested by the Court's question is to "permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions."

In dealing with question 5, *infra,* pp. 170–185, we shall consider the problems which may arise, at least in some areas, in giving effect to a decision that segregation in public schools is unconstitutional. We shall there discuss the question whether, and to what extent, it would be equitable and in the public interest for the Court to enter decrees in these cases requiring that Negro children should "forthwith" be admitted to nonsegregated schools.

The shaping of relief in the present cases involves reference to three fundamental principles governing the granting of judicial remedies, each of which is to some degree applicable here: (1) One whose legal rights have been and continue to be violated is entitled to relief which will be effective to redress the wrong. If a court finds that certain conduct is unlawful, it normally enters a decree enjoining the continuation of such conduct. (2) A court of equity is not inflexibly bound to direct any particular form of relief. It has full power to fashion a remedy which will best serve the ends of justice in the particular circumstances. (3) In framing its judgment a court must take into account not only the rights of the parties but the public interest as well. The needs of the public, and the effect of proposed decrees

on the general welfare, are always of relevant, if not paramount, concern to a court of justice.

The principal problem here, as so often in the law, is to find a wise accommodation of these principles as applied to the facts presented. "The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the [law] in the light of the facts of the particular case." *United States* v. *National Lead Co.,* 332 U. S. 319, 335. But, whatever the difficulties of determining what remedy would be most effective and fair in redressing the violation of constitutional right presented in these cases, we believe there can be no doubt of the Court's *power* to grant such remedy as it finds to be most consonant with the interests of justice.

Congress has expressly empowered the Court, in dealing with cases coming before it, to enter "such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. 2106. The breadth of this power, and the flexibility of judicial remedies which it permits the Court to utilize, have been demonstrated in a great variety of situations. See *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555; *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431; *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 132; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 620, 622; *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–

330; *Alexander* v. *Hillman,* 296 U. S. 222, 239; *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 316; *Central Kentucky Co.* v. *Railroad Commission,* 290 U. S. 264, 271; *Union Pacific Railway Co.* v. *Chicago, &c. Railway Co.,* 163 U. S. 564, 600–601; and see Story, *Equity Jurisprudence* (14th ed.), §§ 28, 578; Pomeroy, *Equity Jurisprudence* (5th ed.), §§ 111, 170, 175a. In *Hecht Co.* v. *Bowles, supra,* this Court said (pp. 329–330):

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

In *Addison* v. *Holly Hill Co., supra,* at 619, the Court emphasized that where governmental action has been in violation of law, the judicial task is to seek a disposition which "is most consonant with justice to all interests in retracing the erroneous course that has been taken." Commenting upon *United States* v. *Morgan,* 307 U. S. 183, and other instances of judicial adaptation of conventional remedies to meet the needs of unusual situations, the Court said (pp. 620, 622):

> The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness,

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> The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness,

> have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law. * * *
>
> * * * * *
>
> In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them.

Where public interests are involved, equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Co.*, 328 U. S. 395, 398; and see *Radio Station WOW, Inc.* v. *Johnson, supra*, at 132; *Yakus* v. *United States*, 321 U. S. 414, 441; *Hecht Co.* v. *Bowles, supra*, at 329–330; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157; *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 552; *Beasley* v. *Texas and Pacific Ry. Co.*, 191 U. S. 492, 498.

In habeas corpus cases arising out of criminal and deportation proceedings the Court has framed its relief to permit correction of illegality where possible, instead of directing immediate or outright discharge of the petitioner. Thus, in *In re Bonner*, 151 U. S. 242, where the trial court had exceeded its jurisdiction in sentencing the petitioner, the Court delayed his discharge in order to afford opportunity for the court to correct its error. The Court held that Section 761 of the

Revised Statutes (now contained in 28 U. S. C. 2243), authorizing "the court * * * to dispose of the party as law and justice require," invested it "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*" (p. 261). And see *Medley, Petitioner,* 134 U. S. 160. Similarly, in *Mahler* v. *Eby,* 264 U. S. 32, where the Court held that a warrant of deportation was defective, it stated that "We need not discharge the petitioners at once because of the defective warrant" (p. 45). To the same effect are *Tod* v. *Waldman,* 266 U. S. 113, and *Butterfield* v. *Zydok,* 342 U. S. 524, 546–47.[51]

In granting relief in civil cases against a practice or condition found to be unlawful, courts have frequently suspended the operation of their decrees on grounds of inconvenience to the public or undue hardship to the wrongdoer, and have allowed sufficient time for removing the illegality. Thus, in *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, an original bill in equity by Georgia to enjoin the defendant copper companies from dis-

[51] Compare *United States* v. *Morgan,* 307 U. S. 183, holding that where an order of the Secretary of Agriculture fixing stockyard rates was void for procedural defects but there was no judicial determination of the reasonableness of the rates fixed by the order, the money representing the difference between the rates in effect and the lower rates of the order should be retained in the registry of the District Court to await a further and valid determination of reasonable rates by the Secretary.

charging noxious gas from their works in Tennessee over Georgia's territory, the Court, in an opinion by Mr. Justice Holmes, held that, notwithstanding that the defendants' activities were unlawful, an injunction would issue "after allowing a reasonable time to the defendants to complete the structures that they are now building, and the efforts that they are making to stop the fumes" (p. 239).[52] Cf. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *Great Central Ry* v. *Doncaster Rural Council*, 87 L. J. R. N. S. 80;[53] *Gregory* v. *Crain*, 291 Ky. 194; *City of San Diego* v. *Van Winkle*, 69 Cal. App. 2d 237, 241.[54]

[52] Although the decision was rendered in 1907, the matter was still before the Court in 1916. See 237 U. S. 474, 678, and 240 U. S. 650.

[53] Other English cases, each involving abatement of a nuisance, are: *City of Manchester* v. *Farnworth* [1930] A. C. 171, 185; *Attorney General* v. *Birmingham*, 4 Kay & J. 528, 541, 547–548 (1858); *Attorney-General* v. *Proprietors of the Bradford Canal*, L. R. 2 Eq. 71 (1866); *Attorney-General* v. *Colney Hatch Lunatic Asylum*, 4 Ch. App. 146, 165–166 (1868); *Attorney General* v. *Corporation of Halifax*, 39 L. J. Ch. N. S. 129 (1869); *North Staffordshire Ry. Co.* v. *Board of Health*, 39 L. J. Ch. N. S. 131 (1870); *Attorney-General* v. *Finchley Local Board*, 3 Times L. R. 356 (1887). See also 1 Seton, *Judgments and Orders* (7th ed.), p. 612.

[54] Other state cases in which the effective date of an injunction was suspended to permit time for necessary readjustment, most of them involving abatement of a nuisance, are: *Harding* v. *Stamford Water Co.*, 41 Conn. 87; *Stovern* v. *Town of Calmar*, 204 Ia. 983, 986; *Caretti* v. *Broring Building Co.*, 150 Md. 198, 210–211; *Brehm* v. *Richards*, 152 Md. 126, 136–137; *Baltimore* v. *Brack*, 175 Md. 615; *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396, 401; *Breed* v. *City of Lynn*, 126 Mass. 367, 370; *Suburban Land Co., Inc.*

In the field of monopolies and illegal combinations federal courts have regarded their powers to be of sufficient flexibility to permit elimination of unlawful practices to take place over a reasonable period of time. Cf. *Northern Securities Co. v. United States*, 193 U. S. 197, 360.[55] Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would, in the particular circumstances, be impracticable. See, for example, the provisions for dissolution of the illegal combinations involved in the *Tobacco, Standard*

v. *Billerica*, 314 Mass. 184, 194; *Gundy* v. *Village of Merrill*, 250 Mich. 416; *Lohman* v. *The St. Paul, etc. R. R. Co.*, 18 Minn. 174; *Doremus* v. *Mayor and Aldermen of Paterson*, 79 N. J. Eq. 63; *State* v. *White*, 90 N. J. Eq. 621; *Chapman* v. *City of Rochester*, 110 N. Y. 273; *Moody* v. *Village of Saratoga Springs*, 17 App. Div. (N. Y.) 207, affirmed, 163 N. Y. 581; *Sammons* v. *City of Gloversville*, 34 Misc. (N. Y.) 459; *Bailey* v. *City of New York*, 38 Misc. (N. Y.) 641; *French* v. *Chapin-Sacks Mfg. Co.*, 118 Va. 117; *Town of Purcellville* v. *Potts*, 179 Va. 514, 524, 525; *Winchell* v. *City of Waukesha*, 110 Wis. 101. See Pomeroy's *Eq. Rem.* (1905), §§ 531, 535; Beach, *Injunctions* (1895), §2; *High on Injunctions* (4th ed.), § 746.

[55] There the Court, in speaking generally of remedies in a civil antitrust suit, said (p. 360):

"This, it must be remembered, is a suit in equity * * *; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand."

charging noxious gas from their works in Tennessee over Georgia's territory, the Court, in an opinion by Mr. Justice Holmes, held that, notwithstanding that the defendants' activities were unlawful, an injunction would issue "after allowing a reasonable time to the defendants to complete the structures that they are now building, and the efforts that they are making to stop the fumes" (p. 239).[52] Cf. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *Great Central Ry* v. *Doncaster Rural Council*, 87 L. J. R. N. S. 80;[53] *Gregory* v. *Crain*, 291 Ky. 194; *City of San Diego* v. *Van Winkle*, 69 Cal. App. 2d 237, 241.[54]

[52] Although the decision was rendered in 1907, the matter was still before the Court in 1916. See 237 U. S. 474, 678, and 240 U. S. 650.

[53] Other English cases, each involving abatement of a nuisance, are: *City of Manchester* v. *Farnworth* [1930] A. C. 171, 185; *Attorney General* v. *Birmingham*, 4 Kay & J. 528, 541, 547–548 (1858); *Attorney-General* v. *Proprietors of the Bradford Canal*, L. R. 2 Eq. 71 (1866); *Attorney-General* v. *Colney Hatch Lunatic Asylum*, 4 Ch. App. 146, 165–166 (1868); *Attorney General* v. *Corporation of Halifax*, 39 L. J. Ch. N. S. 129 (1869); *North Staffordshire Ry. Co.* v. *Board of Health*, 39 L. J. Ch. N. S. 131 (1870); *Attorney-General* v. *Finchley Local Board*, 3 Times L. R. 356 (1887). See also 1 Seton, *Judgments and Orders* (7th ed.), p. 612.

[54] Other state cases in which the effective date of an injunction was suspended to permit time for necessary readjustment, most of them involving abatement of a nuisance, are: *Harding* v. *Stamford Water Co.*, 41 Conn. 87; *Stovern* v. *Town of Calmar*, 204 Ia. 983, 986; *Caretti* v. *Broring Building Co.*, 150 Md. 198, 210–211; *Brehm* v. *Richards*, 152 Md. 126, 136–137; *Baltimore* v. *Brack*, 175 Md. 615; *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396, 401; *Breed* v. *City of Lynn*, 126 Mass. 367, 370; *Suburban Land Co., Inc.*

In the field of monopolies and illegal combinations federal courts have regarded their powers to be of sufficient flexibility to permit elimination of unlawful practices to take place over a reasonable period of time. Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 360.[55] Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would, in the particular circumstances, be impracticable. See, for example, the provisions for dissolution of the illegal combinations involved in the *Tobacco, Standard*

v. *Billerica*, 314 Mass. 184, 194; *Gundy* v. *Village of Merrill*, 250 Mich. 416; *Lohman* v. *The St. Paul, etc. R. R. Co.*, 18 Minn. 174; *Doremus* v. *Mayor and Aldermen of Paterson*, 79 N. J. Eq. 63; *State* v. *White*, 90 N. J. Eq. 621; *Chapman* v. *City of Rochester*, 110 N. Y. 273; *Moody* v. *Village of Saratoga Springs*, 17 App. Div. (N. Y.) 207, affirmed, 163 N. Y. 581; *Sammons* v. *City of Gloversville*, 34 Misc. (N. Y.) 459; *Bailey* v. *City of New York*, 38 Misc. (N. Y.) 641; *French* v. *Chapin-Sacks Mfg. Co.*, 118 Va. 117; *Town of Purcellville* v. *Potts*, 179 Va. 514, 524, 525; *Winchell* v. *City of Waukesha*, 110 Wis. 101. See Pomeroy's *Eq. Rem.* (1905), §§ 531, 535; Beach, *Injunctions* (1895), §2; *High on Injunctions* (4th ed.), § 746.

[55] There the Court, in speaking generally of remedies in a civil antitrust suit, said (p. 360):

"This, it must be remembered, is a suit in equity * * *; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand."

Oil and *Motion Picture* cases.[56] The decree entered in the *Tobacco* case furnishes a useful precedent and guide to the disposition of the present cases, and for that reason we quote at length from the Court's opinion there (pp. 185, 187–188):

> * * * In considering the subject [of relief] * * * three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. * * *
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[56] *United States* v. *American Tobacco Co.*, 221 U. S. 106, 191 Fed. 371 (S. D. N. Y.); *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Paramount Pictures*, 70 F. Supp. 53, 74–75 (S. D. N. Y.), 334 U. S. 131, 85 F. Supp. 881, 899, 339 U. S. 974. See also *United States* v. *National Lead Co.*, 332 U. S. 319, 329–335, 363; *United States* v. *Aluminum Co.*, 322 U. S. 716, 148 F. 2d 416 (C. A. 2), 171 F. 2d 285, 91 F. Supp. 333, 419 (S. D. N. Y.); *United States* v. *International Harvester Co.*, 214 Fed. 987 (D. Minn.), 274 U. S. 693.

* * * Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Antitrust Act. 2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegra-

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Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1, where this Court directed extension of the time for executing the decree from a period of thirty days to at least six months, "in view of the magnitude of the interests involved and their complexity" (p. 81).[58]

[57] A plan was formulated under the supervision of the district court at a series of conferences extending for a period of more than two months. A hearing was held on the plan at which not only the parties but also any person who wished to express his views as a friend of the court was given an opportunity to do so. See 191 Fed. at 373. In the decree approving the plan it was adjudged that it "will recreate out of the elements now composing it [the illegal combination] a new condition which will be honestly in harmony with, and not repugnant to, the law, and without unnecessary injury to the public or the rights of private property." The decree also gave the defendants an extension of the period for carrying the plan into execution and provided for retention of jurisdiction by the court "for the purpose of making such other and further orders and decrees, if any, as may become necessary for carrying out the mandate of the Supreme Court." 191 Fed. at 428, 430–431.

[58] In the *International Harvester* case (214 Fed. 987 (D. Minn.)), the court directed that "the entire combina-

The Court has expressed a reluctance to enter decrees which would involve the judiciary in the administration of complex and detailed matters: "The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective." *United States* v. *Paramount Pictures,* 334 U. S. 131, 163; see also *Brown* v. *Board of Trustees,* 187 F. 2d 20, 25 (C. A. 5). It is clear, however, that this goes to the exercise of the Court's discretion and not to its power to act in such situations. The choice whether or not the courts are to be thrust into a system involving difficult policing problems "should not be faced unless the need for the system is great and its benefits plain." *United States* v. *Paramount Pictures, supra,* at 164. The

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tion and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct, and independent corporations," and it was further provided that "in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, and jurisdiction is retained to make such additional decrees as may become necessary to secure the final winding up and dissolution of the combination and monopoly complained of * * *" (214 Fed. at 1001). The decree was entered in August 1914 and modified in October of that year. In November 1918 a consent decree was entered, and in 1927 this Court affirmed dismissal of a supplemental petition of the Government for further relief in the case. See 274 U. S. 693.

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Court, in rejecting the argument that it should not act because it would be required to embark upon an enterprise involving burdensome administrative functions, said in *Nebraska* v. *Wyoming,* 325 U. S. 589, 616: "The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution." See also *Joy* v. *St. Louis,* 138 U. S. 1, 47; *Southern R. Co.* v. *Franklin &c. C. R. Co.,* 96 Va. 693; *Harper* v. *Railway Co.,* 76 W. Va. 788, 794; Pomeroy, *Equitable Remedies* (1905) § 761. In *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237 U. S. 474, 678, the Court did not hesitate to enter a decree which involved it deeply in the details of effective enforcement.

It may be contended, however, that the powers of a court of equity are not so comprehensive where vindication of the constitutional right to equal protection of the laws is involved. Such right, the Court has pointedly observed, is "personal and present." *Sweatt* v. *Painter,* 339 U. S. 629, 635; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 642; *Shelley* v. *Kraemer,* 334 U. S. 1, 22; *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351; *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 161–162. Thus a complainant must show that his own rights have been unconstitutionally impaired; it is not sufficient for him to establish that the rights of others have been

affected (*McCabe* v. *Atchison, T. & S. F. Ry. Co.*). Similarly, it is no answer to a particular plaintiff's claim to say that at some time in the future he will receive the equality of treatment which is his constitutional right (*Sipuel* v. *Board of Regents*). So, too, in the present cases, the plaintiffs could well say that, as individuals whose constitutional rights have been and are continuing to be violated, it affords them inadequate redress to enter decrees providing only that at some time in the future (perhaps after they are too old themselves to enjoy the benefits of the Court's decision) colored children as a group must be given public education on a non-segregated basis. For these plaintiffs the remedy of immediate admission to non-segregated schools is an indispensable corollary of the constitutional right, for to recognize a litigant's right without affording him an adequate remedy for its violation is to nullify the value of the right.

On the other hand, it is also true that the constitutional issues presented to the Court transcend the particular cases and complainants at bar, and in shaping its decrees the Court may take into account such public considerations as the administrative obstacles involved in making a general transition throughout the country from existing segregated school systems to ones not based on color distinctions. If the Court should hold in these cases that racial segregation *per se* violates the Constitution, the immediate consequence

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would be to invalidate the laws of many states which have been based on the contrary assumption. Racial segregation in public schools is not an isolated phenomenon limited to the areas involved in the cases at bar, and it would be reasonable and in accord with its historic practices for the Court in fashioning the relief in these cases to consider the broad implications and consequences of its ruling.

The "personal and present" language appears in cases involving education on the professional and graduate levels. Each case involved a single plaintiff. It is one thing to direct immediate relief where a single individual seeks vindication of his constitutional rights in the relatively narrow area of professional and graduate school education, and an entirely different matter to follow the same course in the broad area of public school education affecting thousands of children, teachers, and schools. We do not think that when the Court in those cases characterized the right to equal protection of the laws as "personal and present", it was thereby rejecting the applicability, to cases involving the right, of settled principles governing equitable relief.[59] On the con-

[59] This Court long ago cautioned "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Chief Justice Marshall in *Cohens* v.

trary, the Court has recognized that such principles are equally applicable to litigation involving fundamental constitutional rights of individuals. Thus, in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, five Negro citizens brought suit to enjoin the defendant railroads from complying with the Oklahoma "Separate Coach Law" for the reason, among others, that it violated the Fourteenth Amendment. This Court, while it concluded that certain provisions of the law were unconstitutional, held that the complainants were not entitled to the relief sought because they did not show any injury to themselves (235 U. S. at 162, 164):

> The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.

We conclude, therefore, that the Court has undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision.

Virginia, 6 Wheat, 264, 399. And see *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132–133.

V

IF THE COURT HOLDS THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL, IT SHOULD REMAND THESE CASES TO THE LOWER COURTS WITH DIRECTIONS TO CARRY OUT THIS COURT'S DECISION AS SPEEDILY AS THE PARTICULAR CIRCUMSTANCES PERMIT

Question 5 is:

> 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),[60]
>
> (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;

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[60] Question 4 reads as follows:

"4. 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 geographic 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?"

(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 the specific terms of more detailed decrees?

This question is predicated on three assumptions: (1) that the Court will hold that racial segregation in public schools is unconstitutional; (2) that it can permit an effective gradual adjustment to be brought about from existing segregated school systems to ones not based on color distinctions; and (3) that the Court will exercise its equity powers to that end. The question which remains to be considered, therefore, is how the decrees in the present cases should be framed so as to give effective force to the Court's ruling on the constitutional question and at the same time to permit orderly solution of the problems which may arise in eliminating existing racial segregation in public schools.

In this concluding section of the brief, we discuss (a) the difficulties which may be met in carrying out transition to nonsegregated school systems, and (b) the various factors which appear to be relevant in framing the decrees in the cases at bar.

A. *Obstacles to Integration.* In carrying out an adjustment from existing segregated school systems to new ones not based on color distinctions, the difficulties likely to be encountered fall into two groups: (1) those of an administrative nature; (2) those deriving from the fact that racial segregation in public schools has been in existence for many years in a large part of the country.

1. It is not difficult to envisage some of the kinds of administrative problems which may arise in giving effect to a holding that separate school systems are unconstitutional. Such a decision will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states. In many areas existing boundaries of school districts may require extensive revision. School authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited. Schools may have to be consolidated, teachers and pupils transferred, teaching schedules revised, and transportation arrangements altered. In jurisdictions (*e. g.*, South Carolina, District of Columbia) where by statute the allocation of public school funds depends on the relative number of Negro and white children of school age, changes in the law may be required.[61] In some jurisdictions (*e. g.*, District of Columbia, Maryland) it may be necessary to elim-

[61] South Carolina Code (1952), §§ 21–251, 21–290; D. C. Code (1951 ed.), §§ 31–1110, 31–1112.

inate duplication of functions arising from the existence of separate sets of supervisory and administration officials for white and Negro schools.[62] In states (*e. g.*, Mississippi, Texas) which have statutory provisions for separate training schools for Negro teachers, the law may require amendment.[63]

It is not unlikely that in many communities, particularly where separate white and colored residential districts still exist, abolition of segregation would produce no serious dislocations, and no wholesale transfers of teachers or pupils would occur. This could result from purely geographical factors, because the pupils of a school ordinarily reflect the composition of the population of the district in which it is located. The extent of the administrative and legal changes required will thus vary in the different jurisdictions involved, depending on these and other factors which now cannot be evaluated or measured. Accordingly, it is impossible to determine at this time what specific period of time would be required to overcome the administrative obstacles to school integration in any particular area.

In this connection it should be noted that financial cost, which would play so large a role in any program for "equalization" of separate schools,

[62] D. C. Code (1951 ed.), §§ 31–670, 31–671; Anno. Code of Maryland (Flack ed., 1951), Art. 77, §§ 42 (4), 208.

[63] Mississippi Code (1942 ed.), Art. 15, §§ 6808–6811; Vernon's Texas Civil Statutes, title 49, ch. 8.

furnishes no substantial obstacle to integration. As the Attorney General of Virginia stated in his brief on the merits filed last term in No. 4 (p. 21), "It is crystal clear that segregation is more expensive than amalgamation." It has been estimated that a capital outlay of as much as 2 billion dollars might be required in order to make the separate public schools for Negroes "equal", in a physical sense, to those now maintained for white pupils. On the basis of the 1949–50 level of *per capita* current expenditure for Negro pupils in the separate school areas, it has been estimated that it would take an additional $134,824,000 to bring the Negro expenditure up to that for the white pupils, an increase of almost 70 per cent. To raise the cost of transporting Negro pupils at the 1949–50 level to a par with that of transporting white pupils would entail an additional $55,574,582.[64]

An additional economic consideration favoring integration results from recent changes in the number and relative proportion of Negroes in the areas which maintain separate public schools for colored children. During the last decade there have been significant changes in the distribution

[64] These estimates have been made by the Office of Education, Department of Health, Education and Welfare, on the basis of data contained in *Statistics of State School Systems 1949–1950*, being chapter 2 of the *Biennial Survey of Education in the United States* (1948–1950), published by the Office of Education, and in the article *School Building Unit Costs* about to be published in *School Life*, an organ of the Office of Education.

of the Negro population of the country.[65] There has occurred a significant shift of Negroes from the Southern to the Northern, Central, and Western States. A decline in the number and proportion of Negroes in the population has taken place in West Virginia, Georgia, Kentucky, Alabama, Mississippi, Arkansas, and Oklahoma. The Middle Atlantic, East North Central, and Pacific States had the most appreciable increases in their Negro population, and the percentage increases for Negroes far exceeded those of the white population.[66]

The financial burden of maintaining "separate but equal" public schools becomes increasingly onerous and unjustifiable as the Negro population in a particular area decreases. A community re-

[65] See S. Doc. No. 14, 83d Cong., 1st Sess., pp. 4–8.

[66] *Ibid.* The following table taken from data published by the Bureau of the Census shows the changes in Negro population in 17 Southern and border states and the District of Columbia:

	1940		1950	
	Non-whites	Percent non-white	Non-whites	Percent non-white
Delaware	35, 977	13. 5	44, 207	13. 9
Maryland	302, 763	16. 6	388, 014	16. 6
District of Columbia	188, 765	28. 5	284, 031	35. 4
Virginia	662, 190	24. 7	737, 038	22. 2
West Virginia	117, 872	6. 2	115, 268	5. 7
North Carolina	1, 003, 988	28. 1	1, 078, 819	26. 6
South Carolina	815, 496	42. 9	823, 624	38. 9
Georgia	1, 085, 445	34. 7	1, 064, 005	30. 9
Florida	515, 428	27. 2	605, 258	21. 8
Kentucky	214, 202	7. 5	202, 876	6. 9
Tennessee	508, 935	17. 5	531, 468	16. 1
Alabama	983, 864	34. 7	982, 243	32. 1
Mississippi	1, 077, 469	49. 3	990, 485	45. 5
Arkansas	483, 303	24. 8	428, 003	22. 4
Louisiana	852, 141	36. 0	886, 968	33. 1
Oklahoma	232, 206	9. 9	200, 796	9. 0
Texas	927, 279	14. 5	984, 963	12. 8
Missouri	245, 477	6. 5	299, 066	7. 6

quired to support for a handful of Negro children a separate school which must be physically equal in all respects to the schools it operates for white children is, from a purely economic standpoint, obviously not receiving the most for the money it expends for the education of its children. The same money, if expended for integrated schools, would result in greater educational benefits for both white and colored children. These economic considerations alone go far to indicate the relative feasibility of integration as a practical alternative to "equalization".

2. Some Southern leaders have expressed the view that considerable popular opposition will be met in the execution of any program for integration of public schools. In their opinion, separation of the races in the public schools is one of the ways of life in the South (see the finding of the district court in No. 4, R. 620). They predict that popular antagonism to elimination of segregation in public schools, arising from a traditional hostility to the mingling of the races, will most likely be reflected in withdrawal of state aid for those schools (see, e. g., the testimony of Dr. Colgate W. Darden, R. 452, No. 4). On the other hand, the conviction has been expressed that these fears are exaggerated and unjustified, and that there is no reason to assume that, once this Court has authoritatively resolved the constitutional question, the people of the entire coun-

try, including the South, will not abide by its decision (see e. g., R. 197–198, No. 4).

We believe it would be futile and irrelevant to enter into such speculation. Recent years have witnessed, on a fairly large scale, an ever-increasing trend towards the elimination of racial segregation and discrimination in all fields and in every part of the country. In almost every instance this progress has been accomplished without disorder or friction. Traditional attitudes on racial relations are in process of constant revision, particularly in the South. As illustrative, we shall here describe (a) New Jersey's successful experience in integrating segregated public schools in the past few years and (b) the notable achievements of the Armed Forces of the United States in carrying out a program of racial integration.[67]

New Jersey.—Following the adoption in 1947 of a state constitution expressly forbidding racial segregation in the public schools of the state, a program for elimination of segregated schools was put into operation. A survey disclosed that there were 43 school districts in New Jersey which had one or more separate Negro schools. These were located in urban areas, agricultural town-

[67] The materials cited in the following portion of the brief were collected by Dr. Ambrose Caliver, Assistant to the Commissioner of Education, Department of Health, Education and Welfare.

ships, and in some relatively well-to-do suburban communities. Practically all the school officials and a majority of the school board members concerned did not oppose the program of racial integration of pupils.

Since many of the communities involved had individual problems, no single formula could be applied. In a number of districts the existing small Negro schools were closed; in others new consolidated schools were built. In several communities the Negro elementary schools were converted into intermediate or junior high schools. In the larger towns and cities, school districts were rezoned and transfer regulations adopted that required all pupils to attend the schools nearest their homes.

Varying techniques were used for placing white children under colored teachers for the first time. One device used was as follows: where there were two classes of the same grade in a particular school, one class was given a white teacher, the other, a colored teacher, and a class which had a white teacher in the first grade was given a colored teacher in the second grade and a white teacher in the third grade, and so on. Many communities, however, merely placed colored teachers in the same grades in the new system that they had been teaching in the colored schools, and this appeared to work just as effectively.

Some school boards made a single formal public announcement that the schools under their jurisdiction would be integrated; in other districts public meetings were sponsored by the boards after plans for integration had been formulated and approved. In one community a plan for integration over a two-year period was adopted with the approval of Negro parents. During the first year the superintendent of schools conducted public meetings, and integration was completed by the end of that year.

One of the fears anticipated in many communities was withdrawal of pupils from the public schools and their transfer to parochial or private schools. This, however, did not eventuate. In one community where a few children were withdrawn, most of them later reentered the school. Parents who objected to having their children placed under Negro teachers were requested by school officials to give the new system a chance. Most of the protests evaporated.

The program was also successfully carried out in areas where public opposition might have been expected to present a difficult problem. For example, in Salem, which is in the southern part of the state and directly across the river from Delaware, many of the residents were raised and educated in the traditions of the South. Salem had three schools, two for white children and one for colored children. The latter constituted approximately one-third of the total enrollment.

All three schools were integrated; one of them with a colored principal in charge of five white teachers. The school superintendent reported that this was accomplished without incident or friction.

By September 1951, 40 of the 43 school districts involved in the New Jersey program were completely integrated and the remaining three districts had taken substantial steps towards integration. The state official in charge of the program summarized the New Jersey experience as follows:

> While New Jersey cannot furnish any one formula, it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it.[68]

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[68] Bustard, *The New Jersey Story: The Development of Racially Integrated Public Schools*, 21 Journ. of Negro Education 275, 285 (1952). Other areas where public school systems have successfully been integrated include Indianapolis, Indiana, Topeka, Kansas, and Tucson, Arizona. In the District of Columbia a program of racial integration is under way in the Catholic elementary and secondary schools. The Department of Defense has recently announced that it has set the fall of 1955 as its target date for eliminating racial segregation in state-operated schools located on federal military installations. (New York Times, Aug. 24, 1953, p. 21.)

In the field of higher education, many Southern colleges and universities have opened their doors to Negro students. There are at least 17 public institutions of higher learning

The Armed Forces.—Racial integration on a large scale has been successfully achieved in the Armed Forces. The program for elimination of racial segregation and discrimination in the Armed Forces had its origin in Executive Order No. 9981 of July 26, 1948 (13 F. R. 4313).[69] The order established the policy "that there shall be equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion, or national origin." The President's Committee on Equality of Treatment and Opportunity in the Armed Forces, which was charged with the task of seeing that the policy was implemented effectively, found in its report of May 22, 1950, "Freedom to Serve," that

in 12 Southern states which now have Negro students. Negroes have been admitted to 38 private institutions of higher education located in the South and the District of Columbia.

[69] Executive Order 9980 of July 26, 1948, 13 F. R. 4311, declared it to be the policy of the Federal Government that all personnel actions were to be taken without discrimination on account of race, color, religion or national origin. See also 5 C. F. R. 410.1–7 (1952 Supp.) for the regulations implementing this policy. Since 1941, it has been the policy of the Federal Government that there shall be no racial discrimination in employment by Government contractors or subcontractors. See Executive Order 9346 of May 27, 1943, 8 F. R. 7183, and Executive Order 10479 of August 15, 1953, 18 F. R. 4899, for enforcement provisions. Since 1938 public parks and recreational facilities under the jurisdiction of the Department of the Interior have been operated on a non-segregration basis. This policy has been uniformly successful, and there have been no untoward incidents of racial friction.

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broad programs for racial integration adopted by the Navy and the Air Force had been successfully carried out without animosity or incident. The following conclusions of the Committee are significant (Rept. 44):

> Integration of the two races at work, in school, and in living quarters did not present insurmountable difficulties. As a matter of fact, integration in two of the services [the Navy and Air Force] had brought a decrease in racial friction.
>
> The enlisted men were far more ready for integration than the officers had believed.
>
> The attitude of command was a substantial factor in the success of the racial policies of the Air Force and the Navy.

In a recent interview, Dr. John A. Hannah, Assistant Secretary of Defense, stated that "remarkable progress" had been made in the program for ending racial segregation in the Armed Forces and that "In eight months there will be no nonintegrated units in the Army". Dr. Hannah also reported that "Universally the answer from our commanders is that it is desirable and works out very well in spite of contrary predictions," and that there had been no resistance, violence, or demonstrations. (U. S. News & World Report, October 16, 1953, pp. 46, 99.) The success of integration in the Armed Forces furnishes strong evidence of the feasibility of integration in other fields, such as public

schools, where contacts are less intimate and constant.[70]

[70] Other successful experiences have been reported in such fields as industry and labor, housing, the professions, and sports. Both the American Federation of Labor and the Congress of Industrial Organizations have consistently opposed racial discriminations. In industry, racial differentiations have tended to become less significant. For an account of the successful experience of the International Harvester Company in its plants in Evansville, Louisville, and Memphis, see *Selected Studies of Negro Employment in the South: 3 Southern Plants of International Harvester Company* (National Planning Association, 1953). The techniques utilized in those plants are said to have involved "a mixture of persuasion, education, and some judiciously applied coersion." (*Id.*, p. 50.)

The Federal Housing and Home Finance Agency has reported that racial integration has been on the whole entirely satisfactory in 268 public housing projects located in the District of Columbia and in 71 other communities. See *Open Occupancy in Public Housing* (Housing and Home Finance Agency, Public Housing Administration, 1953). Since the ruling by this Court in 1948 that judicial enforcement of racial restrictive covenants is forbidden by the Constitution, *Shelley* v. *Kraemer*, 334 U. S. 1, there has been a growing and substantial dispersal of Negroes throughout residential areas. This has been accompanied by practically no friction or disorder. See the survey conducted by the United Press and reported in the New York Times, January 22, 1951, p. 19; "The People of Chicago," Report of the Chicago Commission on Human Relations for the 5-year period 1947–1951; Report of the Toledo Board of Community Relations, 1951; "The Transitional Housing Area", report of the Director of the Mayor's Interracial Committee in the city of Detroit (1952).

In recent years a number of Southern law schools and medical colleges have relaxed their restrictions against the admission of Negroes. In 1950 the American Medical Association adopted a resolution, reaffirmed in 1952, declaring its

B. *The decrees.* On the basis of the foregoing, the considerations which appear to be relevant to the framing of the decrees in the present cases may briefly be summarized as follows:

1. The constitutional right involved in these cases is "personal and present." The plaintiffs can forcefully argue that the only remedy adequate to redress the existing, continuing violation of their constitutional rights is to direct their admission to nonsegregated schools now and not at some future date when such relief would come, at least for some of them, too late to have any benefits. In the absence of compelling reasons to the contrary, vindication of constitutional rights should be as prompt and effective as is possible in the circumstances.

2. On the other hand, the effects of a decision holding school segregation to be unconstitutional would not be limited to the areas and parties involved in the cases at bar. Such a decision would have national significance and consequences. As a binding precedent, the Court's decision would entail revision of school laws and procedures in

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policy to be against racial qualifications in the admission of physicians to its constituent societies. At the present time Negro doctors have been admitted to 27 constituent societies, located in southern and border states, which had formerly barred Negroes.

The field of professional sports evidences a striking change in racial attitudes. Negroes are now common in the ranks of the professional baseball and football teams. See, generally, *The Integration of the Negro into American Society* (Howard University Press, 1951).

at least seventeen states and the District of Columbia. Administrative and other obstacles will have to be overcome in order to accomplish complete transition to nonsegregated systems. The nature and extent of such problems will vary throughout the country, and the time required for eliminating school segregation in any particular community will depend on numerous factors which neither this Court nor counsel can now evaluate. Regardless whether this Court should direct that school integration be carried out "forthwith" or "gradually", a brief period of time should be allowed for making necessary administrative adjustments.

3. In some places (such as the District of Columbia, Kansas and Delaware) change-over to a nonsegregated system should be a relatively simple matter, requiring perhaps only a few months to accomplish. In such areas, where there are no serious administrative or other impediments to integration, there can plainly be no valid justification for delay in ending exclusion of colored children from schools which they would otherwise be entitled to attend. In other areas, a longer period of time may be needed, depending on local conditions.

4. Despite a decision by this Court that racial segregation in public schools is unconstitutional, there will still remain many areas in which, as a practical matter, the schools will be attended by

at least a preponderance of children of one color. This could arise from purely geographical factors, even though there is full compliance with the letter and spirit of the decision. There are numerous communities characterized by exclusively Negro or white occupancy of particular residential sections. Even under normal school districting drawn on a wholly geographical and nonracial basis, the pupils of a public school in a district reflect the racial composition of its population. It may reasonably be assumed that this factor alone will have considerable effect in many areas in reducing the extent of the adjustments required by a decision prohibiting racial segregation in public schools.

5. There is no single formula or blueprint which can be uniformly applied in all areas where existing school segregation must be ended. Local conditions vary, and what would be effective and practicable in the District of Columbia, for example, could be inappropriate in Clarendon County, South Carolina. Only a pragmatic approach based on a knowledge of local conditions and problems can determine what is best in a particular place. For this reason, the court of first instance in such area should be charged with the responsibility for supervision of a program for carrying out the Court's decision. This Court should not, either itself or through appointment of a special master, undertake to formulate specific and detailed programs of implementation

adapted to the special needs of particular cases.

6. The burden of (a) showing that, in the particular circumstances, a decree requiring the immediate admission of the plaintiffs to nonsegregated schools would be impracticable or inequitable, and, in that event, of (b) proposing, for the court's approval, an effective program for accomplishing transition to a nonsegregated system as soon as practicable, should rest on the defendants. As the responsible authorities in charge of the public schools, they would be in the best position to develop a program most suited to local conditions and needs, and to indicate the length of time required to put it into effect. In passing upon such a program, the lower court could receive the views not only of the parties but of interested persons and groups in the community. Such a locally-developed program for orderly and progressive transition to nonsegregation would tend to encounter less resistance and thus be more likely to achieve success.

As has previously been noted (pp. 160–162, *supra*), the decree entered by this Court in *United States* v. *American Tobacco Co.*, 221 U. S. 106, furnishes a useful precedent and guide to the disposition of the present cases. Adapting the provisions of that decree to the circumstances here involved, the Government respectfully suggests to the Court that, if it holds school segregation to be unconstitutional, the public interest would be

served by entering decrees in the instant cases providing in substance as follows:

(1) That racial segregation in public schools be decreed by this Court to be a violation of rights secured by the Constitution;

(2) That each case be remanded to the appropriate court of first instance for such further proceedings and orders as are necessary and proper to carry out the Court's decision;

(3) That the lower courts be directed on remand to enter decrees under which the defendants shall forthwith be enjoined from using race or color as a basis for determining admission of children to public schools under their authority or control; provided, however, that if the defendants show that it is impracticable or inequitable to grant the plaintiffs the remedy of immediate (i. e., at the beginning of the next school term) admission to nonsegregated schools, the court shall order the defendants to propose and, on approval by the court after a public hearing, to put into effective operation a program for transition to a nonsegregated school system as expeditiously as the circumstances permit;

(4) That for the accomplishment of these purposes, taking into view the difficulties which may be encountered, a period of one year be allowed from the receipt of this Court's mandate, with leave, however, in the event, in the judgment of the lower court, the necessities of the situa-

tion so require, to extend such period for a further reasonable time; and that, in the event before the expiration of the period thus fixed, a condition in harmony with the requirements of the Constitution is not brought about, it shall be the duty of the lower court to enter appropriate orders, by way of injunction or otherwise, directing immediate admission of the plaintiffs to nonsegregated schools; and

(5) That this Court retain jurisdiction for the purpose of making such further orders and decrees, if any, as may become necessary for carrying out its mandate.

CONCLUSION

In response to the questions stated in the Court's order directing reargument of these cases, the United States respectfully submits (1) that the primary and pervasive purpose of the Fourteenth Amendment, as is shown by its history and as has repeatedly been declared by this Court, was to secure for Negroes full and complete equality before the law and to abolish all legal distinctions based on race or color; (2) that the legislative history of the Amendment in Congress is not conclusive; (3) that the available materials relating to the ratification proceedings in the various state legislatures are too scanty and incomplete, and the specific references to school segregation too few and scattered, to justify any definite conclusion as to the existence of a general understanding in such legislatures as to the effect

which the Amendment would have on school segregation; (4) that it is within the judicial power to direct such relief as will be effective and just in eliminating existing segregated school systems; and (5) that if the Court holds that laws providing for separate public schools for white and colored children are unconstitutional, it should remand the instant cases to the lower courts with directions to carry out the Court's decision as expeditiously as the particular circumstances permit, as indicated *supra*.

Respectfully submitted.

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