SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 4

DOROTHY E. DAVIS, ET AL.,
Appellants,

v.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR APPELLEES ON REARGUMENT

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Dated November 30, 1953.

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PRELIMINARY STATEMENT

On June 8, 1953, this Court ordered that this case, together with the other four cases relating to segregation by race in the public schools, be restored to the docket and set down for reargument. We were then directed to discuss five listed questions "insofar as they are relevant" to this case. All of the questions are, or might conceivably be, relevant to this case.

Judicial decisions are not, however, law review articles. They cannot be divorced from their facts and left for determination in the lofty realm of abstract legal issues. The judicial power, with which we shall here be much concerned, is not exercised in a vacuum. By this we mean that the question before this Court for decision in this case is the constitutionality of segregation by race in the high schools of Prince Edward County, Virginia. There are no doubt principles involved of a broader application, but we trust that we may be excused if, from time to time, we refer to the facts developed in the record of this case and found as facts by the court below, for they are entitled to that consideration here which, in our opinion, goes far to determine the matter at issue.

We refer briefly to the points presented in our brief filed with the Court at the last term for it related more directly to the record of this case. We discussed at length the parties and the school problem in Prince Edward County where the Negro high school population has grown by leaps and bounds during the last decade. We then made clear that, if the rule of *stare decisis* is to be followed here, no issue remains, for the only question presented to the Court has been repeatedly decided by it. But if the matter is to be considered anew, it must, we suggested, be considered in the light of the established rule that a reasonable legislative classification in the

light of the particular circumstances does not offend the Constitution.

We then went on to show the action now being taken by Virginia to strengthen its school system. We next pointed out that, in one major respect, this case differs materially from the other four school segregation cases now before this Court. That difference is substantial; it lies in the evidence of record here and the findings of fact made by the court below on the basis of that substantial evidence. We then reviewed the evidence presented for Appellants and showed how flimsy it was when compared with that presented for the school authorities. Finally we pointed out that the court below made clear findings that school segregation was reasonable in the Prince Edward County high schools both as a matter of law and as a matter of fact based on substantial evidence.

We believe that brief worth reviewing in connection with this reargument. Since we do not desire to overburden the Court, we have not repeated here all that we said there, although we shall refer to the precedents, the evidence and the findings in our discussion of the judicial power. But here we are called on to discuss specific questions posed by the Court and to answer a brief of 235 pages.

We consider that a few comments are required as to the brief of the Appellants. It is obvious that in the short time allowed we have not been able to point to all of its errors and its unsupported conclusions. It must be read with care. In many places, the impatient reader will overlook the fact that material placed in apparent relation in succeeding paragraphs is in fact unrelated and that conclusions are drawn as to specific questions from generalities. We think that action unfair and where possible we have pointed to the unfairness. But that has not been possible in all in-

stances. This unfairness will, nevertheless, be apparent to the careful reader.

Our primary purpose, however, is to discuss the questions asked by the Court. The major questions relate to the history and meaning of the Fourteenth Amendment. For convenience of reference, we therefore quote the Amendment in full and then the provisions of the Constitution and Code of Virginia which, according to the Appellants, conflict with the Amendment. We turn, then, to the questions. To the extent that they involve matters of fact, we shall attempt factual answers. Our investigation has led to the conviction that we have nothing to fear from the record of history.

THE CONSTITUTIONS AND THE STATUTE

The Fourteenth Amendment provides:

> "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.

"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."

The Appellants assert that the Amendment makes unconstitutional Section 140 of the Constitution of Virginia and Section 22-221 of the Code of Virginia of 1950, as follows:

"§ 140. Mixed schools prohibited. — White and colored children shall not be taught in the same school."

* * *

"§ 22-221. White and colored persons. — White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

We pass at once to the questions. We have included after each question a summary of the answer that we then give in detail below; accordingly, we have prepared no formal summary of our argument.

QUESTION ONE

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?

ANSWER:

There is substantial evidence that the Congress which submitted the Fourteenth Amendment both contemplated and understood that it would not abolish segregation in the public schools.

There were 37 States in the Union at the time of the ratification of the Amendment. There is affirmative evidence from 23 of these States that it was understood that the Amendment would not abolish school segregation. In 14 States, no evidence, either affirmative or negative, is available. In not one State have we found substantial affirmative evidence that it was either contemplated or understood that

ratification of the Amendment would mean that segregation in the public schools was abolished.

DISCUSSION:

A.

THE CONGRESSIONAL HISTORY

1.

Introduction

In considering this phase of the question, it will not do to look only at the First Session of the Thirty-Ninth Congress. It is true that the Amendment was proposed at that session. But the Amendment had antecedents that presaged its proposal; these must be explored. At the same time, subsequent sessions of Congress may well give important information as to what the Amendment meant to those who participated or were close to participation in its proposal; their words cannot be disregarded.

For this reason, we have reviewed the Congressional civil rights and school history of the decade from 1865 until 1875, from the end of civil war until Democratic victories in Congressional elections put an end to major civil rights agitation. That review is found in Appendix A. We think it correct and as complete as time and space have permitted. What we place here is a summary of that summary to contain only the most salient facts. To the extent that the Appendix is incomplete, this summary must of necessity be even more fragmentary.

2.

The District Schools

No Congress would, we conceive, propose a Constitutional amendment which it thought would abolish segregated

schools and, at the same time, nurture segregated schools in territory subject to its direct control. The power of Congress in the District of Columbia is supreme; the school history there bears directly on our question.

The answer is remarkably plain. There were no public schools for Negroes in the District before 1862 when slavery was abolished there. Congress established public schools for Negroes there on a segregated basis in 1862.[1] It amended these school laws in 1864 and retained segregation.[2] In the middle of the debate on the resolution proposing the Fourteenth Amendment, Congress adopted a statute granting certain property to the trustees of the District's colored schools "for the sole use of schools for colored children. . . ."[3] The same session of Congress adopted another statute providing for an equitable apportionment of school funds to the Negro Schools.[4]

The Congress that proposed the Fourteenth Amendment thus recognized the existence and sanctioned the continuance of segregated schools in the District of Columbia. That action has been considered as substantially determinative that Congress did not intend the Fourteenth Amendment to abolish segregated schools by a court sitting almost contemporaneously with ratification of the Amendment.[5]

But that is not the end of the school story in the District. In 1868 and 1869, Congress passed a bill to combine the trustees of the white and Negro schools of the District; the schools themselves were specifically to remain segregated.[6]

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[1] 12 Stat. 394, 407, 537 (1862).

[2] 13 Stat. 187 (1864).

[3] 14 Stat. 342 (1866).

[4] 14 Stat. 216 (1866).

[5] *State* ex rel. *Garnes* v. *McCann*, 21 Ohio State 198 (1871).

[6] Cong. Globe, 40th Cong., 2nd Sess. (1868) 3900; Cong. Globe, 40th Cong., 3rd Sess. (1869) 919.

This was vetoed by the President but his veto did not contain any disapproval of school segregation.[7]

In 1871, Senator Sumner of Massachusetts made a strong effort to secure enactment of a bill to outlaw school segregation in the District.[8] The bill was debated at length but never brought to a vote since its passage was apparently impossible.[9] Sumner tried again the next year.[10] Again a long debate ensued without a vote.[11] Finally, when, in 1874, Congress codified the laws relating to the District, it specifically preserved the statutes providing for school segregation.[1]

The record of school segregation in the District is a record of continuous Congressional approval. Appellants refer to other legislation relating to the District (Brief, pp. 77-8); they choose in this case not to mention the District schools. The facts are clear and are of deep significance: the Congress that proposed the Fourteenth Amendment approved school segregation; succeeding Congresses refused to change the system.[2]

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[7] *Id.* at p. 1164.

[8] S. 1244, 41st Cong., 3rd Sess. (1871).

[9] Cong. Globe, 41st Cong., 3rd Sess. (1871) 1053-61.

[10] S. 365, 42nd Cong., 2nd Sess. (1872).

[11] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 2484, 2539-41, 3057, 3099, 3122-5.

[1] Revised Statutes of the District of Columbia, 18 Stat. part 2, §§ 281, 282, 283, 305, 310, 314 (1874). The history of these statutes is fully reviewed in the brief for the District of Columbia in *Bolling* v. *Sharpe*, October Term, 1953, No. 8, and in the opinion of the Court of Appeals of the District of Columbia in *Carr* v. *Corning*, 182 F. 2d 14 (1950).

[2] We have not considered evidence from other territories directly under Congressional control since none of them had as many as 500 Negro citizens in 1870. See table included in Appendix B.

3.

The Civil Rights Act and the Amendment

In 1866, Congress passed the First Supplemental Freedmen's Bureau Bill.[3] This purported to give the President the right to use the power of the Federal government to correct any harm resulting whenever

> ". . . any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . on account of race. . . ."

This Bill was to be applicable only in the seceding States. It was passed by both Houses of Congress but it was vetoed by the President, his veto being narrowly sustained.[4] There is no evidence that it was intended to require mixed schools.

A companion measure, both having been introduced at the same time by Senator Trumbull, became the Civil Rights Act of 1866. As enacted, this Act contained a definition of citizenship comparable to that found in §1 of the Fourteenth Amendment and went on to declare that

> ". . . such citizens of every race and color, without regard to any previous condition of slavery . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,

[3] S. 60, 39th Cong., 1st Sess. (1866).

[4] Cong. Globe, 39th Cong., 1st Sess. (1866), 421, 688, 743, 916, 943. The Bill was later enacted in a slightly modified form over a veto. 14 Stat. 173 (1866).

> and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens and shall be subject to like punishment . . . and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."[5]

On this matter, there was a very extended debate, ranging through all sorts of questions, for the Act was to be effective throughout the United States and was not to be confined to the seceding States. Questions as to its effect on school segregation and anti-miscegenation statutes were raised in the Senate but its patron specifically denied that it would affect the latter, stating that the Act was concerned only with the listed civil rights.[6] In the House, the school segregation question was specifically debated. A lone apponent of the Act thought that it might require amalgamated schools even though equal schools were provided.[7] The committee chairman and floor leader who was in charge of the bill, Wilson of Iowa, gave the same unequivocal answer twice:

> "Do [the provisions of the bill] mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. . . . Nor do they mean that . . . their

[5] 14 Stat. 27 (1866). As introduced, the bill had contained broad language prohibiting "discrimination in the civil rights and immunities" of all inhabitants on account of race. This broad language was eliminated by the House Judiciary Committee to leave the bill, as the Chairman said, relating only to the rights specifically stated. He did not think that the amendment changed the meaning. Cong. Globe, 39th Cong., 1st Sess. (1866) 1366-7.

[6] *Id.* at pp. 475, 500, 505, 598, 600.

[7] Rogers of New Jersey. *Id.* at p. 1121. As to the weight to be given his views, *cf. Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394-5 (1951).

children shall attend the same schools. These are not civil rights or immunities."[8]

* * *

"He knows, as every man knows, that this Bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the Bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this Bill can only relate to matters within the control of Congress."[9]

These quotations put beyond question the meaning of the Civil Rights Act of 1866. It was not intended in any way to outlaw school segregation.[10] It applied only to the rights listed in the section quoted above.

That fact is of peculiar significance. It was generally assumed that the purpose of the first section of the Fourteenth Amendment was to write into the Constitution the provisions of the Civil Rights Act of 1866.[11] There were

[8] Cong. Globe, 39th Cong., 1st Sess. (1866) 1117. This statement of Wilson and the next, both made before the bill was amended, completely discredit Appellants' broad assertion (Brief, pp. 90-1) that "most Senators and Representatives" thought that it would destroy all State power to distinguish on the basis of race.

[9] *Id.* at p. 1294. The views of Wilson as committee chairman are entitled to great weight. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474-5 (1921).

[10] The bill was enacted over a veto. Cong. Globe, 39th Cong., 1st Sess. (1866) 1679, 1809, 1861.

[11] This is the generally accepted view:

"In fact, there seems to be little, if any, difference between the interpretation put upon the first section by the majority and by the minority, for nearly all said that it was but an incorporation of the Civil Rights Bill." Flack, *The Adoption of the Fourteenth Amendment* (1908) 81.

"Over and over in this debate, the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other." Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* (1949) 2 Stan. L. Rev. 5, 44.

differences of view as to why this was desirable; some thought that only by adoption of the Amendment could the Civil Rights Act be made constitutional, while others thought adoption of the Amendment desirable to prevent a loss of rights which might result from subsequent repeal of the Civil Rights Act. But there was no substantial dissent from the position that the two were intended to cover the same ground. Since that is true and since the evidence is clear that the Civil Rights Act was not intended to abolish school segregation, it is equally clear that the Amendment cannot of itself be interpreted to require its abolition.

The debates on the Amendment make this result plain. The proceedings of the Joint Committee on Reconstruction, where the Amendment was born, and its reports contain no reference to school segregation.[12] Thaddeus Stevens, the spearhead of the radical forces, said that the design was to prevent repeal of the Civil Rights Act.[1] Many followed in the House to express the view that the two encompassed the same principles. They include Finck, Garfield, Thayer, Boyer, Bromall, Raymond, Eliot, Randall and Rogers.[2] For example, Raymond, a Republican, said:

> "And now, although [the Civil Rights Act] became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."[3]

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[12] An early version of the Amendment conferred affirmative power on Congress to secure privileges and immunities and equal protection. But this draft met opposition from those who thought the powers conferred too broad and it never came to a vote. Cong. Globe, 39th Cong., 1st Sess. (1866) 806, 813, 1094-5.

[1] *Id.* at p. 2459.

[2] *Id.* at pp. 2460-7, 2498-2545.

[3] *Id.* at p. 2501.

Boyer, a Democrat, said:

> "The first section embodies the principles of the civil rights bill. . . ."[4]

The same theme is found in the Senate debates.[5] In addition, the general understanding was that the Amendment was designed to give Congress the power to restrain State action in the field of listed civil rights; and the public schools nowhere appear in the list.[6] The only real mention of the schools was to the effect that the Amendment would require equal and not unequal taxation for the support of education.[7]

Appellants assert that the Amendment was designed to go beyond the Civil Rights Act. But that is not supported by the record. The radical leaders perhaps wished to go further, but they recognized that Congress and the country would not accept a more extreme proposal.[8] So they kept the Amendment within the same bounds as the Civil Rights Act. Regulation of schools is outside those bounds.

Thus the Fourteenth Amendment was proposed. The chief purposes of its first section were to give constitutional support to the Civil Rights Act and to define citizenship. Even if, as some have argued, there was the additional purpose to make the first eight amendments applicable to the States, that has no relevance here, for none of them has any bearing on separate schools.

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[4] *Id.* at p. 2467.

[5] *E.g., id.* at pp. 2896, 2964, 3031, App. p. 240. When Senator Fessenden denied this purpose, Senator Howard was quick to correct him. *Id.* at p. 2896.

[6] *Id.* at pp. 2765, 2961.

[7] *Id.* at App. p. 219.

[8] *Id.* at pp. 2459, 2896. Appellants make much of extraneous statements made by members of the Joint Committee on Reconstruction (Brief, pp. 93-103). But they do not relate in general to the specific terms of the Amendment and cannot be accepted as authoritative guides to its meaning.

4.

Subsequent Civil Rights Agitation

After the Fourteenth Amendment had become a part of the Constitution, the question of national school segregation became for the first time an issue of importance. The leader of those who desired to outlaw segregation was Charles Sumner, Senator from Massachusetts. It was Sumner who, as we have seen, tried in vain to have segregation abolished in the schools of the District of Columbia. He was equally unsuccessful in the broader field.

One fact should be noted at the beginning. Sumner, the leader of those opposed to segregation—in fact, he dedicated much of his life to the subject—was clearly of the opinion that the Fourteenth Amendment did not abolish school segregation without more. This opinion is forcefully expressed in a letter to a convention of Negroes that assembled in Columbia, South Carolina, in 1871. Sumner said:

> "The right to vote will have new security when your equal right in . . . common schools is at last established. . . . Help yourselves, and others will help you. The Civil Rights law needs a supplement to cover such cases."[9]

Since the abolition of school segregation was not already required, Sumner bent every effort to have Congress act to abolish it.[10] The question as to the power of Congress to do so is discussed at another place below; we merely mention

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[9] Lester, *Life and Public Services of Charles Sumner* (New York 1874) 511.

[10] Sumner was the most radical of radicals. His views were so extreme that he had been excluded from membership on the Joint Committee on Reconstruction and never became a member. 2 Fessenden, *The Life and Public Service of William Pitt Fessenden* (1907) 20.

here the debates as they relate to the self-executing operation of the Amendment.

Sumner prepared what he called his Supplemental Civil Rights Bill. In all of its several forms, it purported to outlaw segregation in railways, hotels, theaters, churches and cemeteries as well as in the schools. It was introduced and unfavorably reported in 1870 and 1871.[11]

In 1872, sentiment in Congress strongly favored the enactment of a bill to provide general relief from the disabilities imposed on most southern citizens by the third section of the Fourteenth Amendment. Sumner proposed that such amnesty should be granted only if coupled with his Supplemental Civil Rights Bill. On two occasions, he persuaded the Senate to add his bill to the Amnesty Bill; on both occasions, the Amnesty Bill, which required a two-thirds vote, failed to pass. Finally, the Supplemental Civil Rights Bill was amended to eliminate reference to schools, churches and cemeteries and passed while Sumner was off the floor; it did not receive House consideration. The Amnesty Bill was adopted by both Houses and became law.

The debates on these measures were tremendous.[12] But in none of them is it suggested that the law was unnecessary, because the Fourteenth Amendment, properly interpreted and enforced, would of itself produce the same result. There was much argument over the power of Congress to act; there was even more argument as to the expediency of Congressional action; there was no suggestion of the fact that, even though action might be required, Congress was not the place where it should be taken.

These conclusions are equally true as to the Civil Rights Act of 1875.[13] In the first session of the Forty-third Con-

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[11] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 821-2.

[12] Cong. Globe, 42nd Cong., 2nd Sess. (1871-2). Most of the individual speakers are referred to in Appendix A.

[13] 18 Stat. 335 (1875).

gress, bills to require mixed schools, as well as forced intermixture in hotels, railway cars and the like, were debated in both Senate and House. Again the questions debated were the power of Congress and the expediency of Congressional action, but nowhere is it suggested that no Congressional action was required to reach the desired result.

The House never adopted any bill in 1874 and the bill passed by the Senate was never brought up in the House. In the elections of the fall of 1874, the Democrats unseated 100 House Republicans. As a matter of political expediency, the Republicans wished to enact some civil rights legislation before they lost control of Congress. In the lame duck session that began in December 1874, the old Supplemental Civil Rights Bill was brought up again. A long debate ensued in the House. At last, it was amended to eliminate all reference to the public schools and passed.[1] In the Senate no reference was made to the school system. The bill was enacted as the Civil Rights Act of 1875. Even as so emasculated by the elimination of schools, it was promptly held unconstitutional by this Court.[2] Throughout this debate, it was never urged that the Fourteenth Amendment should be interpreted as self-executing to the extent of abolishing segregated schools.

One further word must be added. As late as December 1875, President Grant recommended to Congress an amendment to the Constitution to require all States to maintain schools to educate all children "irrespective of . . . color. . . ."[3] This qualification would hardly have been necessary if the Fourteenth Amendment had already abolished segregation in the schools.

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[1] 3 Cong. Rec., 43rd Cong., 2nd Sess. (1875) 1010-1.

[2] *Civil Rights Cases*, 109 U. S. 3 (1883).

[3] 7 *Messages and Papers of the Presidents* (1898) 334.

5.

Conclusion

The Civil Rights Act of 1866 admittedly was not designed to abolish segregated schools. The Fourteenth Amendment was proposed so that the rights protected by the Civil Rights Act should thereafter receive constitutional protection. Those measures were intended to cover the same field; the Amendment was to be substantially co-extensive with the Act. This interpretation of the Amendment finds support in the history of subsequent civil rights legislation. Although the question of school segregation received an inordinate amount of legislative consideration, it was not thought that its decision lay with the courts and not with Congress and that Congressional action would therefore be superfluous. And throughout the whole period, Congress fostered segregated schools in the District of Columbia and refused all attempts to abolish segregation there although no question of its power could there arise.

The answer is clear: the Fourteenth Amendment did not abolish school segregation when it became a part of the Constitution in 1868.

B.

THE RECORD FROM THE STATES

We have reviewed in Appendix B all of the available evidence as to the contemplation and understanding of the 37 States at the time in the Union as to the meaning of the Fourteenth Amendment. We refer to the Appendix for a more detailed statement of the material summarized here.

The evidence from the States, unlike that of Congress, is rarely direct. In only two States, Indiana and Pennsylvania, are there full reports of the debates in the legislatures

that considered the Amendment.[4] Even in those States, the reports are not of particular assistance. In addition, the addresses of governors and legislative journals have been reviewed, but it is rare that the Amendment and the schools were considered there at the same time.

But the Amendment and the schools were often considered substantially contemporaneously. It is from action taken in connection with the school systems that we derive evidence. And it is evidence of a very substantial nature. If the legislature that ratified the Amendment established a system of segregated schools, it cannot be urged in good conscience that the legislature thought that school segregation was incompatible with the Amendment. An interval of time may make the evidence less forceful but it is nevertheless relevant.

On the other hand, if school segregation had been abolished prior to ratification of the Amendment, ratification is not evidence that the Amendment was thought to prohibit school segregation. Nor can isolated statements made generally by those who opposed ratification and wished to overemphasize the calamities to result be taken as determinative of our question.

We must, however, make brief mention of the discussion by the Appellants on this question. In addition to their customary relation of the unrelated and their unsupported conclusions, they allege in substance that many of the southern States perpetrated a conscious and colossal fraud on the United States. Virginia is one of the States in respect of which that allegation is made. It is false. There is no evidence to support such a theory of conspiracy. In fact, as to all the States, the truth becomes apparent only if the individual discussions in the Appellants' Brief and in Ap-

[4]Ratification in every State where accomplished was by the legislature and not by a convention as the question implies as a possibility.

pendix B to this brief are compared side by side. When that is done, the error of the conclusions drawn by the Appellants is at once apparent.

With these preliminary words, we turn to the States. We cite, in a sentence or two, the controlling evidence from each but without citation of authority, for that is given in detail in the Appendix. At the end we shall attempt a summary to point up the conclusions of our investigation.

Alabama: The same legislature that ratified the Amendment enacted, less than a month later, a general school law that, in essence, required segregated schools.

Arkansas: The same legislature that ratified the Amendment passed a statute making segregated schools mandatory.

California: The Amendment was never ratified in California and school segregation seems not to have been considered in connection with the rejection. Segregated schools existed before and after the Amendment became a part of the Constitution. The Amendment was considered at the 1866-7 legislative session; laws providing for separate schools were enacted in 1863, 1864, 1866 and 1870.

Connecticut: The same legislature that ratified the Amendment outlawed segregation in the schools. There were less than 10,000 Negroes in Connecticut; it was recognized that school segregation was never a problem there.[5]

Delaware: The Amendment was rejected at first and finally ratified in 1901. There seems to have been no connection between rejection and the school system. Schools for Negroes were not directly supported by the State until 1881.

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[5]A Connecticut Senator made this point clear in opposing Congressional action to prohibit segregated schools. See Appendix A, pp. 127-8.

Negroes were never admitted to the white public schools during the reconstruction period.

Florida: Under military pressure, Florida ratified the Amendment in 1868. At that time, Florida supported Negro schools but had no State-supported white schools. Segregation was not required by law until 1887.

Georgia: The same session of the Georgia legislature that ratified the Amendment established the public school system and made segregation mandatory.

Illinois: Illinois had segregated public schools before and after ratification of the Amendment, separate schools being abandoned only in 1874.

Indiana: Negro children were excluded from the schools at the time that the Amendment was ratified in 1867. Separate schools for Negroes were provided in 1869. The Indiana supreme court held in 1874 that segregated schools did not violate the Amendment.

Iowa: Segregated schools were held to violate the Iowa constitution in 1858, long before the Amendment was considered. This ruling was reaffirmed in 1868 but the Amendment was not mentioned.

Kansas: The Kansas legislature of 1867 ratified the Amendment; the legislatures of 1867 and 1868 authorized segregated schools.

Kentucky: Kentucky rejected the Amendment, but schools played no part in the rejection. The same legislature enacted a statute permitting the establishment of Negro schools. No real education of the Negro was undertaken until 1882.

Louisiana: Louisiana, in the year in which it ratified the Amendment, adopted a constitution prohibiting segregated

schools. Mixed schools could never be put into practical operation. The evidence from Louisiana is so conflicting as to defy a rational conclusion.

Maine: Maine, with 1,606 Negro inhabitants in 1870, gives no evidence of consideration of the question here at issue.

Maryland: The Fourteenth Amendment was rejected by Maryland in 1867; schools were not apparently an issue in the rejection. The first comprehensive school system, adopted in 1868, required segregated schools.

Massachusetts: Segregated schools were held inoffensive to the Massachusetts constitution in 1849 but were outlawed in 1855 by statute. There is no record that school segregation was considered in connection with ratification of the Amendment.

Michigan: In 1869, Chief Justice Cooley, a renowned constitutional lawyer, held school segregation offensive to a Michigan statute. The issue was a difficult one. He never mentioned that the Amendment might apply to the case, although it would have made decision easy if the general view had then been that the Amendment abolished school segregation.

Minnesota: Segregation in the schools had been prohibited in Minnesota in 1864. There were 759 Negroes in Minnesota in 1870. No evidence can be derived from the records of this State.

Mississippi: The legislature that ratified the Fourteenth Amendment enacted a general school law permitting local determination of the question whether the schools should be segregated.

Missouri: Missouri's public schools have been segregated

either on a permissive or a mandatory basis since a time prior to the ratification of the Amendment.

Nebraska: Admitted to the Union after the Amendment was proposed, Nebraska promptly outlawed segregated schools, but there is no evidence that this action bore any relation to the Fourteenth Amendment.

Nevada: The legislature that ratified the Amendment prohibited mixed schools and required the establishment of segregated schools.

New Hampshire: There were less than 600 Negroes in New Hampshire in 1870. There is no evidence that segregation was considered in connection with the Amendment.

New Jersey: School segregation existed in New Jersey before and after ratification of the Amendment, and there is no record that the matter was taken into account when the Amendment was ratified.

New York: The Amendment was ratified in New York in 1867. By a statute of 1864, the legislature authorized segregated schools. Segregated schools existed in New York all through the reconstruction era and were upheld by its courts against constitutional attack as late as 1900.

North Carolina: The same legislature that ratified the Fourteenth Amendment established segregated schools in North Carolina.

Ohio: Separate schools for Negroes were required in Ohio long before the ratification of the Amendment and continued until 1887. The Ohio Supreme Court held the Amendment inapplicable in 1871.

Oregon: Oregon, with 346 Negroes in 1870, had certain legislation dealing specially with Negroes and separate schools existed to some extent after ratification. Nothing in the history of ratification of the Amendment gives a clear answer on the question raised here.

Pennsylvania: Segregated schools were required in Pennsylvania as early as 1854 and existed until 1881. Debates on ratification of the Amendment give no clear picture that a majority thought that school segregation would be abolished and in fact no action was taken to abolish it in Pennsylvania schools for 14 years after ratification.

Rhode Island: Segregation in the schools was permitted in Rhode Island before 1866 but was then abolished by statute. No evidence exists that the matter was considered when the Amendment was ratified in 1867.

South Carolina: Both the incoming and outgoing governors recommended segregated schools to the South Carolina legislature that ratified the Amendment. There was never a real effort to establish amalgamated schools.

Tennessee: The same legislature that ratified the Amendment amended the school law to require segregated education in Tennessee.

Texas: The same Texas legislature that ratified the Amendment enacted a statute permitting school segregation on a local option basis.

Vermont: Vermont, with less than 1,000 Negroes in 1870, never had segregated schools and the question was not an issue in connection with ratification of the Amendment.

Virginia: The same legislature that ratified the Amendment made segregated schools mandatory in Virginia. The language of the statute was almost identical with that at issue in this case.

West Virginia: The same legislature that ratified the Amendment enacted a statute requiring segregated schools in West Virginia.

Wisconsin: Wisconsin, with few Negroes, never had segregated education and there is no evidence that this question played any part in the ratification of the Amendment.

How may these diverse conclusions be summarized? A summary will be attempted as follows, with a look first to those States providing no evidence, either affirmative or negative, that school segregation was considered in connection with ratification of the Fourteenth Amendment.

1. States with few Negroes where the question never seems to have arisen at all:

Maine
New Hampshire
Oregon
Vermont
Wisconsin
TOTAL 5

2. States where segregated schools were prohibited prior to or substantially contemporaneous with ratification of the Fourteenth Amendment:

Connecticut
Iowa
Massachusetts
Michigan
Minnesota
Nebraska
Rhode Island
TOTAL 7

3. States, generally under Negro control, where conditions were so chaotic that no answer is possible:

Florida
Louisiana
TOTAL 2

Now, let us turn to States providing an affirmative answer:

1. States where segregated schools were established,

either on a mandatory or a permissive basis, by the same legislature that ratified the Fourteenth Amendment:

Alabama
Arkansas
Georgia
Kansas
Kentucky[6]
Mississippi
Nevada
North Carolina
Tennessee
Texas
Virginia
West Virginia
TOTAL 12

2. States where segregated schools existed, either on a mandatory or a permissive basis, both before and after ratification of the Amendment:

California[6]
Illinois
Missouri
New Jersey
New York
Ohio
Pennsylvania
TOTAL 7

3. States where segregated schools were established within two years following ratification of the Amendment:

Indiana
Maryland[6]
TOTAL 2

4. State where the first schools for Negroes were established after ratification on a segregated basis:

Delaware[6]
TOTAL 1

[6]California, Kentucky and Maryland never ratified the Fourteenth Amendment; ratification was not accomplished in Delaware until 1901.

5. State where segregation was recommended contemporaneously with ratification by two governors and the schools were always segregated:

South Carolina

TOTAL 1

Into these categories fall all of the 37 States. If a summary is now made of the summary, this is the result:

Number of States where substantial evidence exists that ratification of the Fourteenth Amendment was not thought to outlaw segregated schools	23
Number of States where no substantial evidence on the question exists	14
Number of States where substantial evidence exists that ratification was thought to outlaw school segregation	0
TOTAL	37

The answer to the question cannot be mistaken. The legislatures that ratified the Fourteenth Amendment neither contemplated nor understood that it would abolish segregation in the public schools.

QUESTION TWO

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 SEC. 5 OF THE AMENDMENT, ABOLISH SUCH SEGREGATION, OR

(b) THAT IT WOULD BE WITHIN THE JUDICIAL POWER, IN THE LIGHT OF FUTURE CONDITIONS, TO CONSTRUE THE AMENDMENT AS ABOLISHING SUCH SEGREGATION OF ITS OWN FORCE?

ANSWER:

(a) *There is no indication that the Congress that proposed the Amendment understood that future Congresses might act to abolish school segregation. In succeeding Congresses, there were many who thought that Congress had this power, but they were never enough to enable Congress to enact a statute outlawing school segregation. This question should, therefore, be properly answered in the negative.*

(b) *No.*

DISCUSSION:

A.

THE POWER OF CONGRESS

The Fourteenth Amendment is not primarily a grant of power to Congress. It is specifically expressed in terms of a prohibition against State action. In fact, a proposed amendment in the form of a grant of power to Congress was presented by the Joint Committee on Reconstruction, debated and returned to the Committee without action after substantial opposition had developed.[7]

The power of Congress is derived solely from the fifth section:

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

[7] Cong. Globe, 39th Cong., 1st Sess. (1866) 813, 1094-5.

This provision was derived with minor variations from the Thirteenth Amendment and has been repeated, again with minor changes, in the Fifteenth, Eighteenth and Nineteenth.

The meaning of § 5 was the subject of much debate. A number of those who voted in favor of the Civil Rights Act of 1866 based the constitutional power of Congress to enact that statute on the similar words of the Thirteenth Amendment. That this was not considered firm support is evidenced, as we have seen, by the fact that many thought that the Fourteenth Amendment was designed to make that Act constitutional.

In the debates on the Fourteenth Amendment itself, very little was said of the fifth section. Senator Howard stated that it gave Congress

> ". . . authority to pass laws which are appropriate to the attainment of the great object of the amendment."[8]

But that is almost all that is available on the subject. Since the members of the Congress that proposed the Amendment understood so clearly that the Amendment was not designed to prohibit segregation in the schools, it is not remarkable that they did not discuss the right of Congress to abolish school segregation by statute. But it is remarkable that there was no further discussion of the general power of Congress under § 5, for it was to be a guide for future action by the very persons framing the Amendment.

If discussion of Congressional power was absent in the late 60's, there was indeed a surfeit of it in the early 70's. While Charles Sumner was pressing so hard for enactment

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[8] *Id.* at p. 2766. Only Rogers of New Jersey, a die-hard States-rights Democrat, thought that Congress might outlaw equal separate schools. He was in the minority on the Amendment. *Id.* at App. pp. 133-4.

of his Supplemental Civil Rights Bill, either by itself or as an amendment to the General Amnesty Act, the halls of Congress rang with discussions of its power to outlaw school segregation. Sumner was the leader of those who thought that power plenary and his principles permeate the debate. There was, he said,

> ". . . a new rule of interpretation for the Constitution, according to which . . . it is to be interpreted uniformly for human rights."[9]

Again he said:

> "I have also sworn to support the Constitution and it binds me to vote for anything for human rights."[10]

Another facet of Sumner's philosophy of constitutional law was his trust in the Declaration of Independence. He considered that "more sublime in character and principle" than the Constitution,[11] and often found a constitutional basis in the Declaration for the measure which he supported so ardently.

Sumner was strongly opposed because of these unorthodox beliefs. Senator Morrill of Maine stated that the Amendment was not a grant of power to the central government and that it could not take cognizance of school matters.[1] Similarly, Senator Trumbull asserted that the right to go to school was not a civil right and never had been, and that Congress therefore had no right to act.[2]

The debate continued after Sumner's death while the

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[9] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 727.

[10] *Id.* at p. 3263.

[11] *Id.* at p. 761.

[1] *Id.* at App. pp. 3-5.

[2] *Id.* at p. 3189.

Civil Rights Act of 1875 was on the road to enactment. Thus proponents of Congressional Action asserted that Congress could act to enforce civil rights, including mixed schools, even though no State had acted to deny those rights.[3] Opponents held the contrary view; Congress could act to correct State action that infringed civil rights but only after that action had been taken.[4] Their view was that the Amendment was not a grant of additional power to Congress. At all events, the right to go to school was not a fundamental right protected by the Fourteenth Amendment.[5]

In summary, nothing in the recorded history of the Congress that proposed the Amendment indicates that it thought Congress could outlaw segregated schools by statute. In later Congresses, there was much dispute on the question, but Congress never passed a statute relating to school segregation. Twice the Senate passed bills to abolish school segregation, in each case by a tie vote broken by the vote of the Vice President.[6] But no such bill was ever passed by the House and the amendment to eliminate all references to schools in the bill that became the Civil Rights Act of 1875 was adopted in the House by the overwhelming vote of 128 to 48.[7]

One further factor must be taken into account that is in reality an imponderable. That is the extent that partisan politics played in the opinions expressed on the school issue. The Democrats opposed and the Republicans favored civil rights legislation. The Republicans thought and admitted that the enactment of civil rights legislation would win them

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[3] See, *e.g.*, 2 Cong. Rec., 43rd Cong., 1st Sess. (1874) 412-3.

[4] See, *e.g.*, *id.* at pp. 379-80.

[5] *Id.* at pp. 384-6.

[6] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 919, 3268.

[7] 3 Cong. Rec., 43rd Cong., 2nd Sess. (1874) 1010.

Negro votes.[8] The Republicans lost heavily in the elections of 1874; the Civil Rights Act of 1875 was enacted by a lame duck Congress for political reasons so that Republicans might assure retention of the Negro vote before the Democrats took over. The constitutional opinions of those open to such obvious bias are of necessity suspect.

We conclude, therefore, with the opinion that many in the early 1870's thought that Congress had the power to outlaw school segregation. But they were never an effective majority. And there were just as many, if not more, who were of the contrary view. Furthermore, the existence of these opinions does not make clear any opinion at all in preceding Congresses, and it is the Thirty-Ninth Congress that is the important one. That Congress—the one that framed the Amendment—had no affirmative view that later Congresses might by legislation outlaw segregation by race in the public schools.

One further word is required. We have limited this answer, as we understand the question to be limited, to a discussion of the intention of the framers of the Amendment. We refer to the answer to the third question for a brief discussion of the point whether Congress might now, under the limited authority given it by § 5, enact a statute abolishing school segregation. We think that question also to require a negative answer.

B.

THE CONGRESSIONAL OPINION OF THE EXPANDING JURISDICTION

The Congress that proposed the Fourteenth Amendment did not understand that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing school segregation of its own force.

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[8] See, *e.g.*, 2 Cong. Rec., 43rd Cong., 1st Sess. (1874) 4167.

The judicial system received bare mention in the civil rights agitation. On one occasion, a senator opposing the Civil Rights Act of 1866, suggested that it should be left to the courts to determine the incidents of slavery prohibited by the Thirteenth Amendment.[9] Later on, others thought that the Fourteenth Amendment should be enforced by the judiciary and not by Congress.[10] Thus, Senator Thurman of Ohio, opposing civil rights legislation in 1872, thought that the fifth section of the Fourteenth Amendment added not "one iota to the power of Congress," and that Congress could enforce the Amendment only

> ". . . by providing for the making of a case for the judicial tribunals of the United States. . . ."[1]

But these are merely incidental references. The framers of the Amendment were interested in conditions at that time and not in changed conditions that might exist at a later time. The leaders of the radicals rather feared a Supreme Court which, at that time, had views more conservative than theirs. Many of their immediate successors thought that the Court was too restrictive in its interpretation of the Amendment.[2] None of them looked to the Court to expand the meaning of the Amendment under any circumstances.

Indeed, it would have been remarkable if any other result were true. It would, in effect, have been a delegation of legislative power to assume, at the beginning, that a power to determine school segregation unconstitutional should arise, like a springing use, at some undetermined future time.

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[9] Cong. Globe, 39th Cong., 1st Sess. (1866) 1805.

[10] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 913-5; 2 Cong. Rec., 43rd Cong., 1st Sess. (1873) 380.

[1] *Id.* at p. 4083.

[2] Such was the view of some after the decision in the *Slaughter-House Cases*, 16 Wall. 36 (1873).

Thaddeus Stevens and the other leaders of reconstruction were intent on gathering power into their own hands, as Andrew Johnson learned; it was not in their nature to delegate to others.

The answer to this question is no.

QUESTION THREE

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?

ANSWER:

Certainly judicial power exists if the only question be whether this Court is empowered to make an enforceable decision. But to interpret the Fourteenth Amendment as authority for the judicial abolition of school segregation would be an invasion of the legislative power and an exact reversal of the intent of the framers of the Amendment. It would reverse unquestioned precedent in decisions of this Court that have withstood the test of time without impairment. Furthermore, it would overturn the established meaning of the Amendment that the Court should sustain State legislative action which is, as here it was found to be, reasonable on the particular facts. In these circumstances, abolition of school segregation is not within the judicial power.

DISCUSSION:

A.

INTRODUCTION

This is, we conceive, the most difficult of the questions posed by the Court. Its difficulty does not lie in the weak-

ness of our position but in the phrasing of the question.

Let us take the first clause; we are asked to assume that the answers to questions 2(a) and (b) do not dispose of the issue. That seems to us a simple assumption, although the necessity for making it is confusing. What the framers of the Amendment considered that Congress might do in the future has little, if any, bearing on a situation where Congress has done nothing. Similarly, what those framers thought that this Court might do in the future would not dispose of this case, no matter whether conditions had materially changed (which they have not). It does not seem that an answer to either part of that question, regardless of what the answer might be, could dispose of the issue. So, although the assumption is easily made, to be required to make it is disconcerting because it seems remote from the issue.

We pass then to the question itself. That is framed in terms of judicial power. Has the Court in mind the ability to make an enforceable decision? Certainly that is an aspect of judicial power in its broadest sense. Or is the Court merely asking whether, in the facts of this case, it may properly reverse the decision of the court below? That, again, concerns an aspect of judicial power in proper application.

This question, therefore, covers a broad field. The whole field cannot be explored without an excursion that the Court would find unwelcome into a discussion of jurisprudence, an area always approached with hesitation by those such as we who are the artisans and not the artists of the law. In a word, we cannot, within any reasonable limits of space, follow all the trails which this question asks us to enter. Our brief discussion will center on five points: first, the power of this Court in its broadest sense; second, the relation of the judiciary to the legislature; third, the nature of the process by which a statute is held to conflict with the Con-

stitution; fourth, the effect and weight of the relevant precedents; and, finally, the meaning of the Fourteenth Amendment as applied to the facts of this case.

B.

POWER

A dictionary defines power as "ability to act." A legal scholar has circumscribed its meaning deftly by terming it the correlative of liability and the opposite of disability.[3] If power be used in this sense, this Court certainly has judicial power to declare school segregation offensive to the Constitution.

Mr. Justice Cardozo made this point clear more than 30 years ago. He said:

> "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law."[4]

In result, however, the conclusion of Mr. Justice Cardozo is wrong when applied to the particular decisions of this Court. The decisions of this Court are the law binding the parties and there is no appeal. They will be enforced, in the absence of revolution or executive disregard.[5] We urge no

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[3]Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 Yale L. J. 16, 30; (1917) 26 Yale L. J. 710.

[4]Cardozo, *The Nature of the Judicial Process* (New Haven 1921) 129.

[5]"John Marshall has made his decision:—*now let him enforce it!*" Andrew Jackson quoted in 4 Beveridge, *The Life of John Marshall* (New York 1919) 551.

such course of action; nor, we assume, does anyone. In this sense, therefore, the power of this Court is plenary.

We point out that the question is, nevertheless, not a simple one of whether schools shall be segregated or not. There is the further alternative of whether there shall be schools or not. We find nothing in the Constitution that requires public education by any State. Again, this is not a threat; it is a simple statement of fact. Georgia, for example, has appropriated more than 100 million dollars in 1953 for the public schools. The appropriation is conditioned on continued segregation. If segregation ends, so do State funds for the public schools.[6]

In the broadest sense, then, the Court has the power to end segregation in the public schools. It exercised this power in other years when it refused to outlaw segregation on the ground that segregation was not unconstitutional but not on the ground that this Court could not decide the question. But this answer seems too obvious; it cannot have been the intention of the Court. The Court must mean for us to discuss the field in which its power is properly to operate. In that sense, we discuss the judicial power in succeeding sections.

C.

LEGISLATIVE POWER

Mr. Justice Holmes said:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[7]

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[6] Georgia Laws (1953) No. 202.

[7] *Missouri, K. and T. R.* v. *May,* 194 U.S. 267, 270 (1904).

We take this to mean that this Court, though it be always vigilant to protect fundamental rights of liberty and property, has limited authority. There are areas in which the judicial power may operate; equally, there are areas reserved to the legislature in which the judicial power may not operate. We suggest to the Court with all deference that this case lies in an area for the operation of the legislative power in which the judicial power should not interfere.

This Court is not equipped to solve the problem. Nor is the system of Federal courts as a whole. Segregation exists in the schools of 17 States. In these States, there are certainly more than a thousand counties and probably many more school districts. Is this Court to supervise the operation of amalgamation in each of these school districts? New school district lines will be universally required; is the Federal judiciary to pass upon the propriety of each? That is not the machinery of the judicial system; it is expressly the machinery of the executive carrying out the declared will of the legislature.

Furthermore, in a technical sense, a reversal of the lower court decision here is of necessity of limited effect. In this sense, nothing that this Court can do at this time will affect the schools of North Carolina. Nor will a reversal here affect the schools of Nottoway County, Virginia, adjoining Prince Edward County. Nor, for that matter, will it affect the elementary schools of Prince Edward County, for they are not at issue in this case. Yet a holding that school segregation by race violates the Constitution will result in upheaval in all of those places not now subject to Federal judicial scrutiny. This Court has made many decisions of widespread effect; none would affect more people more directly in more fundamental interests and, in fact, cause more chaos in local government than a reversal of the decision in this case.

It seems to us that this points up the fact that the problem before the Court is essentially legislative—it is a policy decision to be made in the light of present social conditions and the great guaranties of the Fourteenth Amendment. To abolish school segregation would be a long step in the field of social relations, of the type normally to be taken after mature consideration by persons elected directly by the people. Segregation has existed in the schools for more than a century; to eliminate it overnight would be to do more than fill a gap in the social framework of the country.

We know of no firm line that can be drawn between the judicial and the legislative powers. Judges legislate; everyone recognizes that. To quote again from Mr. Justice Holmes:

> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."[8]

Is the abolition of school segregation a crack or crevice in the law? Would the Court, in taking that action, be merely filling a gap? History and size belie that conclusion.

This Court stays its hand in many matters where it has the power to act, if the term power be used in its broadest meaning. In one sense, whenever the Court refuses to hold a statute unconstitutional it makes a determination that the judicial power is not then to interfere with the legislature. But there are other cases. The Court will not determine questions as to the proper ratification of an amendment to the Constitution;[9] it will not enforce the constitutional

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[8] *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 221 (1917).

[9] *Coleman* v. *Miller,* 307 U.S. 433 (1939).

guaranty of a republican form of government;[10] it will not interfere with relations with other nations nor review judgment determinations made in the exercise of the war power.[11] It will not even decide the question of title to personal property held by a lower court if that question depends for solution on the validity of action taken by a foreign nation.[12] These are among many examples that could be chosen. The reason that the Court refuses to make the requested determination is that it does not possess the machinery necessary to make or to enforce its determination, or that some other branch of the government has better machinery. That same condition, we suggest, exists in this case.

Again we point out that we do not need at this time to conclude the question as to the location of the legislative power. Of course, the State legislatures may act. Whether Congress may act presents a novel and more difficult question. Our view is that Congress may not abolish school segregation by a statute within its constitutional power. We give here, in summary form, the reasons for our view.

Any power possessed by Congress must be found in §5 of the Amendment. That section gives Congress the right to enforce the other sections of the Amendment and no more. Congress is not empowered to define acts which violate the Amendment nor is it authorized to define the scope of the Amendment's operation. Much less is Congress authorized to expand the effect of the Amendment. Congress has the simple power to provide appropriate relief in the event of violations:

> "This is the legislative power conferred upon Congress, and this is the whole of it. . . . It does not authorize

[10] *Highland Farms Dairy Co.* v. *Agnew*, 300 U.S. 608 (1937).

[11] *Ex parte Republic of Peru*, 318 U. S. 578 (1943); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

[12] *Octjen* v. *Central Leather Co.*, 246 U. S. 297 (1918).

> Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws . . . when these are subversive of the fundamental rights specified in the amendment."[1]

The only section of the Amendment possibly applicable in the case of school segregation is the first section. But that section confers no power on Congress; it is by its express terms only a limitation of the powers of the States. The Congress that proposed the Amendment refused to propose it in a form conferring power on Congress; the affirmative form was considered and rejected while the negative form was proposed and ratified. Congress acquired no power under the first section.

On this basis, we take as our major premise the fact that school segregation was not outlawed by the first section of its own force. Congress may enforce the provisions of that section within the scope of its intended operation; Congress is given no power to expand its meaning. Therefore, Congress may not outlaw school segregation, for to do so would be to expand the operation of the first section of the Amendment and that is beyond the power of Congress.

This syllogistic reasoning is not, as it may appear, an oversimplification of the problem. It does not result in divesting §5 of all meaning and purpose. Congress could enact a statute declaring that any State law is void which prohibits all left-handed people from owning property and Congress could provide a remedy in the Federal courts in the event of the attempted enforcement of such a law. Thus Mr. Justice Bradley stated that he would uphold any act of Congress that

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[1] *Civil Rights Cases*, 109 U. S. 3, 11 (1883)

> " . . . is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified."[2]

But those wrongful acts must be within the scope of operation of the Amendment. Beyond that Congress may not go.

Furthermore, §5 has a field for operation entirely beyond the first section of the Amendment. For example, the second section of the Amendment has never been made operative, but it could be put into effect only by an act of Congress. In putting it into effect, Congress would act under §5. Finally, we refer again to the apparent Congressional disinclination in the reconstruction era to rely on the judiciary to enforce the new rights then created; that disinclination is, of itself, sufficient justification for inclusion of the fifth section.

The reasoning that we urge here has the support of authority. Time and time again, as we show in Appendix A, the limited power given Congress under the Amendment was made clear in the great Congressional debates of the 1870's. A Congressional declaration that school segregation violated the Amendment would be an extension of the Amendment's terms, and Congress has no power to make that extension.

But this is a question that may arise at some future time; it is not at issue here for Congress has not acted. We discuss the question briefly here for it was raised in argument by the Court and we believe that our position should be made clear. But we assume that no full argument is required now for that should await the time when Congress has acted and the question is presented to this Court for determination.

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[2] *Id.* at p. 16.

We point out here only that the question now before the Court is, on the record here, a legislative question. The mere size of the problem makes that clear as does its history. Segregated schools are not an isolated custom but a social pattern followed by one-third of the nation, a pattern that has been followed, under the scrutiny of Congress, the State legislatures and the courts, for a century. To change this pattern by court decree—of uncertain and indirect effect in different localities—would be to do more than fill a gap, more than to legislate "interstitially." That decree would be judicial legislation of unprecedented scope and effect. It would be an invasion of the power reserved to the legislature.

In this sense, this Court has no judicial power to reverse the decree of the court below.

D.

THE POWER TO HOLD UNCONSTITUTIONAL

In 1793, the General Court of Virginia exercised the judicial prerogative of declaring an act of the General Assembly in conflict with the Constitution of Virginia. The report goes on to show that this decision so strongly affected the judges that they forthwith filed a remonstrance with the General Assembly and resigned in a body.[3]

Modern judges do not feel so strongly as to conflicts with the legislative branch. But throughout our history, the act of declaring a statute unconstitutional has been taken only with the greatest hesitation. John Marshall set the precedent:

> "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be de-

[3] *Kamper* v. *Hawkins,* 1 Va. Cas. 20 (1793); see *id.* at pp. 98, 108.

> cided in the affirmative in a doubtful case. . . . The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."[4]

This is the "presumption of constitutionality"[5] which is given to every legislative act, including the constitution and statute of Virginia under attack in this case. This has been termed "a policy of the Court which recognizes that the law-making power resides in the legislature."[6]

This Court clearly has the power to overcome the presumption. Mr. Justice Cardozo has well stated the reason for the existence of the power:

> "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."[7]

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[4] *Fletcher* v. *Peck*, 6 Cranch 87, 128 (1810).

[5] See, *e.g.*, Brandeis, J., in *O'Gorman and Young, Inc.* v. *Hartford Fire Insurance Co.*, 282 U.S. 251, 257-8 (1931).

[6] Levy, *Our Constitution: Tool or Testament?* (New York 1941) 246.

[7] Cardozo, *The Nature of the Judicial Process* (New Haven 1921) 92-3.

Do we face in this case an assault of opportunism, a resort to expediency, a small encroachment, an attack by the unprincipled? Again, a century of experience in 17 States makes such a claim absurd. This is not the sort of case for the exercise of the power.

What, in general terms, is the extent of this phase of the judicial power? We quote again from Mr. Justice Holmes:

> "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all."[8]

This case, we submit, falls squarely in the category of legislative discretion. The Fourteenth Amendment did not outlaw school segregation at the time of its ratification. Whether or not to adopt school segregation is a matter for the conscience of the individual State legislatures based on factual conditions in the several States. These facts, of necessity, are best known to the legislatures.

But we are met with the doctrine of the evolving Constitution. Mr. Justice Cardozo said:

> "The great generalities of the constitution have a content and a significance that vary from age to age."[9]

Mr. Justice Frankfurter has expressed a similar view:

> "The Constitution of the United States is not a printed finality but a dynamic process; its application to the

[8] *Otis* v. *Parker,* 187 U.S. 606, 608-9 (1903).

[9] Cardozo, *The Nature of the Judicial Process* (New Haven 1921) 17.

> actualities of government is not a mechanical exercise but a function of statecraft."[10]

We do not deny that many judges of wide renown have accepted these precepts.[11] But we seek to ascertain the scope of the doctrine. Is the present rule broader than the rule stated in an opinion in which Mr. Justice Holmes concurred that the meaning of the Constitution "does not alter" but that:

> " . . . as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred."[1]

To what extent can changed conditions expand the meaning of the Constitution? We take it that each State will remain entitled to two Senators regardless of the extent of changed conditions. But we submit that this Court's power is certainly more limited than that.

Let us make our point clear. When this Court had before it for decision the case of *Hammer* v. *Dagenhart,*[2] it did not have any knowledge of the intention of the framers as to the exact meaning of the commerce clause as applied to the exact factual situation then presented to the Court. The framers never considered that exact question. Nevertheless, this Court made its decision. When substantially the same facts came before the Court 23 years later, the Court had

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[10] Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge 1939) 76.

[11] See the discussion of this point in Jackson, *The Task of Maintaining Our Liberties* (1953) 39 A. B. A. J. 961, 964. It may be noted that in this case there is no conflict between the will of the legislature and the original meaning of the Constitution: here the Court is asked to act on "election returns" without an election.

[1] *South Carolina* v. *United States,* 199 U.S. 437, 448 (1905).

[2] 247 U.S. 251 (1918).

no further insight as to the exact meaning of the framers on the exact facts of the case. But the 1941 Court was not disturbed; it held that the 1918 Court had mistaken the meaning of the commerce clause and overruled the earlier decision.[3]

This is a different case. Here the exact intention of the framers is known, as we have shown above. They did not intend the Amendment to abolish school segregation; it is just as if they had put a footnote to the Amendment to that effect.[4] Now the Court is asked, because of changed conditions, to overrule its prior decisions in exact accord with the expressed intention of the framers and to reach a result exactly opposite to their expressed intention.

To put the case bluntly: Where the Constitution, as interpreted by its framers, says that red is red, can this Court, because of changed conditions, say that red is not red?

The Court may have that power; but we can find no case where the question has been faced in those terms and a decision reached. We submit that the Court cannot carry the doctrine of the evolving Constitution to this extreme and that the judicial power does not extend to reversal of the exact intention expressed by the framers of the Constitution.

E.

THE EFFECT OF PRECEDENT

If this case were to be decided solely on the basis of precedent, this brief could have been much more limited.

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[3] *United States* v. *Darby*, 312 U.S. 100 (1941).

[4] Compare, for example, the decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), which seems historically correct. The Civil Rights Act of 1866 expressly gave the Negro "the same right to . . . purchase . . . real . . . property. . . ." The Fourteenth Amendment constitutionalized the Civil Rights Act. The Court's decision appears, therefore, to coincide with the intent of the framers.

There is ample precedent in the decisions of this Court to uphold school segregation:

> "But for over a century it has been settled doctrine of the Supreme Court that the principle of *stare decisis* has only limited application in constitutional cases. It might be thought that if any law is to be stabilized by a court decision it logically should be the most fundamental of all law—that of the Constitution. But the years brought about a doctrine that such decisions must be tentative and subject to judicial cancellation if experience fails to verify them. The result is that constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors."[5]

If this be the rule of the Court, it presents many unfortunate facets. It makes the ordering of their affairs difficult, if not impossible, for citizens who would attempt plans for the future in the light of the experience of the past. It makes every case subject to determination by an *ab initio* examination based on broad principles. It sharply diminishes precedent as a guide to the decisions of this Court.

We had not thought that a question directed to the scope of the judicial power could be answered exclusively by resort to historical precedent. It seemed to us to require a broader investigation. We thought that it required an examination of general principles underlying the Constitution and its great doctrine of the separation of powers. But Appellants have chosen to present an answer relying entirely on their interpretation of historical precedent. We are happy to meet them on their own ground.

We turn first to the controlling precedents. The first is *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). That case con-

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[5] Jackson, *The Task of Maintaining Our Liberties* (1953) 39 A. B. A. J. 961, 962.

cerned a Louisiana statute requiring railways in that State to provide "equal but separate accommodations for the white, and colored races. . . ." This Court upheld that statute. In the majority opinion, the Court admirably set forth the principles stated by those who favored the Fourteenth Amendment in the 39th Congress and, at the same time, made the rule applicable to this case unmistakably clear:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." (p. 544)

In that same case, many of the same arguments of fact were presented then that Appellants present now. The Court dismissed those arguments then as this Court should now:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason

> of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." (p. 551)

The Appellants seek now to turn Mr. Justice Harlan's dissenting opinion into a controlling precedent by extolling its virtues (Brief pp. 40-1). But Mr. Justice Harlan did not refer to schools. When a school question arose again at a later date, he took the other side.

That case was *Cumming* v. *Board of Education*, 175 U.S. 528 (1899). There a county school board supported a high school for whites with public funds but refused to support a high school for Negroes with like funds. The appellants sought to enjoin continued support of the white school. The relief that they sought was denied. Mr. Justice Harlan spoke for a unanimous Court. He said:

> "Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We

> may add that 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. We have here no such case to be determined. . . ." (p. 545)

It cannot with fairness be said that *Plessy* v. *Ferguson* does not support our position in this case, and indeed Appellants recognize this by asking that *Plessy* v. *Ferguson* be overruled. No other solution is possible if their position is to be upheld. But they refuse to give equally controlling weight to another precedent. That is *Gong Lum* v. *Rice,* 275 U.S. 78 (1927). There the question was the right of a Chinese child to attend a white school rather than a Negro school. Mr. Chief Justice Taft said for a unanimous Court that included Holmes, Brandeis and Stone:

> "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." (p. 86)

The Chief Justice then proceeded to cite 15 cases to support this proposition and added a substantial quotation from *Plessy* v. *Ferguson.*

But it is urged (Brief, p. 48) that the separate but equal doctrine was not "at issue" in *Gong Lum* v. *Rice.* That seems denied by the closing words of the Chief Justice:

> "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." (P. 87)

The *Gong Lum* case presents a clear situation where the separate but equal doctrine was sustained under attack.

These are the school cases decided by this Court that relate to the separate but equal doctrine. In all of the other cases, this Court found inequality to exist in fact. If the separate but equal doctrine has vitality, as we are certain that it does, these are the precedents that determine the matter.

But Appellants refer to "the mistaken belief that the doctrine of *Plessy* v. *Ferguson* . . . is a correct expression of the meaning of the Fourteenth Amendment . . ." (Brief, p. 31). The rule announced there is held to be "wholly at variance with that of the earlier cases and the intent of the framers. . . ." With the latter we do not deal here, for that has been covered in the earlier sections of this brief. We merely repeat that the intent was that the Amendment should relate to civil rights and that the author of the Civil Rights Act of 1866, Senator Trumbull of Illinois, said:

> "The right to go to school is not a civil right and never was."[6]

As to the earlier cases, they are not in point. This Court reviewed them when it decided *Plessy* v. *Ferguson* and said:

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[6] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 3189.

"The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder* v. *West Virginia*, 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia* v. *Rives*, 100 U.S. 313; *Neal* v. *Delaware*, 103 U.S. 370; *Bush* v. *Kentucky*, 107 U.S. 110; *Gibson* v. *Mississippi*, 162 U.S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company* v. *Brown*, 17 Wall. 445."

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"In the *Civil Rights case*, 109 U.S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the

States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that the Fourteenth Amendment 'does not invest Congress with power to legislate upon subjects that are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."

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"Thus in *Yick Wo* v. *Hopkins*, 118 U.S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power." (pp. 545-50)

These quotations cover all except two of the cases prior to *Plessy* v. *Ferguson* cited by the Appellants and their

inapplicability to this case is made as apparent by the reasoning there given as it would be by further discussion here. In *United States* v. *Cruikshank*, 92 U. S. 542 (1875), the Court found that long indictments under the Enforcement Act of 1870 were inadequate as a matter of law since they did not charge a conspiracy to deprive persons of their rights as citizens of the United States but of their rights as citizens of States. This was merely an application of the rule of the *Slaughter-House Cases*, 16 Wall. 36 (1873), that the Amendment was designed only to protect rights derived as citizens of the United States. *Ex Parte Virginia*, 100 U. S. 339 (1879), was simply another jury exclusion case. No alternative was offered; Negroes were simply excluded from jury service.

None of these cases with one exception presented the question that arose in *Plessy* v. *Ferguson*. None brought before the Court a separate but equal situation. They all concerned absolute exclusion of Negroes; no separate equality was offered. They can therefore have no relevance to this case and the general language found in them cannot be applied by analogy here for there is no analogy.

The one exception is *Railroad Company* v. *Brown*, 17 Wall. 445 (1873). But there the charter of the Company enacted by Congress forbade "exclusion" from cars because of color and this Court very properly held that the Company could not adopt a regulation in contravention of the act of Congress authorizing it to operate. The Fourteenth Amendment is not mentioned in the opinion and had no relevance to the decision.

It is true that *Plessy* v. *Ferguson* was a case of first impression in the Supreme Court. But other courts of importance had considered and given their approval to the separate but equal doctrine. These included the highest courts of

New York, Ohio, Indiana and California.[7] And, among the earlier cases, Appellants have chosen to disregard *Hall* v. *DeCuir*, 95 U. S. 485 (1877). There, as applied to interstate transportation, this Court held invalid as a burden on commerce a Louisiana statute prohibiting regulations distinguishing on the basis of race or color. In a concurring opinion, Mr. Justice Clifford reviewed and approved the early State cases upholding segregation in the schools. It cannot be urged that the doctrine of *Plessy* v. *Ferguson* was something unknown; it was novel only because it was generally accepted and the Court had not been called on at an earlier date to restate the obvious.

Next it is urged that *Plessy* v. *Ferguson* was in error because the Court gave some weight to the customs and traditions of the people (Brief, pp. 42-3). We do not think this error. We do not urge that customs and traditions may override a clear constitutional prohibition. But there is no prohibition in the field of education. The mere constant repetition of the unwarranted assertion that the purpose of the Fourteenth Amendment was to prohibit all distinctions based on race cannot change the established fact that its purpose was to eliminate distinctions on the basis of race in certain specific fields of civil rights and the school system was not included within those fields. We do not urge customs or tradition as the sole basis for our position. We do not countenance threats of violence nor do we suggest in any way whatsoever that the possibility of violence should bear on the decision of this case. That is not in point. But customs and traditions, like long continued administrative interpretation of a statute, have a bearing on intention,

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[7] *Dallas* v. *Fosdick*, 40 How. Prac. (1869); *Peoples* ex rel. *Dietz* v. *Easton*, 13 Abb. Prac. (N. S.) 159 (1872); *People* ex rel. *King* v. *Gallagher*, 93 N. Y. 438 (1883); *State* ex rel. *Garnes* v. *McCann*, 21 Ohio State 198 (1871); *Cory* v. *Carter*, 48 Ind. 327 (1874); *Ward* v. *Flood*, 48 Cal. 36 (1874).

construction and the test of reasonableness. After all, as Mr. Justice Frankfurter has said:

> "The Fourteenth Amendment did not tear history up by the roots. . . ."[8]

Similarly, a jury made up of men brought fresh from Tibet to Washington, D. C., would not satisfy the requirements of procedural due process. In a word, all men act in varying degrees on the basis of history and custom. A man who knew nothing of our history or our customs could not fit the definition of a reasonable man as that term is used in our law. By the same token, a determination of reasonableness cannot be made without reference to history and customs. Of course, history and customs are not conclusive; but they are entitled to consideration. Appellants assert here, as they did so often at the former hearing, that reasonableness must be determined in a vacuum. No man lives by the unvaried application of the doctrinaire. Appellants seek to avoid the facts of life; this Court cannot avoid them when decisions are to be reached.

Finally, Appellants offer the Court an interpretation of the history of the Nineteenth Century (Brief, pp. 50-65). That section is written, apparently, by a hand different from the one that composed, in lawyer-like fashion, the earlier argument. It is an irrelevance and a perversion.

History is a difficult subject. The historian must have capacity for detachment. No one factor can bear too strongly in his interpretation. Otherwise, he sees history, as through a colored glass, in terms of his own predilections. We have had historians who believed that all events could be explained by the characters of a few leading men who took the principal roles. The Civil War era, about which we

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[8] *Goesaert* v. *Cleary*, 335 U. S. 464, 465 (1948).

are here much concerned, may be explained in apparently persuasive terms from either a radical northern or a radical southern point of view; the stories, if compared, would seem to relate to different wars. We are accustomed to the theory of history that interprets all events in terms of the class struggle.

This section, we suppose, is written by one of the Negroid-conspiracy school of historians. It is a school to which we are not accustomed. It interprets all history in the light of a supposed race struggle. All white persons belong either to the saints (who desire exaltation of the Negro) or the sinners (who desire subjugation of the Negro). For a short time the saints gained the ascendancy. But in some dark and smoke-filled room in 1877 a conspiracy was hatched and the sinners regained control. For the remainder of the century the sinners persecuted the Negro and controlled this Court. *Plessy* v. *Ferguson* was one of the results.

We have already mentioned the tendency of Appellants to charge conspiracy where no evidence warranted the charge. Here this Court becomes a party to the conspiracy. But one fact cannot be explained. Segregated education was wide-spread all during the '60s and '70s, and Congress fostered it in the District of Columbia all the time that the saints were in control. Why was not the issue presented to this Court before the dark conspiracy of 1877 was hatched? The failure to do so was remarkably inopportune. The reason was that no one ever thought that school segregation offended the Fourteenth Amendment. That theory is a Twentieth Century afterthought. The conspiracy has now been manufactured to lend color to the theory.

We say no more about this section. It is, we suppose, an effort:

> ". . . in the name of 'realism', to rely upon 'facts' to determine decisions. These they would select largely from sociology, political science, psychology and other nonlegal disciplines. Citations of weekly magazines, newspapers and an endless list of popular, scientific and professional books and reviews are now found. . . ."[9]

But this section is none the less a perversion of history. All of life can no more be interpreted in terms of a supposed race struggle than it can in terms of a supposed class struggle.

We come, then, to the turn of the century. *Plessy* v. *Ferguson,* representing a determination of a question of first impression, is the established rule. We seek now to determine whether the decisions of this Court in the last five decades have robbed it of vitality. They have not.

We turn first to the school cases, the only ones bearing any direct relationship to this case. Of these there are four; and none of them weakens the authority of *Plessy* v. *Ferguson.* We take them up one by one.

The first was *Missouri* ex rel. *Gaines* v. *Canada,* 305 U. S. 337 (1938). There, Missouri provided a law school for white students; it provided none for Negroes; it would pay tuition fees in a foreign university. The State cited *Plessy* v. *Ferguson.* This Court held the separate but equal rule inapplicable where the State, in fact, did not provide separate facilities:

> "But . . . the fact remains that instruction in law for negroes is not now afforded by the State . . . and that the State excludes negroes from the advantages of the law school it has established. . . ." (p. 345)

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[9] Jackson, *The Task of Maintaining Our Liberties* (1953) 39 A. B. A. J. 961, 962.

These facts determined the matter; *Plessy* v. *Ferguson* did not apply.

The next case was *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948). Oklahoma had a law school for whites but none for Negroes; it refused admission of Negroes to the white school. Of course, this was the same case as the *Gaines* case and that is the only authority cited in the *per curiam* opinion. Again, *Plessy* v. *Ferguson* did not apply.

Next comes *Sweatt* v. *Painter*, 339 U. S. 629 (1950). There Mr. Chief Justice Vinson stated:

> ". . . we cannot find substantial equality in the educational opportunities offered white and Negro students by the State." (p. 633)

That determination made *Plessy* v. *Ferguson* automatically inapplicable. This the late Chief Justice formally recognized:

> "We cannot, therefore, agree with respondents that the doctrine of *Plessy* v. *Ferguson* . . . requires affirmance of the judgment below." (pp. 635-6)

Had these words been the end, *Plessy* v. *Ferguson* would have stood unimpaired. But that was not the end. The Chief Justice went on:

> "Nor need we reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." (p. 636)

We do not assert those words to be a reaffirmation of the doctrine of *Plessy* v. *Ferguson*, but we cannot interpret them as questioning its doctrine.

The last of these cases is *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). Again the decision was based on a finding of factual inequality. The State adopted restrictions which set

> ". . . McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction." (p. 641)

The conclusion was that "the conditions under which this appellant is required to receive his education" deprived him of constitutional rights (p. 642). In a word, there was separation but no equality. *Plessy* v. *Ferguson* was again inapplicable.

These are all of the school cases. In all of them there was separation; in none of them was there equality. The separate but equal doctrine comes through them unimpaired.

But Appellants strongly rely on other authority. That is *Buchanan* v. *Warley,* 245 U. S. 60 (1917). It is cited in five different sections of their Brief. But it has no applicability here. Counsel and this Court in that case made unmistakable its present irrelevance.

Buchanan v. *Warley* concerned a Louisville ordinance that prohibited a Negro from moving to a residence on a block where more than half the present residents were white and *vice versa.* A white man offered his house to a Negro; the Negro agreed to buy if he could occupy the house. The white man sought specific performance; the Negro set up the ordinance. This Court held the ordinance invalid. As a result, the white man was successful in his suit.

The argument for the white man is found in the report. His counsel distinguished the transportation cases and then went on:

> "The cases of public schools are even more remote from that under consideration. The States are not bound to provide schools for anybody. Statutes regulating attendance at schools do not cut down rights previously recognized, but grant privileges which would not otherwise exist. If, therefore, the privileges granted to white and to colored children are in general similar, there can be no complaint." (p. 63)

This Court adopted an historical interpretation of the Fourteenth Amendment. It pointed to the Civil Rights Act of 1866 which specifically gave the Negro the same right as the white to purchase, sell and hold property. It then pointed out that this statute had been re-enacted after the ratification of the Fourteenth Amendment. The Court continued:

> "These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U.S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." (p. 79)

That might well have been the end to the matter. But the Court went on to distinguish *Plessy* v. *Ferguson:*

> "It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races." (p. 79)

But this was not all:

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> "It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races." (p. 79)

But this was not all:

> "As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us." (p. 81)

Finally, Appellants cite this case to bolster the Court against intimidation from violence which they assert that we threaten. We deny any threat as emphatically as possible. We expect dislocation if schools are amalgamated. We do not urge that race hostility be avoided by the denial of constitutional rights; we do urge that race hostility not be promoted where, as here, no constitutional rights are at issue.

We do not see how *Buchanan* v. *Warley* helps the cause of Appellants. This Court there noted the existence of school segregation and said that it presented a different case. The separate but equal doctrine passes inviolate and tacitly approved.

The other cases cited by Appellants are more remote from the issue; none of them involves the separate but equal doctrine. Most, in fact, concern situations of exclusion without equality. It will serve no useful purpose to refer to all of them; we note a few. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), and *Barrows* v. *Jackson,* 346 U.S. 249 (1953), are extensions of *Buchanan* v. *Warley* and have historical justification in the constitutionalization of the Civil Rights Act of 1866 by the Fourteenth Amendment. A State may not destroy because of race the right to acquire property. *Oyama*

v. *California*, 332 U.S. 633 (1948). A State may not unreasonably exclude residents from engaging in occupations. *Truax* v. *Raich*, 239 U.S. 33 (1915); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). A State may not use its machinery to limit the right of voting when the limitation is based on racial discrimination. *Smith* v. *Allwright*, 321 U.S. 649 (1944). Still further removed are cases arising under the Commerce Clause or relating to limitations on Federal power. *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Ex parte Endo*, 323 U.S. 283 (1944). In none of the cases arising under the Fourteenth Amendment is anything concerned except a stark prohibition; none of them involves or could involve the separate but equal doctrine.

That is all that there is to precedent. *Plessy* v. *Ferguson* remains unimpaired. At the time that the opinion was delivered, it was a correct decision on the basis of history of a question of first impression in this Court and it was in accord with prior decisions of this Court. Since that time, it has withstood attack and the principle which it invoked remains as vital today as it was in 1896.

Here we are concerned with the nature of the judicial power. If the Court means by this question to seek the nature of the judicial power in terms of its prior decisions, a meaning that seems to us remote, our answer is clear. The judicial power, so defined and circumscribed, does not authorize in this case reversal of the court below.

F.

THE FOURTEENTH AMENDMENT RECONSIDERED

It is, of course, too late to consider the Fourteenth Amendment anew, as if it had none of the gloss that repeated decisions of this Court have given to it. Those decisions have become as much a part of our way of life

as the Amendment itself. The language of the Amendment in the light of the decisions of this Court stakes out with sufficient plainness the limits of the judicial power.

Even if we were to take a fresh look at the privileges and immunities clause, the first of the great guaranties, we should be compelled to follow the path taken by this Court. The Amendment, it will be recalled, begins with definitions of citizenship and makes it clear that there are two kinds of citizenship. Only then does it continue:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

This clause was carefully drawn. It had constitutional precedent. A State may not abridge the privileges and immunities not of citizens of all types, but only of citizens in respect of their capacity as citizens of the United States. So the conclusion was obvious:

> ". . . it is only the [privileges and immunities of the citizen of the United States] which are placed by this clause under the protection of the Federal Constitution, and . . . the [privileges and immunities of the citizen of the State], whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."[10]

This conclusion cannot be disputed; the only question left is to determine the privileges and immunities of citizens of the United States.

Again, this Court then followed a path that we would have to follow today. Before the Amendment, the specific civil rights given to the citizen by the Constitution were few —bills of attainder, *ex post facto* laws, the sanctity of con-

[10] *Slaughter-House Cases,* 16 Wall. 36, 74 (1873).

tracts. Did the Amendment transfer to Congress the duty to protect all rights? Of course not. Only those rights which were at the time derived directly from citizenship of the United States are protected by the Amendment.[11]

Is the privilege of going to an unsegregated school a right derived from the Constitution? We are reminded again of the remark of Senator Trumbull, the Senator who introduced the bill that became the Civil Rights Act of 1866:

> "The right to go to school is not a civil right and never was."[12]

Surely the method and place of education is not a privilege or immunity conferred on citizens of the United States by the Constitution as it existed before the Amendment was ratified. The privileges and immunities clause can have no relevance to this case.

The rule as to privileges and immunities so adopted by this Court has never varied:

> "Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States."[13]
>
> * * *
>
> ". . . the privileges and immunities clause protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship."[14]
>
> * * *
>
> "The protection extended . . . by the privileges and immunities clause includes those rights and privileges

[11] *Id.* at p. 78.

[12] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 3189.

[13] *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908).

[14] *Madden* v. *Kentucky*, 309 U. S. 83, 90-1 (1940).

> which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship. . . ."[15]

So the judicial power, to the extent that it is conferred by the privileges and immunities clause, does not authorize reversal of the court below and the abolition of school segregation.

We pass over the due process clause, for life and property are surely not involved in this matter and liberty can be brought in only by the most tortured reasoning. We come then to equal protection:

> ". . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

Equality is not identity. All persons are not entitled to the same treatment. It has never been urged that a State may not lock up a thief nor hospitalize a lunatic. Yet all persons are not accorded the treatment given thieves and lunatics. On any rational basis, equal cannot be interpreted to mean the same.

> "It has been decided many times that a State may classify persons and objects for the purpose of legislation. We will . . . consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose."[1]
>
> * * *
>
> ". . . what the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent . . . to permit the States to classify the subjects of legislation, and

[15] *Snowden* v. *Hughes,* 321 U. S. 1, 6-7 (1944).

[1] *St. John* v. *New York,* 201 U.S. 633, 636-7 (1906).

> make differences of regulation where substantial differences of condition exist."[2]

What is the test applied by this Court? The sole test is whether the legislature acted within the bounds of reason. Mr. Justice Holmes said:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. . . . The only question is whether . . . the legislature . . . could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. . . . Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know."[3]

In briefer form, Mr. Justice Hughes said:

> "The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat."[4]

The determinations of reasonableness are not made in the air; the particular conditions of each case lead to the result in that case. That is what Mr. Justice Holmes said above. That is still the view of this Court:

> "The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties,

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[2] *Phoenix Insurance Co.* v. *McMaster,* 237 U.S. 63, 72-3 (1915).
[3] *Dominion Hotel, Inc.* v. *Arizona,* 249 U.S. 265, 268 (1919).
[4] *Purity Extract and Tonic Co.* v. *Lynch,* 226 U.S. 192, 204 (1912).

> addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[5]

Again, the same idea has been expressed in another way:

> "It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered."[6]

The question under equal protection is thus whether the State action is within the bounds of reason in all of the circumstances of the case. If that is the only question, precedents are of little value. Certainly at other times in other places prior Courts have thought that school segregation met this test.[7] Even less relevant are all the other equal protection decisions upholding State legislation, such as the medical decisions which this case closely resembles.[8] We are remitted to the facts of this case at this time for a determination of reasonableness.

We do not fear this examination. The record in this case abounds with testimony as to the reasonableness of school segregation. The court below found such segregation reasonable and proper at this time in Virginia as a matter of

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[5] *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

[6] *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949).

[7] See Section E above. If changed conditions were the only issue, we should point out here that the arguments made and the facts asserted by appellants are to a remarkable extent mere echoes of the arguments made and the facts asserted by Charles Sumner in the Senate in the 1870's.

[8] See, *e.g.*, *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905), and *Bacon* v. *Walker*, 204 U.S. 311 (1907).

fact.[9] We will review here very briefly indeed that testimony and finding at the risk of repeating to a large extent what was contained in our brief on the original hearing.[10]

The expert witnesses for the Appellants were men who had no knowledge of Virginia conditions (R. 154, 169-70, 194, 214, 218-9, 261-2, 245-6). They based their conclusions on "general reading" (R. 194) and on a questionnaire completely lacking in significance (R. 204, 232, 554-5). In addition, one conducted two tests, one of which was subject to "a slightly controlled answer" and the other of which gave results similar to those obtained in New England (R. 248-53, 519, 255-60, 278, 280-2). No one could form on the basis of their expert testimony a reliable opinion that school segregation in Prince Edward County is without reason (Original Brief, pp. 21-4).

The witnesses who supported school segregation were equally expert, had wide experience and were completely familiar with conditions in Virginia. We summarize again their testimony:

Dr. Howard, Virginia's Superintendent of Public Instruction, with 30 years of experience as a teacher and administrator in Virginia schools (R. 438): "It has been my experience, in working with the people of Virginia, includ-

[9]The question of time and place is an important one in the test of reasonableness. Segregation exists only where the two races live side by side in substantial numbers. Almost 70% of the Negro population of the nation are found in the States and the District of Columbia where school segregation is mandatory. In the 27 States where there is no segregation, Negroes constitute less than 5% of the population. These statistics, taken from the 1950 census, will be found in the table printed as Appendix C.

[10]We do not touch here the question of equal facilities. Since the trial in the court below, a new high school for the Negroes of Prince Edward County has been completed. In physical facilities, it is better than anything provided for the whites. In curriculum, it is at least the equal of the white schools. Information on these points is supplied to the Court in Appendix D.

ing both white and Negro, that the customs and the habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best. . . ." (R. 444)

Dr. Lancaster, former State Superintendent of Public Instruction, now President of Longwood College, Farmville, Virginia (R. 463): "I have no evidence that segregation in the schools *per se* has created warped personalities, and so forth. . . ." "But there is certainly nothing to indicate that [Negro students] are thwarted in their development or affected adversely." (R. 472) If segregation be stricken down, "the general welfare will be definitely harmed." (R. 472) ". . . there would be more friction developed." (R. 468) ". . . the progress of Negro education . . . would be set back at least half a century. . . ." (R. 469)

Dr. Darden, former Member of Congress and Governor of Virginia, now President of the University of Virginia (R. 452): ". . . I think the races separated, if given a fairly good opportunity, are better off." (R. 458) ". . . given good schools and good teachers, the children in separate schools in Virginia would be better off than in mixed schools." (R. 459)

Dr. Stiles, Dean of the Department of Education of the University of Virginia, not a native Virginian and with wide experience in States where schools are not separate (R. 486-9): In mixed schools, the Negroes "keep to themselves", "may become very aggressive . . . or . . . very submissive." (R. 489-90) The Negroes are not accepted by the white students (R. 490) or by teachers. "The teacher's acceptance of a child . . . is a vital factor in her ability to teach him, or the child's being accepted in a group . . . is a vital factor in how well he learns." (R. 500-1) If the Negro children were placed in the same schools as the white, ". . . I think they would be worse off at the present time." (R.

504) "The Negro child gets an opportunity to participate in segregated schools that I have never seen accorded to him in non-segregated schools. He is important, he holds offices, he is accepted by his fellows, he is on the athletic teams, he has a full place there." (R. 512)

Dr. Kelly, child psychiatrist, a native of Michigan with national experience and 6 years in Virginia (R. 515-6): "I think that the abrupt termination of segregation [by law] would make for some very vicious and very subtle forms of segregation. . . ." (R. 523) "When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops. . . ." (R. 524) ". . . given equal opportunities of physical equipment and teacher background, I could visualize no great harm coming to either group." (R. 525)

Mr. Buck, clinical psychologist educated in Philadelphia's mixed public schools and with a broad Virginia experience (R. 530-4): "I don't think that any thoroughly objective and sufficiently large study [of the effect of segregated schools] has ever been done." (R. 539) "I do not" think it would be possible for the Negro child to obtain general acceptance by white teachers and students (R. 537-8). "I do not know of any instance in history where a social ill was corrected by coercion or by a dramatic or sudden change, where the results were beneficial to either group or both groups." (R. 536)

Dr. Garrett, Chairman of the Department of Psychology of Columbia University, a leading national authority under whom two of Appellants' experts studied, a native Virginian and a graduate of a Virginia College (R. 545-8): "So long as the facilities which are allowed are equal, the mere fact of separation does not seem to me to be, in itself discriminatory." (R. 550) "It seems to me that in the State of Vir-

ginia today, taking into account the temper of its people, its mores, and its customs and background, that the Negro student at the high school level will get a better education in a separate school than he will in mixed schools." (R. 555)

But Appellants assert that these experts admitted that school segregation is harmful (Brief, p. 29). That is not a fair statement of their conclusions. Dr. Garrett, for example, made his position completely clear:

> "What I said was that in the state of Virginia, in the year 1952, given equal facilities, that I thought, at the high school level, the Negro child and the white child—who seem to be forgotten most of the time—could get better education at the high school level in separate schools, given those two qualifications: equal facilities and the state of mind in Virginia at the present time."
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> * * *
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> "If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off immediately, and I think, as I have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school." (R. 568-9)

This statement cannot be mistaken. Appellants' effort to make these witnesses conclude something that they did not mean is another example of their refusal to look at facts

in their surroundings. Their conclusion is not the proper one.

One further factual matter merits attention. Appellants assert that the factors which led this Court to find factual inequality in the case of *Sweatt* v. *Painter*, 329 U. S. 629 (1950), are equally present "at any level of public education." (Brief, p. 27) If that were true as a matter of law, the *Sweatt* decision becomes an absurdity. This Court would not have been so careful to preserve *Plessy* v. *Ferguson* if it meant that its rule could never be applied.

But that contention is not true as a matter of fact. Chief Judge Parker disposed of that contention in a most admirable manner in his opinion in *Briggs* v. *Elliott* (98 F. Supp. 529, 535, E. D. S. C. 1951; Record on appeal, pp. 185-6). In this case, his views are supported by expert testimony:

Dr. Stiles: "I think as people are more alike in their adult status and in their cultural attainments there is a greater chance of . . . mutual acceptance." ". . . the problem in the high school level is accentuated by the attitudes of parents." "I think [the high school] would be the most difficult level at which to bring about the abolition of segregation." (R. 439)

Dr. Lancaster: "I think it has been pretty clearly brought out that we have a state of maturity that is obtained, certainly on the graduate and professional levels, where there is far more tolerance than there is among children. . . ." (R. 468)

Dr. Garrett: ". . . I think that graduate students . . . are mature enough to meet their own responsibilities and to decide for themselves who their friends will be . . . so that it is no longer on a strictly racial basis." (R. 565)

These expert opinions make clear what is general knowledge. The level of maturity is important in human relations.

The level of maturity is quite different in high school students from the level of graduate students. At the high school level, a different set of values obtain. To the extent that the factors relied on in *Sweatt* v. *Painter* have any bearing on the high school students, they are outweighed by other factors of greater importance.

This evidence could lead only to one factual conclusion. The findings of fact by the court below are impressive:

> "It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored 'children' in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and wont." (R. 620)
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> * * *
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> "So ingrained and wrought in the texture of their life is the principle of separate schools, that the president of the University of Virginia expressed to the Court his judgment that its involuntary elimination would severely lessen the interest of the people of the State in the public schools, lessen the financial support, and so injure both races. . . . With the whites comprising more than three-quarters of the entire population of the Commonwealth, the point he makes is a weighty practical factor to be considered in determining whether a reasonable basis has been shown to exist for the continuation of the school segregation.
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> "In this milieu we cannot say that Virginia's separation of white and colored children in the public schools is without substance in fact or reason. We have found no hurt or harm to either race. This ends our inquiry. It is not for us to adjudge the policy as right or wrong —that, the Commonwealth of Virginia 'shall determine for itself.' " (R. 621-2)

These findings are that school segregation in the facts of this case is reasonable. They are clearly supported by substantial evidence in the record. They were made by a court of experienced judges who have a much more intimate knowledge of local conditions than this Court can possibly have or obtain.

Does this Court, then, have the judicial power to cast aside these findings and, on its own initiative, hold school segregation beyond all reason in the high schools of Prince Edward County, Virginia? That is what it must do in order to abolish school segregation there. We submit that the Court does not have that power.

In this sense, again, it is not within the judicial power to abolish segregation in the public schools.

G.

CONCLUSION

We have attempted to approach the answer to this question from various points of view. But, in essence, the problem is unitary; it is the question of judicial restraint. We quote once more from Mr. Justice Holmes:

> "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."[1]

This case is fraught with feeling. That is true on both sides. It is hard to view it on the basis of the record with

[1] *Truax* v. *Corrigan*, 257 U.S. 312, 344 (1921).

the detachment that alone can lead to sound judgment. But, if viewed in that light, the case falls squarely within the words just quoted.

The problem of school segregation is a legislative problem. As time passes, it may well be that segregation will end. But the judges of the proper time to end it should be the legislators who are so much nearer the facts of the racial problems that caused segregation. The question is a practical one for them to solve; it is not subject to solution in the theoretical realm of abstract principles.

In this most basic meaning of the term judicial power, we conclude that the judicial power does not authorize the abolition of school segregation.

QUESTION FOUR

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?

ANSWER:

The Court may permit an effective gradual adjustment if it should find that school segregation must be abolished. Precipitate action would make education impossible and do irreparable harm to all children in the schools.

DISCUSSION:

We discuss this question and the next less at length, for they assume that the critical issue has been decided in a fashion contrary to the position that we urge. But we think that neither of them presents a point of difficulty.

We believe that no extended discussion is needed to show the havoc that would result if we should find one Monday noon in March that all schools had to be amalgamated on Tuesday. School district lines are drawn by legislative or administrative bodies that cannot act overnight. Teacher assignments would have to be changed; facilities would have to be reallocated; transportation would have to be rearranged. The ways of life that have existed for generations would be swept away. They could not be replaced in a twinkling.

Unless these changes could be made pursuant to an ordered plan, immense harm would result. The harm would primarily be to the children; if segregation harms them, which it does not, then precipitate amalgamation would be far worse. We venture to suggest that, if immediate amalgamation were ordered in the Virginia schools, they could not reopen for 12 months. The action of this Court would result in a lost year of Virginia education. It is not an overstatement to say that the prospect is appalling.

But there is no need for the Court to take such action. There is a wealth of precedent to support its authority to permit gradual amalgamation. The closest analogy comes not from the decisions of this Court but from the decisions of lower courts as to separate but unequal schools. In those cases it has been almost the universal rule to permit a reasonable time for equalization. Immediate amalgamation is not required if the local officials are taking proper steps to eliminate inequality. Chief Judge Parker made this point in a case now before this Court:

> "In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort."[2]

The same rule has been applied in many other situations. Perhaps the most familiar are those arising out of the anti-trust laws. It is generally recognized that the economic tangles which those statutes have required to be unwound cannot be eliminated without some delay and it is the established rule to permit a reasonable time to accomplish the result desired. Thus in the Standard Oil litigation this Court modified the decree of the court below "in view of the magnitude of the interests involved and their complexity" by extending the period allowed for the decree to take effect.[3] This same principle is consistently applied in anti-trust litigation; " a liberal time period" is allowed to carry out the decrees of the court.[4] In another recent case, a two year period was established for a divestment order.[5]

These are merely applications of the general equitable rule that the remedy afforded should fit the particular case established. This Court has said:

> "The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would

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[2] *Briggs* v. *Elliott,* 98 F. Supp. 529, 537 (E.D.S.C. 1951).

[3] *Standard Oil Co.* v. *United States,* 221 U.S. 1, 81 (1911).

[4] *United States* v. *Aluminum Company of America,* 91 F. Supp. 333, 419 (S.D.N.Y. 1950).

[5] *United States* v. *Timken Roller Bearing Co.,* 83 F. Supp. 284 (N.D. Ohio 1949), modified 341 U.S. 593 (1951). In similar proceedings under the Public Utility Holding Company Act, Congress gave a period of one year for compliance and added provisions for extensions of time. 15 U.S.C. §79k(c).

otherwise be entitled, without condition, is undoubted."[6]

* * *

"It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."[7]

* * *

". . . 'equity will administer such relief as the exigencies of the case demand at the close of the trial.' "[8]

These principles make it clear beyond dispute that this Court has the power to permit a gradual adjustment. The facts of this case make it equally clear that, if segregation is to go, it should not be overthrown in precipitate disregard of the interests of the school children who, in the last analysis, must look to this Court for protection from educational chaos.

QUESTION FIVE

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

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[6] *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U.S. 264, 271 (1933).

[7] *Eccles* v. *Peoples Bank,* 333 U.S. 426, 431 (1948).

[8] *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.,* 338 U.S. 621, 630 (1950).

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?

ANSWER:

(a) *No.*
(b) *None.*
(c) *No.*
(d) *In the event of a decision to reverse, this case should be remanded to the court below with instructions to require the amalgamation of the high schools of Prince Edward County, Virginia, within a reasonable time in such manner as that court shall find reasonable in all the circumstances.*

DISCUSSION:

We will discuss the alternatives suggested by the Court very briefly.

It is normally not the province of an appellate court to frame detailed decrees:

> "... in order to prevent any complication and to clearly define the situation we think instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding with directions to the court below. . . ."[9]
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> * * *
>
> "We would exceed our appellate functions were we to adopt that suggestion [to approve a specific form of relief] in this case. 'The framing of decrees should take place in the District rather than in Appellate Courts.' "[10]

[9] *United States* v. *American Tobacco Co.*, 221 U.S. 106, 188 (1911).

[10] *Besser Manufacturing Co.* v. *United States*, 343 U.S. 444, 449 (1952).

The rule so announced makes it clear why the first three alternatives suggested by the Court should not be adopted. It is not the duty of this Court to work out the details necessary to carry out a gradual policy of school amalgamation. The Court does not have the machinery to accomplish that result and should not, in any event, attempt to shoulder that burden.

As far as sections (a) and (b) of this question are conceived, we submit that this Court is at present unable to adopt the alternative they suggest because the record contains no evidence as to how the result proposed can be reached. It is not a problem subject to easy solution. It certainly cannot be solved in the absence of the facts. We do not now know the facts. This alternative seems inconceivable.

There are many arguments why this Court should not attempt the same result through a special master. First, a matter of this sort is customarily determined by the courts of first instance. Second, the court below is a local court with a much closer knowledge of the local situation and that knowledge can be used to advantage to reach the proper result. Finally, the Court is not legislating a nation-wide statute to abolish school segregation. It will act in this case to abolish school segregation in the high schools of Prince Edward County, Virginia. In the companion cases, it will act to outlaw school segregation in the particular localities from which those cases come to this Court. Conditions vary materially in those five places, and the form and nature of the respective decrees must vary accordingly. This Court may tell Virginia how not to conduct its schools; it may not tell Virginia how the schools shall be run. Nothing will be gained by reference to a master appointed by this Court except confusion of issues and results.

If the decision of the court below is to be reversed, this case should go back to the District Court with instructions to see that segregation is abolished within a reasonable time. We do not suggest any particular time for that should be determined by the court below after plans for amalgamation have been prepared and submitted to that court for approval by the local school authorities. The best solution may require years before amalgamation is complete. Perhaps only one class should be amalgamated each year; perhaps amalgamation should be accomplished in different schools at different times. These are matters which should be left to the sound discretion of the court below with its greater familiarity with local conditions. That court will not be reluctant to supervise in the most diligent manner the consummation of the best plan that can be devised.

We suggest, therefore, that any adverse decision at the most require the court below to receive evidence promptly as to the best plan for amalgamation and thereafter to supervise that plan until the program provided for shall have been concluded. That is, in our view, the only orderly and practical way in which school segregation can be abolished.

But no matter how it is done, to abolish school segregation by court decree will result in difficulties that can hardly be overestimated. These are difficulties of physical equipment and difficulties of emotional conflicts. The school system of Virginia will suffer a body blow from which it will require years to recover.

CONCLUSION

We close this brief with a feeling of renewed conviction. Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not

offend the Constitution of the United States but serves to provide a better education for living for the children of both races. Nothing that we have found in our new and more painstaking review of the history, the law and the record in this case has shaken that conclusion in the least.

The court below in this case found as a matter of law and as a matter of fact based on substantial evidence that school segregation in the Prince Edward County high schools did not constitute unlawful discrimination. Its decision should be affirmed.

Dated November 30, 1953.

Respectfully submitted,

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APPENDIX A

THE FOURTEENTH AMENDMENT BEFORE CONGRESS

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1.

Introduction

The first 10 amendments of the Constitution of the United States, effective in 1791, were limitations on the powers of the central government. So too was the Eleventh, ratified in 1798, while the Twelfth, which became a part of the Constitution in 1804, changed the mechanics for the election of the executive. None of these in any way extended the power of the government of the United States.

Sixty years then elapsed without further change of the Constitution. Toward the end of this period came the extreme convulsion of civil war. At least one of the purposes of those who were successful in that conflict was to increase the power of the central government in relation to the State governments. So the Congress of representatives of the northern States proposed in rapid succession soon after the end of the war 3 constitutional amendments that, for the first time, extended the powers of the government in Washington.

These amendments had their bases in war. They were not framed over night; they developed and progressed from stage to stage as a part of the pattern of reconstruction. With the Thirteenth and Fifteenth Amendments, we shall not deal in detail, for they are of no significance in the field of school segregation, but we point out, as an aside, that the necessity for the Fifteenth Amendment makes clear the error of those who claim that the Fourteenth Amendment is all-encompassing.

The Fourteenth Amendment grew out of the Civil Rights Act of 1866; that, in turn, must be considered along with

its forerunner, the Freedmen's Bureau Bill. So we must begin our review before the Fourteenth Amendment was proposed for ratification. Furthermore, Congress is in many respects a continuing institution; many of the same persons sit for years in the succeeding sessions. Congressional action after the ratification of the Fourteenth Amendment is therefore of significance also. The fever pitch of reform lasted with diminishing force at least until the Civil Rights Act of 1875 became law.

So if we are to scour the records for the sentiment of Congress as to the meaning of the Fourteenth Amendment, we must cover the entire decade from 1866 to 1875. That we propose to do. It is not an easy task, nor one subject to the refinements of mathematical exactitude. We look primarily for references to the schools. But we cannot tell exactly what weight to accord to each passing remark. Certainly every reference by one member of Congress to the school system is not to be taken as the sentiment of Congress as a whole. We must, therefore, weigh as well as recount the statements as to schools.

We seek here, therefore, two things: the first is the general purpose of the Amendment with relation to the school system, and the second is the weight to be accorded specific mention of the schools. With these aims in mind, we pass to a review of the Congressional history of the decade in as much detail as space permits.

2.

The Early District of Columbia Schools

The powers given by the Constitution to Congress in respect of the District of Columbia are plenary; Congress establishes and controls the school system of the District.

The will of Congress as to segregated schools is thus directly reflected by its action as to the District.

There was no publicly supported educational system for Negro children in the District prior to the abolition of slavery there in April 1862. Schools were then established but only on a segregated basis to be supported by taxes levied on property owned by Negroes.[1] The method of raising money for these schools was changed in 1864; school taxes levied on all property were then to be divided in proportion to the number of children of each race.[2] Segregation remained unchanged.

Thus, from the very beginning, schools have been segregated by Congress in the District of Columbia. They remain segregated today.[3]

3.

The First Supplemental Freedmen's Bureau Bill

This Bill[4] was the first effort at Congressional reconstruction and a forerunner of the Fourteenth Amendment. It was designed to supplement the original Freedmen's Bureau Bill enacted in March 1865 to protect freedmen in territory under Federal control.

The first six sections of the Bill as it came from the Judiciary Committee of the Senate related directly to reconstruction. They authorized division of the southern States into districts, the appointment of commissioners, the reservation of land and its award to loyal refugees and

[1] 12 Stat. 394 (1862); 12 Stat. 407 (1862); 12 Stat. 537 (1862).

[2] 13 Stat. 187 (1864).

[3] *Cf. Bolling* v. *Sharpe*, October Term, 1953, No. 8.

[4] S. 60, 39th Cong., 1st Sess. (1866).

freedmen. They authorized the construction of school buildings for freedmen, but there is nothing to indicate that mixed schools were intended by this provision, although some opponents thought that it might be used to force mixed schools at a later date.[5]

The seventh section consisted of the statement of principles that were the seed of the Fourteenth Amendment. It provided that if, because of any State or local law, custom or prejudice:

> ". . . any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . on account of race . . . it shall be the duty of the President of the United States, through the Commissioner, to extend military protection . . . over all cases affecting such persons so discriminated against."

Section 8 contained the proposed sanction, making it a misdemeanor for any person to subject any other person on account of color:

> ". . . to the deprivation of any civil right secured to white persons, or to any different punishment. . . ."

These provisions of the Bill were to apply only to those States or districts where the ordinary course of judicial proceedings had been interrupted by war. All offenses were

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[5] Cong. Globe, 39th Cong., 1st Sess. (1866) 541; *cf. id.* at App. p. 71. The schools, as in fact operated, were separate. The Daily North-Carolina Standard (Raleigh, April 21, 1868), p. 3, col. 2.

to be heard before and determined by officers and agents of the Bureau.[6]

In debate in the Senate, questions were raised as to the power of Congress to provide education for the freedmen and as to the effect of the Bill on anti-miscegenation statutes.[7] But Senator Trumbull of Illinois, one of the leaders of the radicals and the senator who had introduced the Bill, made it clear that there was no intention to prohibit anti-miscegenation statutes.[8] The Bill passed the Senate on January 25, 1866, by a partisan vote.[9]

The Bill then went to the House. There Mr. Dawson of Pennsylvania stated that the radicals desired mixed schools though he did not indicate that the Bill required it.[10] Mr. Moulton of Illinois thought the civil rights protected by the Bill to include only fundamental rights, such as the rights to liberty, to hold property and to contract.[1] On the other hand, Mr. Thornton took a broader view, apparently believing that the Statute was intended to permit miscegenation.[2] The Bill passed the House on February 6, 1866,

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[6] Cong. Globe, 39th Cong., 1st Sess. (1866) 209-10. One commentator on this Bill has stated:

> "There seems to be little doubt but that [the Bill] was unconstitutional and that it could scarcely be justified even as a war measure. The measure was unwise and inexpedient to say the least of it, for it retarded rather than aided reconstruction." Flack, *The Adoption of the Fourteenth Amendment* (1908) 14 (hereinafter cited as Flack).

[7] Cong. Globe, 39th Cong., 1st Sess. (1866) 318, 372, 417-18.

[8] *Id.* at p. 420.

[9] *Id.* at p. 421.

[10] *Id.* at p. 541. The remarks quoted by Appellants (Brief, p. 82) will, if reviewed in full, show that he was speaking of the ultimate goal of the radicals and was not attempting an interpretation of the Bill.

[1] *Id.* at p. 632.

[2] *Ibid.* Others were likewise split on this point. *Cf.* Mr. Rousseau, Kentucky Republican (App. p. 69), with Mr. Phelps of Maryland (App. p. 75).

by a vote of 136 to 33,[3] and the Senate promptly agreed to minor House amendments.[4]

The President vetoed the Bill on February 19.[5] The veto was sustained by a narrow margin in the Senate, after a short debate in which Senator Davis of Kentucky noted that segregation of some sort was prevalent in almost every State.[6] The Bill in a slightly modified form was re-enacted later in the session over the veto of the President.[7] There was substantially no debate at that time.

We cannot draw from this history any conclusion that the civil rights referred to in the Bill included a right for the Negro to attend the same school as the white.

4.

The Civil Rights Act of 1866

This Act is particularly important in any history of the Fourteenth Amendment since it was designed to cover the same field in much the same language. It was a companion measure to the Freedmen's Bureau Bill, both having been introduced at the same time by Senator Trumbull of Illinois. But there was one major difference: the Freedman's Bureau Bill was applicable only to the States that seceded while the Civil Rights Act applied throughout the United States. Because of this distinction one prominent representative thought the former within constitutional bounds but the latter invalid as encroaching on the rights of the States.

The bill that became the Civil Rights Act provided as introduced:

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[3] *Id.* at p. 688.
[4] *Id.* at p. 743.
[5] *Id.* at p. 916.
[6] *Id.* at pp. 936, 943.
[7] 14 Stat. 173 (1866).

> "That there shall be no discrimination in the civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color . . . shall have the same rights to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none others, any law, statutes, ordinance, regulation, or custom to the contrary notwithstanding."[8]

The bill was bitterly contested in both Houses because of vagueness and on constitutional grounds. Its patron, Senator Trumbull of Illinois, pointed out that it included only the civil rights specifically enumerated:

> "The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property.
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> * * *
>
> "This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man."[9]

But others were not so sure. Senator Saulsbury, a Democrat from Delaware, was much troubled by the general lan-

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[8] Cong. Globe, 39th Cong., 1st Sess. (1866) 211. The first section as amended also provided "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." *Id.* at p. 474.

[9] *Id.* at p. 475. In view of this language, it is impossible to concur with Appellants' sweeping language as to this Senate debate (Brief, p. 85).

guage.[10] Senator Cowan, Pennsylvania Republican, thought that it might mean the end of segregated schools in his State; he characterized the bill as "monstrous."[1] Two senators thought that anti-miscegenation statutes might be outlawed, not by the general language of the bill but by the freedom of contract provision.[2] But Senator Trumbull reiterated that the bill was concerned only with civil rights and that it would not prohibit anti-miscegenation laws.[3] The bill passed the Senate on February 2, 1866, by a vote of 33 to 12.[4]

When the bill came before the House on March 1, 1866, the floor leader was Mr. Wilson of Iowa, Chairman of the Judiciary Committee to which the bill had been committed. In opening debate on the bill, he spoke as follows on its general provisions:

> "This part of the bill will probably excite more opposition than any other. . . . What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. . . . Nor do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities."[5]

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[10] *Ibid.*

[1] *Id.* at p. 500.

[2] *Id.* at pp. 505, 598.

[3] *Id.* at p. 600.

[4] *Id.* at p. 607.

[5] *Id.* at p. 1117. The words of Mr. Wilson are clear and of great significance. As this Court said in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474-5 (1921):

> "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge* v. *Williams*, 3 How. 9, 24; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79;

There could hardly be a clearer statement that the language of the Civil Rights Act is not intended to abolish segregated schools. Nor could the statement come from a more important source: the chairman of the committee and floor leader as to the bill.

But Mr. Rogers, a States-rights Democrat from New Jersey, seems to have taken the opposite view. He was bitterly opposed to the bill and thought it far beyond the power of Congress. He referred to the statutes prohibiting miscegenation and the Pennsylvania act requiring school segregation. He continued:

> "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 . . ."

then it could confer suffrage on the Negro. But he alone seems to have thought that the bill might abolish school segregation where equal schools were provided and his view was based on principles at complete variance with those held by the vast majority of the House.[6] In any event, his view

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United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns* v. *United States,* 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns* v. *United States, supra; Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, 198-199; *United States* v. *Coca Cola Co.,* 241 U. S. 265, 281; *United States* v. *St. Paul, Minneapolis & Manitoba Ry. Co.,* 247 U. S. 310, 318."

[6] Cong. Globe, 39th Cong., 1st Sess. (1866) 1121. Mr. Delano of Ohio thought that the bill might invalidate an Ohio statute excluding Negroes from the public schools, but that was because no schools at all were provided for Negroes. He does not say that equal schools would be affected by the bill. *Id.* at App. p. 158. Similar remarks were made by Mr. Kerr of Indiana. *Id.* at p. 1271.

as to the meaning of the bill cannot be accepted as authoritative for, as Mr. Justice Douglas said in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-5 (1951):

> "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

Mr. Bingham of Ohio, a radical leader who had supported the Freedmen's Bureau Bill, opposed this measure for he thought it beyond constitutional limitations. He thought that the opening language prohibiting "discrimination in the civil rights and immunities" should be omitted and moved to send the bill back to the Committee.[7] He was answered by Mr. Wilson as follows:

> "He knows, as every man knows, that this Bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the Bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this Bill can only relate to matters within the control of Congress."[8]

Although Mr. Bingham's motion was defeated, the bill was sent back to the Committee.[9] On March 13, it came back to the House floor for further consideration. In Committee, the bill had been amended to eliminate the initial broad generalities. As amended, it provided as follows:

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[7] *Id.* at pp. 1266, 1290-3.

[8] *Id.* at p. 1294.

[9] *Id.* at pp. 1294, 1296.

> "That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crimes whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

Mr. Wilson, still in charge of the bill, stated that the change was made to appease those who thought the bill too broad, although he did not think that the amendment materially changed the bill.[10] He went on to say that one purpose of the amendment was to eliminate fears that the bill might confer suffrage on the Negro:

> "To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section."[11]

The bill was then passed by the House by a vote of 111 to

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[10] *Id.* at p. 1366. Appellants seek, apparently, to discredit Wilson by stating that he accepted Bingham's interpretation (Brief, p. 87). To begin with, Bingham never said anything specifically applicable to schools. Furthermore, Wilson said here that the purpose of the amendment was merely to eliminate "a latitudinarian construction not intended."

[11] *Id.* at p. 1367.

38.[1] The House amendments were adopted in the Senate without debate.[2]

On March 27, 1866, the President returned the bill to the Senate without his approval.[3] His veto message contains his objections to the bill section by section. He stated that by the first section:

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

He added that he did not believe that the bill would annul State laws in regard to marriage; but if Congress could prohibit discrimination in the matters specifically limited in the bill, it could repeal State marriage laws.

The radical element of Congress was determined to enact the bill and delayed its reconsideration in the Senate until the composition of that body had been arranged more to its liking.[4] The bill was brought up on April 4 and a vigorous debate ensued. Little in this debate is of interest here, except to note a substitute bill proposed by Senator Doolittle of Wisconsin. His bill would have provided simply that the States should not inflict any incident of slavery upon a Negro, leaving to the judiciary the task of determining those incidents.[5] This is one of very few instances where it was proposed that Congress look to the judiciary; his bill was not considered seriously and did not survive.

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[1] *Ibid.*

[2] *Id.* at pp. 1413-6.

[3] *Id.* at p. 1679.

[4] Flack, pp. 36-9.

[5] Cong. Globe, 39th Cong., 1st Sess. (1866) 1805.

The bill as to civil rights was passed in the Senate over the President's veto on April 6, 1866, by a vote of 33 to 15.[6] Little debate was permitted in the House and the bill was passed there three days later by a vote of 122 to 41.[7] It thus became law.[8]

The Civil Rights Act is, we believe, important because of its reference to the "full and equal benefit of all laws." This can have no meaning except equal protection. But the leader of those who sought enactment of the bill in the House made it unmistakably clear that the Act had no relation to or effect on segregated schools. Those who spoke in generalities or in fearful opposition are not to be taken as authoritative interpreters of legislation. On the other hand, the views of the floor leader and committee chairman, shared by other proponents, are of telling significance.

One word more should be added. The proponents of the Act thought that it applied only to the rights specifically listed in the first section; the President in his veto message makes it clear that he shared that view and even opponents of the measure eventually agreed to that interpretation.[9] Nothing in that first section has any specific relation to the educational system. Appellants make many sweeping statements as to the bill, but their "generalizations" (Brief, pp. 90-2) are not based on the record. In our opinion, the record proves that mixed schools were not within the contemplation of Congress when the Civil Rights Act was enacted.[10]

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[6] *Id.* at p. 1809.

[7] *Id.* at p. 1861.

[8] 14 Stat. 27 (1866).

[9] Cong. Globe, 39th Cong., 1st Sess. (1866) 1415, 1781.

[10] The early cases under the Civil Rights Act are reviewed in Flack (pp. 47-53). Significantly, not a single one of them relates to schools. Flack's conclusion as to schools is completely unsupported.

5.

The Resolution Proposing the Amendment

We have, for convenience, discussed the Freedmen's Bureau Bill and the Civil Rights Act as if they were taken up and concluded before the resolution proposing the Fourteenth Amendment was put before Congress. But they were all cotemporaneous. The first proposals to amend the Constitution preceded the introduction of those bills. The major debates on the proposed amendment came only after consideration of the bills had been concluded and were, therefore, to some extent shaped by what had been said in their regard; but the initial steps came before final action on the bills. During this period many minds collaborated to shape the Amendment in its final form, and particularly the first section with which we are chiefly concerned.

When the 39th Congress convened for its first session in December, 1865, Thaddeus Stevens, the Pennsylvania radical, proposed the creation of a Joint Committee on Reconstruction to consist of 6 Senators and 9 Representatives.[11] This proposal was soon adopted,[12] and it was this Committee that evolved the resolution that proposed the Fourteenth Amendment.

We must point out at once that the meaning of the Fourteenth Amendment cannot, as Appellants seek (Brief, pp. 93-103), be derived from extraneous statements of wishes and desires by members of this Committee. Its majority were the fire-eaters; they may well have wished to destroy all race distinctions. But what they wished to do and what the majority in Congress were willing to do were quite different things; they did not speak for the majority. As a result, what they wished to do and what they in fact did

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[11] Cong. Globe, 39th Cong., 1st Sess. (1865) 6.

[12] *Id.* at pp. 30, 47.

were quite different things. Even their leader, Stevens, recognized this when he spoke about the Amendment in almost its final form:

> "This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. . . . Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this."[1]

So we must be careful to distinguish between general statements and specific statements of interpretation of the Amendment. If we rely only on the latter, we can find its true historical meaning.

Mr. Stevens introduced a proposed amendment at the beginning of the session,[2] and Mr. Bingham of Ohio, "the Madison of the first section of the Fourteenth Amendment," as Mr. Justice Black aptly calls him,[3] introduced another phrased in different terms.[4] These proposals went to the

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

[2] *Id.* at p. 10.

[3] *Adamson* v. *California*, 332 U. S. 46, 74 (1947). This, of course, is the same Bingham who had thought the Civil Rights Act unconstitutional. An example of the misleading character of the apparent scholarship of Appellants is found in their discussion of Bingham on page 99 of their brief. They quote in part a statement of Bingham and the implication is that Bingham is giving his blessing to mixed schools. The implication is erroneous. The original text should be consulted. Cong. Globe, 40th Cong., 2nd Sess. (1868) 2462 (the citation in Appellants' brief is in error). It will there be found that Bingham was engaging in a political debate with Democratic opponents in connection with a bill as to the readmission of 5 southern States. Bingham never mentions schools; he is talking primarily of voting rights. As usual, he is speaking in generalities. The impression left by Appellants is materially misleading.

[4] Cong. Globe, 39th Cong., 1st Sess. (1865) 14.

Committee on Reconstruction which considered them together with various substitutes.[5] At length, on February 3, 1866, the Committee adopted and ten days later reported to the Senate and House a proposed amendment as follows:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property."[6]

Mr. Bingham brought this proposal before the House for debate on February 26, and a lively debate followed. He argued that the proposed amendment simply gave Congress a right of enforcement, that all of the rights included in it had been conferred by other provisions of the Constitution but that Congress had had no enforcing power.[7] He turned to the privileges and immunities clause of Article IV, §2, and the due process provision of the Fifth Amendment; apparently he thought that Congress was now to be given the power to enforce these provisions on the States. No very clear conception of detailed purpose comes from his speech.

Opposition arose at once. Mr. Rogers of New Jersey quickly pointed out that the proposed amendment was designed to give constitutional sanction to radical legislation such as the Civil Rights Act (then on the way to enactment). He feared also that it would authorize Congressional repeal of anti-miscegenation statutes and action in all fields to give the Negroes all the rights of the whites. This might

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[5] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* (1949) 2 Stan. L. Rev. 5, 20-1 (hereinafter cited as Fairman).

[6] Fairman, p. 21; Cong. Globe, 39 Cong., 1st Sess. (1866) 806, 813.

[7] Cong. Globe, 39th Cong., 1st Sess. (1866) 1033.

include Congressional power to compel amalgamated schools.[8] A number of representatives then spoke to the same effect as Mr. Bingham; no new powers were to be conferred but the enforcement power was to be strengthened.[9]

Mr. Hale, of New York, spoke in opposition, objecting to the "extremely vague, loose, and indefinite provisions" of the proposed amendment.[10] It was, he thought, a grant of extreme legislative power; Congress might undo the statutes placing married women under disabilities. Mr. Bingham answered him by denying any such intention, though his rationalization is again difficult.[1] He also delivered an elaborate speech toward the end of the debate but no great meaning can be derived from it. His conclusion was that the proposed amendment

> ". . . certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons."[2]

This may glitter but it is fool's gold. If that is what the amendment was to do, its exalted level seems far above that of the public schools.

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[8] *Id.* at App. p. 133-4.

[9] *Id.* at pp. 1054, 1057.

[10] *Id.* at pp. 1063-4. Even the extremist Stevens recognized the right of classification when he interrupted Hale to state that "where all of the same class are dealt with in the same way then there is no pretense of inequality." *Ibid.*

[1] *Id.* at p. 1089.

[2] *Id.* at p. 1094. Appellants cite Bingham as replying to Hale that his proposal would give Congress general and roaming legislative authority (Brief, p. 106). Bingham made such a statement but Hale pointed to its inconsistency. Bingham then made the modified answer quoted above. For a review of this debate which points up the inadequacy of Bingham's thinking, see Fairman, pp. 29-37.

After Mr. Bingham had concluded, two representatives from New York suggested that the matter be postponed. Apparently, a majority were unwilling to confer affirmative power on Congress in the way proposed by the Amendment, desiring instead a prohibition on the States. So postponement was agreed to.[3] This particular proposal was never heard of again.

More than two months now elapsed before anything further was done on the proposed amendment, either in committee or on the floor. During that period the Civil Rights Act was passed, vetoed and passed over the veto. It was not until April 21, 1866, that a new plan came before the Committee, this time presented by Stevens but in fact prepared by Robert Dale Owen.[4] This was in five sections (as is the Amendment as ratified) but the first section provided simply that there should be no discrimination as to civil rights by the States of the United States on account of color.

Mr. Bingham at once sought to insert an equal protection clause, but this was rejected.[5] He then tried to add to the enforcement clause in § 5 the following provision:

> "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."[6]

We now approach the final form. On April 25, a motion to strike out Bingham's addition to § 5 was carried. At the next meeting Bingham sought to substitute for § 1 in the

[3] Cong. Globe, 39th Cong., 1st Sess. (1866) 1094-5.

[4] Flack, p. 65; Fairman, p. 41.

[5] Flack, p. 66; Fairman, p. 41.

[6] *Ibid.*

draft his proposed addition to § 5. This was finally agreed to by a vote of 10 to 3.[7] The amendment in this form was ordered reported to Congress by a partisan vote.[8] Nothing in the proceedings of the Committee indicates that it at any time intended to require amalgamated schools.

The proposed amendment left the Committee accompanied both by majority and by minority reports. Schools are mentioned in neither. The majority were concerned primarily in securing civil rights for the Negroes, apparently the civil rights supposedly protected in the Civil Rights Act.[9] Its report concluded in this way:

> "The conclusion of your committee therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions. To this end they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to." [10]

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[7] Flack, p. 67; Fairman, p. 42.

[8] Flack, p. 68; Fairman, p. 43. This is the form in which the Amendment went to the States except for the definition of citizenship added in the Senate as described below.

[9] II *Reports of the Committees of the House*, 39th Cong., 1st Sess. (1866) XIII, XVIII.

[10] *Id.* at p. XXI.

The minority, Democrats all, argued that the Southern States had never left the Union. They were therefore entitled to immediate representation in Congress and the country need not fear readmission of their representatives.[1] Furthermore, they pointed out that a provision for mandatory Negro suffrage was not included in the proposed amendment because to have gone so far "would be obnoxious to most of the northern and western states. . . ."[2]

The resolution so approved by the Committee was introduced in both the Senate and the House on April 30, 1866.[3] It was debated first in the House, the debate opening on May 8, 1866.

Thaddeus Stevens spoke first. His concept of the purpose of Section 1 was clear. All of its provisions, he declared:

> ". . . are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. . . ."

He continued:

> "Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. . . ."

But the first section was not to his practical mind of greatest significance:

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[1] *Id.* at p. 7.

[2] *Id.* at p. 9.

[3] Cong. Globe, 39th Cong., 1st Sess. (1866) 2265, 2286.

> "The second section I consider the most important in the article."[4]

To Thaddeus Stevens, then, the first section was equal protection, the purpose was to write the Civil Rights Act into the Constitution, and these were generalities not of significance in comparison with the greater practical purpose of the second section to limit southern representation.

It will not do to assert, as Appellants do (Brief, p. 118), that Stevens made it clear that the Amendment was to go further than the Civil Rights Act. He made no such statement nor can any such intention be implied. He discussed in specific terms punishment for crime, means of redress, protective laws and testimony in court, all of which were listed in the Civil Rights Act; he never mentioned in any terms an attempt at broader application.

Mr. Finck, a Democrat from Ohio, followed; if the first section was necessary, the Civil Rights Act was unconstitutional.[5] Mr. Garfield, also from Ohio but, of course, a Republican, disagreed; he stated that the purpose was to prevent the repeal of the Civil Rights Act.[6] Mr. Thayer of Pennsylvania, a Republican, adopted the same view.[7] Mr. Boyer, a Pennsylvania Democrat, opposed the proposed amendment:

> "The first section embodies the principles of the civil rights bill. . . ."[8]

Mr. Broomall, a radical, did not disagree on this point:

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[4] *Id.* at p. 2459.
[5] *Id.* at pp. 2460-1.
[6] *Id.* at p. 2462.
[7] *Id.* at p. 2465.
[8] *Id.* at p. 2467.

> "The fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition in another shape, in the civil rights bill, shows that it will meet the favor of the House."[9]

Mr. Shanklin of Kentucky spoke next.[10] A Democrat, he opposed the proposed amendment as investing "all power in the General Government." He was followed by Mr. Raymond, the Republican publisher of the *New York Times*. Mr. Raymond said that this was the third time that this matter had come before the House; the first was Bingham's proposed amendment, the second the Civil Rights Act. Mr. Raymond opposed the Civil Rights Act for he thought the power of Congress to enact it "very doubtful, to say the least." He concluded:

> "And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."[1]

Many other speakers followed; it is only necessary to touch on major speeches. Mr. Eliot, a Massachusetts radical, was in favor of putting the Civil Rights Act in the Constitution.[2] Mr. Randall of Pennsylvania opposed; he spoke in general terms of the broad applicability of the Amendment, pointing out that suffrage was not included.[3] Mr. Rogers of New Jersey, ever a States-rights Democrat, held strong views. The first section, he thought,

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[9] *Id.* at p. 2498.
[10] *Id.* at p. 2500.
[1] *Id.* at p. 2501.
[2] *Id.* at p. 2511.
[3] *Id.* at p. 2530.

> ". . . is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ."[4]

He was excited about privileges and immunities. He thought that this phrase covered many rights, but he did not mention schools. He predicted revolution.

He was followed by Mr. Farnsworth who picked up the phrase "equal protection of the laws" as new to the Constitution. He thought that none could object to this concept but he did not attempt its definition.[5]

Mr. Bingham followed with a major speech.[6] As in so many of his utterances, he sparkles with generalities but his exact meaning is obscure. He said:

> ". . . this amendment takes from no State any right that ever pertained to it."

But apparently all he meant there was that States had exercised powers erroneously and that Congress might now supervise their exercise. He went back to nullification; he thought that Congress would be able to overcome the disabilities which any such theory might impose on citizens of the United States. But he comes nowhere near the subject of our investigation.

Mr. Stevens closed briefly. The vote was taken. The resolution proposing the Amendment was adopted by a vote of 128 to 37.[7]

Any review of the House debate must lead to the conclusion that most of the members thought that the chief

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[4] *Id.* at p. 2538.
[5] *Id.* at p. 2539.
[6] *Id.* at p. 2542.
[7] *Id.* at p. 2545.

purpose of § 1 of the proposed amendment was to place the provisions of the Civil Rights Act in the Constitution and thus to prevent the amendment or repeal of that Act at any later date.[8] We may then, it seems, interpret the Amendment to mean the same thing that its supporters and the supporters of the Civil Rights Act considered that the Act meant. That is all of a specific nature that we find in this debate.

The scene then passed to the Senate. Debate began on May 23, 1866. Senator Howard of Michigan took the lead in presenting the resolution since Senator Fessenden of Maine, the Chairman of the Committee on Reconstruction, had not been well. He spoke at length on "privileges and immunities" for this clause, he apparently thought, contained the gist of § 1. He considered this phrase incapable of accurate definition, but he listed a great many that he thought included. These were the first 8 amendments of the Constitution together with some even less well defined privileges and immunities included in Article IV, § 2. Despite the long list that he gave, schools were never mentioned. He went on:

> "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect those great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not

[8] This is the generally accepted view:

"In fact, there seems to be little, if any, difference between the interpretation put upon the first section by the majority and by the minority, for nearly all said that it was but an incorporation of the Civil Rights Bill." Flack, p. 81.

"Over and over in this debate, the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other." Fairman, p. 44.

> powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment. . . . Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."

But again, these guarantees include no reference to the public schools.

Senator Howard made clear his views on the last portion of the first section. He said that this portion:

> ". . . does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."

That is the general field for the operation of the due process and equal protection clauses. They were not designed, as Appellants assert, to wipe out all distinctions based on race or color. Senator Howard made this clear by his reference to the right to vote:

> "But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which

> a people cannot exist except as slaves, subject to a despotism."[9]

Is the right to go to an amalgamated school one of those "fundamental rights"? Is it more than the right to vote itself? Howard could not have thought so.

Howard spoke also of the last section of the proposed Amendment. He added that § 5 gave Congress power to pass laws

> ". . . appropriate to the attainment of the great object of the amendment."[10]

Howard, like Stevens, made it clear later on that the Amendment did not go as far as he would like. He said:

> ". . . it is not entirely the question what measure we can pass the two Houses: but the question really is, what will the Legislatures . . . do . . . ?"
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> * * *
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> "The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race."[11]

Appellants assert (Brief, p. 118) that, like Stevens, Howard thought that the Amendment went beyond the Civil Rights Act. That is inaccurate. The contrary is true. When asked as to the purpose of the proposed Amendment, Howard said:

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[9] Cong. Globe, 39th Cong., 1st Sess. (1866) 2765. The difference between Flack and Fairman lies primarily in regard to Howard's speech. Flack's view is that it is clear evidence that Congress intended that the Fourteenth Amendment should incorporate the Bill of Rights. Flack, p. 87. Fairman takes the contrary view. Fairman, pp. 58-9.

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

[11] *Id.* at p. 2896.

> "We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power. . . ."[12]

Senator Wade on the same day moved a substitute which contained the germ of the definition of citizenship.[1] Further consideration was then postponed. The Senate Republicans went into caucus where no doubt most of the basic differences were threshed out. Of the debates there we have no record. On May 29, the Senate returned to a consideration of the proposed amendment. Senator Howard at once offered a series of amendments, the product of the caucus.[2] The only amendment proposed for § 1 was the addition of the clause defining citizenship.

Some debate followed on the citizenship provision. Then Senator Doolittle of Wisconsin asserted that the Amendment was designed to validate the Civil Rights Act.[3] Senator Fessenden denied that he had heard such a purpose mentioned in the Committee, but he had missed many sessions and Senator Howard interposed to remark that the purpose of the amendment was to prevent the repeal of the Civil Rights Act.[4]

Senator Poland of Vermont made a speech in which he stated that the purpose of § 1 was to permit Congress to prohibit State interference with the privileges and immunities referred to in Article IV, § 2.[5] He admitted that the proposed amendment would not confer suffrage on the Negro. Senator Stewart of Nevada renewed the general

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[12] *Ibid.*

[1] *Id.* at p. 2768.

[2] *Id.* at p. 2869.

[3] *Id.* at p. 2896.

[4] *Ibid.*

[5] *Id.* at p. 2961.

theme that the proposed amendment was designed to put the Civil Rights Act in the Constitution.[6]

At last we come to a reference to schools. Senator Howe, Wisconsin Republican, interpreted the equal protection clause to require a State to provide "protection of equal laws," a concept now familiar.[7] As an example of what would be outlawed, he cited a Florida statute taxing whites and Negroes to support white schools and then taxing Negroes again to support Negro schools. His suggestion very properly was not denied.

Senator Davis of Kentucky, an opponent of the proposed amendment, spoke at length. He expressed the view that the amendment was designed to provide constitutional support for the Civil Rights Act.[8] He was followed by Senator Henderson, a Republican from Missouri. He listed the rights given by the Civil Rights Act; schools were not mentioned.[9] He implied that the proposed amendment would accomplish only the same result as the Civil Rights Act. Senators Hendricks and Johnson concluded the debate by stating that portions of § 1 could not be understood.[10] The vote was then taken—June 8, 1866—and the resolution was adopted by a vote of 33 to 11.[1]

The resolution went back to the House for concurrence in the Senate amendments. Debate was limited to one day. Mr. Rogers stated that the resolution "embodied the gist of the civil rights bill."[2] The House concurred with the Senate amendments on June 13 by a vote of 120 to 32.[3]

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[6] *Id.* at p. 2964.
[7] *Id.* at App. p. 219.
[8] *Id.* at App. p. 240.
[9] *Id.* at p. 3031.
[10] *Id.* at pp. 3039-41.
[1] *Id.* at p. 3042.
[2] *Id.* at App. p. 229.
[3] *Id.* at p. 3149.

From this review, what conclusions are to be drawn? If we turn to Flack, we find these:

> "In conclusion, we may say that Congress . . . had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:
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> > "1. To make the Bill of Rights (the first eight Amendments) binding upon or applicable to the States.
> > "2. To give validity to the Civil Rights Bill.
> > "3. To declare who were citizens of the United States."[4]

Fairman disagrees at length with the first conclusion and we are rather of the view that his position is the proper one.

But that is all beside the point before us now. Without regard to that dispute, there are in all these thousands of words few passages that are directed in terms to the question of segregated schools. Furthermore, most of those who spoke considered that the Amendment was designed to cover the same field as the Civil Rights Act.[5] We know from the authoritative Mr. Wilson that the Civil Rights Act was not intended to disestablish segregated education.

The Fourteenth Amendment then went to the States. In another place we review the evidence of record there. We continue here to follow the Congressional path.

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[4] Flack, p. 94.

[5] Although we have been unable to make an extensive independent review of current newspapers, it is interesting to note that quotations given in Flack and Fairman (*a*) make no mention of schools, and (*b*) confirm the view that the main purpose of the Amendment was to write the Civil Rights Act into the Constitution. Flack, pp. 140 *et seq.*; Fairman, pp. 68 *et seq.*

6.

Contemporary School Legislation for the District

The debate on the resolution proposing the Fourteenth Amendment began in earnest on May 8, 1866, when Mr. Stevens opened the fight in the House after the reports of the Committee on Reconstruction had been filed. The resolution achieved final passage on June 13, 1866. Right in the middle of this short period the Senate took action to confirm the existence of segregated schools in the District of Columbia.

On May 21, 1866, the Senate passed "An Act donating certain Lots in the City of Washington for Schools for Colored Children in the District of Columbia."[6] This act, which became law on July 28,[7] required the Commissioner of Public Buildings:

> ". . . to grant . . . to the trustees of colored schools for the cities of Washington and Georgetown . . . for the sole use of schools for colored children . . . [named lots], said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools. . . ."

If the Fourteenth Amendment was designed to do away with separate schools for the Negroes, the members of Congress who proposed the Amendment certainly did not so understand it, or their action is so inconsistent as to be incomprehensible. Not only was the statute just quoted enacted at this time but another statute was adopted almost simultaneously to provide for an equitable apportion-

[6] Cong. Globe, 39th Cong., 1st Sess. (1866) 2719.

[7] 14 Stat. 342 (1866).

ment of school funds to the Negro schools.[8] We take these statutes as uncontrovertible approval of the continuance of segregated schools in the District by the Congress that proposed the Fourteenth Amendment to the States.

7.

The Readmission Acts

In the Reconstruction Act of 1867,[9] one of the conditions to be satisfied before representatives of the seceding States were to be readmitted to Congress was that each State should submit a revised constitution for Congressional approval. Congress began the consideration of these revised constitutions when a bill for the readmission of Arkansas came before the first session of the Fortieth Congress in 1868.

During the consideration of this bill in the Senate, Senator Drake, a Republican from Missouri, moved to add as a condition that the right to vote or "any other right" should not be denied or abridged because of race or color.[10] His colleague, Senator Henderson, also a Republican, apparently thought that this proposal might affect segregated schools. He therefore moved an amendment to make specific the permission for such schools. Henderson's amendment was not accepted for it was apparently thought unnecessary, Senator Frelinghuysen of New Jersey stating his view that neither the Fourteenth Amendment nor Drake's proposal "touched" the mixed school question.[11] The House refused to agree to the Drake amendment.[12]

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[8] 14 Stat. 216 (1866). The bill that became this statute was introduced on April 4, 1866, and became law on July 23, 1866.

[9] 14 Stat. 428 (1867).

[10] Cong. Globe, 40th Cong., 2nd Sess. (1868) 2748.

[11] *Ibid.*

[12] *Id.* at p. 2904.

Shortly thereafter, the Senate considered a House bill for the readmission of North Carolina, South Carolina, Georgia, Alabama and Louisiana. In the Judiciary Committee, the Drake amendment was added except that it was limited to the right to vote alone and the provision as to "any other right" was omitted. Senator Trumbull, Chairman of the Judiciary Committee and author of the Civil Rights Act of 1866, explained the action of the Committee:

> "And the committee have recommended the striking out of this fundamental condition and inserting the words contained in the [Drake] amendment which was adopted by the Senate to the Arkansas bill with the exception of the words 'or any other rights.' Those words which were in that amendment offered by the Senator from Missouri are omitted by the Judiciary Committee in reporting this bill, it being thought that there was no necessity for their insertion, and that it might lead to a misunderstanding as to what their true purport was. . . . It might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri did not intend. . . ."[13]

Senator Trumbull thus adopts a consistent course. His statement would be incomprehensible if he had thought that the Fourteenth Amendment abolished segregation in the schools. He makes clear, contemporaneously with ratification of the Amendment, his view that whether or not schools shall be segregated is a matter for the discretion of the States.

8.

Charles Sumner

The Fourteenth Amendment became a part of the Constitution on July 28, 1868. Of course, the members of Con-

[13] *Id.* at p. 2858.

gress were not thereafter, in an authoritative sense, entitled to interpret the Amendment, but they discussed it at great length. And the question of amalgamated schools was one that, along with other forms of racial segregation, occupied the attention of Congress for much of its sessions until the crusading spirit faded away after 1875.

In reviewing these debates, we shall find many who opposed school segregation and many who favored it. The discussions both by proponents and opponents covered two fields: expediency and constitutionality. We will not review discussions of expediency for they can have no relevance to the scope of the Fourteenth Amendment since it was already a part of the Constitution. We will touch on the constitutional debate, but we must recall that it is often hard to separate the two. This general rule should be borne in mind as the story unfolds.

The opposition to racial segregation had one leader, a man of such remarkable talent that we interrupt here for a moment the chronological story to make particular mention of his character. That was Charles Sumner, Senator from Massachusetts from 1851 until his death on March 11, 1874. He was born in Boston in 1811 and was graduated from both the College and Law School of Harvard University. Thereafter, he traveled widely in Europe, forming friendships with important leaders abroad that lasted for the rest of his life.

On his return to Boston, Sumner began the practice of law. He took his place in the circle of New England culture that flourished so brightly in that era. He was the close friend of Longfellow and Whittier. But Sumner's genius was of a political turn. He became a leader in the group of intellectual abolitionists centered in Boston that played such a dramatic role in bringing on the crisis of civil war.

Sumner entered the Senate in 1851. He at once made clear his abolitionist sentiments and continued his activities in the field of race relations throughout his subsequent career. He took a leading role in the successful effort made by Congress to assume control of the reconstruction program and he was the bitter enemy of Andrew Johnson. Strangely enough, he seems to have had little part in framing the Fourteenth Amendment.[14] But his interest in the Negro never flagged.

As we shall outline more in detail below, Sumner made strenuous efforts to outlaw school segregation in the District of Columbia in 1871-2. But most important to him was his bill to make segregation illegal in hotels, railway cars, schools, churches and graveyards throughout the nation. This bill became an obsession. As Carl Schurz, his contemporary in the Senate and a warm personal friend, said:

> "This measure, indeed, was nearest to his heart, and he pressed it in season and out of season, urging it especially by way of amendment to amnesty bills as a joint measure of reconciliation."[15]

He was never successful during his lifetime in forcing his bill to enactment though, amended to eliminate reference to schools, it was passed as the Civil Rights Act of 1875.

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[14] Sumner was considered too radical for a place on the Joint Committee on Reconstruction. Senator Fessenden was appointed in his place. Fessenden wrote his wife just after Congress convened and the Committee was appointed in December 1865:

> "Mr. Sumner was very anxious for the place, but standing as he does before the country, and committed to the most ultra views, even his friends declined to support him, and almost to a man fixed upon me." 2 Fessenden, *The Life and Public Service of William Pitt Fessenden* (1907) 20.

[15] Schurz, *Charles Sumner, An Essay* (University of Illinois Press 1951) 123.

Not only was the advisability of his bill, the Supplemental Civil Rights Bill as he termed it, called in question but its constitutionality was under constant attack in the Senate. Sumner supported it by authority that seems remarkable today. During the first great debate on the measure in 1872, the record of a previous statement was quoted by an opponent:

> " 'Mr. Morrill of Maine. The Senator said that the Declaration [of Independence] was as much an authority as the Constitution of the United States.
> " 'Mr. Sumner. Very well; that I do say, certainly and a little more.' "[16]

Sumner immediately replied:

> "Mr. Sumner. Very well; I say a little more in what it is; that is, as a rule of interpretation. If you give preference to either, it is to the Declaration. Indeed, I cannot escape from that conclusion. It is earlier in time; it is loftier, more majestic, more sublime in character and principle."[1]

This was not the only occasion on which he expressed this remarkable view. Later in the debate, he said:

> "The great principles and promises of the Declaration of Independence must become a living reality, and that can be done only through an act of Congress."[2]

In fact, his philosophy seems more than liberal even by

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[16] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 761.

[1] *Ibid.*

[2] *Id.* at p. 3264.

today's standards. In reply to a Senator who wished to look more closely to the words of the Constitution, Sumner said:

> "I have also sworn to support the Constitution, and it binds me to vote for anything for human rights."[3]

This philosophy was almost too much even for Schurz, a wartime general in the Union Army. He commented that Sumner thought

> "The Declaration of Independence higher than the Constitution. . . ."[4]

And Schurz points to Sumner's

> *". . . way of surmounting points of law by appeals to the rights of man."*[5]

Even Sumner's official biographer considered this approach to a constitutional problem unusual. He observed:

> "[Morrill] complained, and had reason to complain, of Sumner's mode of handling a constitutional question, —his drawing on sublime doctrines of human right rather than looking sharply at the written text."[6]

It was Sumner's view, then, that a basis for outlawing school segregation might be found in the Declaration of

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[3] *Id.* at p. 3263; *cf. id.* at p. 727:

> "I say a new rule of interpretation for the Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly for human rights."

[4] Schurz, *Charles Sumner, An Essay* (University of Illinois Press 1951) 123.

[5] *Id.* at p. 117; italics in original.

[6] 4 Pierce, *Memoir and Letters of Charles Sumner* (Boston 1894) 501. Details of Sumner's civil rights activities are briefly given in this volume. *Id.* at pp. 501-4, 580-2.

Independence and that, as a result, Congress might properly act. Furthermore, where what he termed human rights were at issue, he did not consider it necessary to take into account the words of the Constitution. These novel theses discredit his judgment in constitutional matters.

His activities in Congress also make it clear that he did not conceive that the Constitution of itself forbade school segregation even after ratification of the Fourteenth Amendment. We find no reference to a suggestion of judicial action or judicial power and his insistence on Congressional action negates any belief that the courts had the power to act unaided. But there is other confirmation on this point. On October 24, 1871, a convention of Negroes met in Columbia, South Carolina. To this convention Sumner addressed a letter, dated October 21, 1871. In this letter he said:

> "Can a respectable colored citizen travel on steamboats or railways, or public conveyances generally, without insult on account of color? . . . I might ask the same question in regard to hotels, or even common schools. An hotel is a legal institution, and so is a common school. As such, each must be for the equal benefit of all. Now, can there be any exclusion from either on account of color? It is not enough to provide separate accommodations for colored citizens, even if in all respects as good as those of other persons. Equality is not found in an equivalent, but only in equality. In other words there must be no discrimination on account of color. The discrimination is an insult and a hindrance, and a bar, which not only destroys comfort and prevents equality, but weakens all other rights.
>
> "The right to vote will have new security when your equal right in public conveyances, hotels, and common schools, is at last established; but here you must insist for yourselves, by speech, by petition, and by vote. Help yourselves, and others will help you also. The Civil Rights law needs a supplement to cover such

> cases. This defect has been apparent from the beginning, and, for a long time, I have striven to remove it. I have a bill for this purpose now pending in the Senate. Will not my colored fellow-citizens see that those in power shall no longer postpone this essential safeguard? Surely, here is an object worthy of effort."[7]

So Sumner, using terms which sound familiar for they are the same as those used by more modern agitators, clearly expressed the view that additional authorization was required before the segregated school would have to disappear.

It will, we believe, make the history of the early 1870's fall into clearer focus to keep these opinions in mind. Sumner was the protagonist in the segregation drama. He considered that school segregation had not already been outlawed; his view that Congress could pass the legislation necessary to do so was based on a concept utterly at variance with any normal canon of constitutional law.

9.

The Enforcement Acts (1870-1871)

Brief mention must be made of these acts, though they add but little to our story. The first, which became law on May 31, 1870,[8] was designed initially as a measure to enforce the Fifteenth Amendment.[9] It dealt with the protection of the Negro's right to vote. It was thereafter enlarged to include enforcement of the Fourteenth Amendment and was amended to re-enact the Civil Rights Act of 1866.[10]

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[7] Lester, *Life and Public Services of Charles Sumner* (New York 1874) 511.

[8] 16 Stat. 140 (1870).

[9] Cong. Globe, 41st Cong., 2nd Sess. (1870) 3479.

[10] *Id.* at p. 3480.

Even though the Fourteenth Amendment was still a recent addition to the Constitution, no effort was apparently made to broaden the rights protected by act of Congress.

The opposition was not particularly stiff; Senators Vickers and Thurman spoke at length in opposition, presaging the views that they were to express in the great debate of 1872.[1] The bill was passed by the Senate by a vote of 43 to 8,[2] and was adopted in the House without substantial debate.[3]

The Second Enforcement Act was approved on February 28, 1871.[4] It dealt wholly with voting rights. It was adopted in both House and Senate by large majorities.[5]

10.

The Supplemental Civil Rights Bill and the General Amnesty Act

As the 1860's gave way to the beginning of a new decade, Charles Sumner developed his Supplemental Civil Rights Bill. To it, as we have seen, he devoted much of his time and energy. It was the forerunner of the Civil Rights Act of 1875, adopted with restrictive amendments after Sumner's death in 1874.

The Bill took several forms but, in general, all provided

> "That all citizens of the United States, without distinction of race, color or previous condition of servitude, are entitled to the equal and impartial enjoyment of accommodations, advantages, facilities or privileges furnished by common carriers . . . innkeepers . . . the-

[1] *Id.* at pp. 3480-4.

[2] *Id.* at pp. 3688-9.

[3] The vote was 133 to 58. *Id.* at p. 3884.

[4] 16 Stat. 433 (1871).

[5] The House vote on February 15, 1871, was 144 to 64; the Senate vote, 9 days later, was 39 to 10. Cong. Globe, 41st Cong., 3rd Sess. (1871) 1285, 1655.

aters . . . common schools . . . church organizations . . . cemetery associations. . . ."

A further provision purported to safeguard the right of all to serve as jurors and another would repeal all statutes, State or Federal, containing the word "white" for the purpose of discrimination as to color. Criminal and civil sanctions were included.

The bill had been introduced by Sumner in 1870 and in 1871 and had been unfavorably reported.[6] When Congress met in December, 1871, Sumner saw his opportunity. It will be recalled that § 3 of the Fourteenth Amendment had excluded from office many southern citizens, although the disability was subject to removal by a two-thirds vote of Congress. Sentiment in 1871 was strongly in favor of a general amnesty, excluding only a very limited number from its terms. Bills to that effect were introduced in both the Senate and the House; the House promptly passed its bill and sent it to the Senate.

The Senate first considered its own bill. Sumner moved in Committee of the Whole to tack on his Supplemental Civil Rights Bill as an amendment, saying that justice to the Negro must go hand in hand with generosity to the southern States.[7] A debate ensued but at last the amendment was defeated by a vote of 29 to 30.[8] Sumner tried again in committee, but Thurman of Ohio opposed, as he always did, and nothing further was accomplished at this time.[9]

When Congress met again in January, 1872, the amnesty bill came before the Senate (after having been reported

[6] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 821-2.

[7] Cong. Globe, 42nd Cong., 2nd Sess. (1871) 241.

[8] *Id.* at p. 274.

[9] *Id.* at pp. 278-9.

by the Committee of the Whole). Sumner again proposed his amendment.[10] A tremendous debate followed. Sumner spoke again and again.[1] The opposition was strangely divided. Some favored the amendment but not as a part of the amnesty bill for they thought the latter would be endangered in the House.[2] Others, however, felt that the amendment, either in whole or in part, violated the Constitution. Its proponents refused to state the specific constitutional provisions supporting the amendment; Sumner, as we have seen, relied on the Declaration of Independence and on those unspecified provisions that supported the Civil Rights Act of 1866.[3] But he was strongly, though vaguely, supported.[4]

Senator Morrill of Maine made a strong speech attacking the constitutionality of Sumner's amendment. He assumed that its constitutional basis lay, at least in part, in the Fourteenth Amendment. But that was no proper basis. He said:

> "I submit that in no proper sense can the fourteenth amendment be regarded as a substantive grant of power. It is in terms, in essence and effect, a prohibition to the States."[5]

He thought that the privileges and immunities clause was limited to those rights specifically listed in the Civil Rights

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[10] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 381.

[1] *Id.* at pp. 381-4, 429, 726-30, 821.

[2] See, *e.g.*, Sawyer, *id.* at p. 488.

[3] *Id.* at p. 728.

[4] See, *e.g.*, Morton, *id.* at pp. 524, 846; Flanagan, *id.* at p. 587; Edmunds, *id.* at p. 731. Morton, it may be noted, considered that the remedy for violation of the Amendment was to be found in Congress and not in the courts. For a statement of his views at an earlier time while governor of Indiana, see the discussion as to that State in Appendix B.

[5] *Id.* at App. p. 3.

Act of 1866 and that the government of the United States had no right to take from the people the direction of education.[6] Many other senators expressed similar constitutional doubts.[7] Ferry of Connecticut, for example, held the view that the Federal government should not interfere with schools and churches.[8] Tipton thought that the judiciary should enforce the Amendment and that Congress was empowered to act only when there was no other remedy.[9]

When Sumner's amendment came to a vote, the result was a 28 to 28 tie. Vice President Colfax cast the deciding vote in favor of the amendment.[10] Sumner was elated; he said:

> "The bill is now elevated and consecrated."[11]

But his fight was in vain, for the amnesty bill as so amended failed to receive the necessary two-thirds vote and was defeated.[1]

After 3 months of quiet, the House bill to provide a general amnesty came before the Senate on May 8, 1872. Sumner immediately moved his Supplemental Civil Rights Bill as a substitute bill.[2] Trumbull of Illinois replied that

> "The right to go to school is not a civil right and never was."[3]

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[6] *Id.* at App. p. 4.

[7] See, *e.g.*, Vickers, *id.* at p. 386, App. p. 41; Thurman, *id.* at p. 494, App. p. 25; Scott, *id.* at p. 531; Davis, *id.* at p. 763; Saulsbury, *id.* at p. 928, App. p. 7.

[8] *Id.* at p. 893.

[9] *Id.* at pp. 913-5.

[10] *Id.* at p. 919.

[11] *Id.* at p. 927.

[1] *Id.* at p. 928.

[2] *Id.* at p. 3181.

[3] *Id.* at p. 3189. Trumbull introduced and sponsored the bill that became the Civil Rights Act of 1866. See Section 4 of this Appendix.

Ferry of Connecticut brought up the analogy of segregation by sex; could Congress outlaw such segregation?[4] But Edmunds and Sherman supported Sumner.[5] Sumner grew excited; he said:

> "Now, question on my motion."[6]

But the debate was to continue. Boreman, Casserly and Bean opposed the substitute.[7] Ferry of Connecticut moved to strike out the provision as to mixed schools. He thought that dictation to local communities on school management would be "fatal to the school system of the country." He went on:

> ". . . in the community where I reside there is no objection to mixed schools . . . and if I were called upon to vote there, I should vote for them. It would be a useless expense to establish separate schools for the few colored people in that community. But I cannot judge other communities by that community. . . . I believe the Senator's bill relating to the District of Columbia, for instance, would utterly destroy the school system in this District. . . .
>
> "Take for instance the State of Ohio where I understand the law permits the districts to have mixed or separated schools. . . . I observe a decision of the supreme court of Ohio reported in yesterday's newspapers, bearing upon the very point suggested in this bill; for it had been the assertion . . . that compelling the separation of the races into different buildings was a violation of the fourteenth amendment, notwithstanding that both races . . . enjoyed the same or equal accommodations,

[4] *Id.* at p. 3190.

[5] *Id.* at pp. 3190, 3192. Sherman indicated the view that the Amendment of itself did not outlaw school segregation.

[6] *Id.* at p. 3195.

[7] *Id.* at pp. 3195, 3196, 3249, 3251.

> facilities, and advantages. That court . . . as I understand, the majority of it, of judges whose political opinions are like those of the majority of this body, . . . 'sustained the constitutionality [of separate schools]. . . .'
>
> "I believe that that decision of the supreme court of Ohio is good law."[8]

But Ferry's amendment to eliminate schools was rejected, 25 to 26.[9] And an amendment proposed by Blair to provide for local option was also defeated.[10] Senators Bayard, Casserly and Stockton attacked the constitutionality of Sumner's substitute, Casserly citing the Massachusetts case of *Roberts* v. *City of Boston* which upheld segregated schools.[1]

Ferry then moved to add the amnesty bill to Sumner's substitute. That was agreed to, 38 to 14.[2] Trumbull then moved to strike out Sumner's substitute and leave only the amnesty bill, but that was lost when the Vice President voted again to break a tie.[3] Sumner's substitute was next defeated, 27 to 28, but when he moved to add his Supplemental Civil Rights Bill to the original House amnesty bill, his motion was adopted, again after a tie vote.[4] But these maneuvers were in the end unsuccessful for the bill as so amended did not receive the required two-thirds vote and died.[5]

Matters now passed to a crisis as far as amnesty was concerned. Shortly after 5 o'clock in the morning on May

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[8] *Id.* at p. 3257.
[9] *Id.* at p. 3258.
[10] *Id.* at p. 3262.
[1] *Id.* at p. 3261.
[2] *Id.* at pp. 3262-3.
[3] *Id.* at pp. 3263-5.
[4] *Id.* at p. 3268.
[5] *Id.* at p. 3270.

22, 1872, the Senate took up Sumner's bill.[6] Sumner was not present. The bill was amended to eliminate schools, churches, cemeteries and juries and passed, 28 to 14.[7] The Senate then went on to consider amnesty. Sumner, outraged, appeared on the floor and moved to amend the amnesty bill by adding his Supplemental Civil Rights Bill in its original form.[8] The Senate, now in no mood to tarry, rejected his proposal, 13 to 27, and passed the amnesty bill in the form approved by the House.[9] The vote was 38 to 2; of the two dissenting votes, one was Sumner's. It was after 10 o'clock in the morning when the Senate adjourned.

The House took no action on Sumner's bill. It had, on March 11, 1872, defeated a motion to suspend the rules and then to consider a desultory resolution declaring, among other things, that it would be unconstitutional for Congress to force mixed schools.[10] But there was no debate at that time and it seems questionable whether this action represents a proper test of House sentiment.

Two facts stand out from these debates. The more obvious is that the Senate was sharply divided on the constitutionality of any bill to outlaw school segregation. But equally important is the general acceptance of the fact that school segregation was not unconstitutional of itself and that no court could so declare. Nowhere is it suggested that the judiciary in construing the Fourteenth Amendment might without more put school segregation outside the constitutional pale.

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[6] *Id.* at pp. 3727-8.
[7] *Id.* at pp. 3735-6.
[8] *Id.* at p. 3737.
[9] *Id.* at p. 3738.
[10] *Id.* at p. 1582.

11.

Further District of Columbia School Legislation

During all of this period, when Congress debated so violently civil rights legislation applicable to the country as a whole, it was from time to time active in connection with the schools of the District of Columbia. We review here this evidence of the temper of Congress for the whole period from the ratification of the Fourteenth Amendment until the end of the tempestuous decade in 1875.[1]

In 1868, the Senate passed without substantial debate a bill to transfer the duties of the trustees of the Negro schools in Washington and Georgetown to the trustees of the public schools.[2] This bill was not designed to amalgamate the schools but simply to amalgamate the controlling trustees; the schools were to remain segregated. The House passed the bill in 1869 and sent it to the President.[3] The President vetoed the bill, stating that its provisions were "contrary to the wishes of the colored residents of Washington and Georgetown."[4] No further action was taken.

The great debate on segregated schools in the District began in February 1871. A bill was reported to reorganize the District schools, creating one board to assume the duties of the various school authorities.[5] Section 6 of this bill in effect forbade any segregation in the revised school system.

Senator Patterson of New Hampshire moved to strike out the segregation ban. He thought that amalgamation

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[1] See, for a review of District legislation in this period, *Carr* v. *Corning*, 182 F. 2d 14 (App. D. C. 1950).

[2] Cong. Globe, 40th Cong., 2nd Sess. (1868) 3900.

[3] Cong. Globe, 40th Cong., 3rd Sess. (1869) 919.

[4] *Id.* at p. 1164.

[5] S. 1244, 41st Cong., 3rd Sess. (1871); see Cong. Globe, 41st Cong., 3rd Sess. (1871) 1053.

"will tend to destroy the schools of the City. . . ."[6] Sumner jumped into the fray; the anti-segregation provision was, to his mind, "the vital part of the bill."[7] He made a long speech but, of course, no constitutional discussion was here appropriate.[8] His supporters were to a large extent the radical southerners. Thus Senator Harris of Louisiana favored amalgamation although he commented that

> "We have not been able so far to operate [amalgamated] schools in our State very well. . . ."[9]

Senator Sawyer of South Carolina thought Patterson's proposal "a retrograde step,"[10] Senator Revels of Mississippi considered that this amendment would encourage prejudice.[1] Senator Wilson of Massachusetts also supported his colleague.[2]

Patterson asserted, however, that his proposal was to leave the matter up to the local board for determination,[3] expressing the view that it was

> ". . . doubtful . . . whether a majority of the colored people in this District desire this clause in the bill."[4]

He was supported by Senators Tipton of Nebraska[5] and Thurman of Ohio, the latter terming the proposal for forced

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[6] *Id.* at p. 1054.
[7] *Id.* at p. 1055.
[8] *Id.* at pp. 1055-6.
[9] *Id.* at p. 1055.
[10] *Id.* at p. 1058.
[1] *Id.* at pp. 1059-60.
[2] *Id.* at p. 1061.
[3] *Id.* at p. 1056.
[4] *Id.* at p. 1059.
[5] *Ibid.*

mixture "tyrannical."[6] Finally, Senator Hill of Georgia moved to amend Patterson's amendment to the effect that no distinction on account of race should be made in the method of education, thus leaving actual segregation permissible.[7] Patterson accepted this proposal.[8] But there the matter died; it was not, apparently, considered again during that session.

Sumner returned to the attack in 1872. He caused to be reported without amendment a bill to abolish the trustees of the colored schools established in 1862 and to require mixed schools in the District.[9] Discussion began on April 18, 1872. Sumner led off by asserting that the bill had been proposed at the request of the trustees of the colored schools.[10] Senator Stockton of New Jersey began for the opposition. He said:

> "I think in the condition the two races are before the law as you have placed them in this country we are bound to legislate on all subjects of legislation with equality toward them. . . . Whenever you come to interfere with any individual rights, with my right to say where my children shall go to school, . . . you are then treading on the bounds of that civil liberty which our ancestors came to this country to establish."[1]

Senator Bayard of Delaware opposed the bill[2] and Senator Ferry of Connecticut proposed an amendment that would require an affirmative popular vote in the District

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[6] *Id.* at p. 1057.

[7] *Id.* at p. 1060.

[8] *Id.* at p. 1061.

[9] S. 365, 42nd Cong., 2nd Sess. (1872); Cong. Globe, 42nd Cong., 2nd Sess. (1872) 2484.

[10] *Id.* at p. 2539.

[1] *Id.* at p. 2540.

[2] *Id.* at p. 2541.

before amalgamation would become mandatory.[3] Sumner attempted time and again to get favorable action,[4] and he was supported by Senator Edmunds of Vermont, an ardent radical, who said:

> "It is a matter of great importance that we determine fairly and squarely whether in the District of Columbia, where we have the power, that we will exercise it in the protection of equal rights, or that we will not. . . ."[5]

But Ferry of Connecticut reiterated his opposition to forced mixture, asserting that Sumner

> ". . . proposes a tyrannical rule from without without consulting the sentiments of those within. . . ."[6]

There again the matter died. Apparently, it never thereafter became a major issue. In 1874, Congress codified the laws relating to the District of Columbia.[7] It specifically preserved the mandatory segregation requirements enacted in 1866; they are the statutes now under attack before this Court.[8]

If the Congresses that first succeeded the ratification of the Fourteenth Amendment had considered that it expressed a firm policy against school segregation, it is inexplicable that they specifically refused to eliminate such segregation in the District of Columbia. Here was no question of constitutional power but solely one of policy; yet even then the

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[3] *Id.* at p. 3057.

[4] *Id.* at pp. 3099, 3122.

[5] *Id.* at p. 3123.

[6] *Id.* at pp. 3124-5.

[7] Revised Statutes of the District of Columbia, 18 Stat. part 2 (1874).

[8] See *id.*, §§281, 282, 283, 306, 310 and 314. *Bolling* v. *Sharpe,* October Term, 1953, No. 8.

considerations of policy were against the amalgamation of schools.

12.

The Federal Aid to Education Bill

Here is a small straw in the wind.

Early in 1872, the House considered a bill to give financial assistance to education in the States from the proceeds from the sale of public lands.[9] The bill was silent on the question of school segregation. Some thought, however, that aid might be withheld from certain States because their schools were segregated. So an amendment was proposed to make it clear that aid should not be withheld for this reason.[10] This amendment was adopted by the House by a vote of 115 to 81 on February 7, 1872.[1] The bill as so amended was passed by the House[2] but did not receive Senate consideration.

13.

The Civil Rights Act of 1875

We now approach the climax of Congressional action in the field of school segregation. Sumner's Supplemental Civil Rights Bill then came back before Congress to be dissected and disputed and finally to be passed after all reference to schools was excised.

This is a long and turbulent story. We cannot refer to all the speeches. We must pick and choose as we can for those most relevant to our question.

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[9] H. R. 1043, 42nd Cong., 2nd Sess. (1872).

[10] Cong. Globe, 42nd Cong., 2nd Sess. (1872) 882.

[1] *Ibid.*

[2] *Id.* at p. 903.

We turn first to the House. There in December 1873, a civil rights bill was favorably reported and taken under his wing by General Butler of Massachusetts.[3] It provided:

> "That whoever, being a corporation or natural person, and owner, or in charge of any public inn; or of any place of public amusement or entertainment for which a license from any legal authority is required; or of any line of stage-coaches, railroad, or other means of public carriage of passengers or freight; or of any cemetery, or other benevolent institution, or any public school supported, in whole or in part, at public expense or by endowment for public use, shall make any distinction as to admission or accommodation therein, of any citizen of the United States, because of race, color or previous condition of servitude, shall, on conviction thereof, be fined. . . ."[4]

Debate began on December 19, 1873.[5] Butler stated that the purpose of the bill was simply to override hostile State legislation.[6] Mr. Beck of Kentucky led for the opposition. He thought the bill clearly unconstitutional and referred to the recently decided *Slaughter-House Cases*.[7] His view was that the

> ". . . rights pertaining . . . inferentially to common schools, are not embraced in the powers confided to Congress by the constitutional amendments."[8]

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[3] H. R. 795, 43rd Cong., 1st Sess. (1873); 2 Cong. Rec., 43rd Cong., 1st Sess. (1873) 318.

[4] *Id.* at p. 378.

[5] *Id.* at p. 337.

[6] *Id.* at p. 340.

[7] 16 Wall. 36 (1873).

[8] 2 Cong. Rec., 43rd Cong., 1st Sess. (1873) 342.

Mr. Rainey, a South Carolina Negro, spoke for the bill,[9] and debate went over until after the holidays.

It began again on January 5, 1874. Mr. Frye of Maine spoke in favor and was followed by Mr. Harris of Virginia in opposition.[10] Mr. Stephens of Georgia, Vice President of the Confederate States of America, made a long opposing speech. There was, he said, a

> ". . . want of necessary power, under the Constitution."[1]

He spoke of the war-time amendments:

> "Neither of these amendments confer, bestow, or even declare, any rights at all to citizens of the United States. . . ."[2]

Of § 5, he said, in effect, that it simply authorized Congress to establish methods by which violations of the Amendment might be determined by the courts.[3]

He, as did many others, pointed to the distinction made in the *Slaughter-House Cases* between the rights of a citizen of the United States and the rights of a citizen of a State; the right to education at the expense of a State was not, they considered, a right of a citizen of the United States.

Mr. Mills of Texas made a strong constitutional argument. He said:

> ". . . the fourteenth amendment was adopted, not to enlarge the privileges and immunities already conferred, but simply to prohibit the States from abridging them as they existed. . . .

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[9] *Id.* at p. 343.
[10] *Id.* at p. 375.
[1] *Id.* at p. 379.
[2] *Id.* at p. 380.
[3] *Ibid.*

> "From the authority of adjudged cases it is clear that the privileges and immunities mentioned in the fourteenth amendment are only such as are conferred by the Constitution itself. . . ."[4]

His speech has been summarized as follows:

> "Those rights and privileges which were conferred by the State, and without which they would not exist, were not fundamental, he declared, and were not, therefore, included among the rights guaranteed by the Fourteenth Amendment. The right to go to school was not fundamental, for schools could be closed entirely without abridging the rights of any citizen of the United States, which could not be done if it were a right conferred by the Constitution."[5]

Mr. Elliott of South Carolina, a Negro, thought that there was

> ". . . not a line or word . . . in the decision of the Supreme Court in the great Slaughter-House cases which casts a shadow of doubt on the right of Congress to pass the pending bill. . . ."[6]

Mr. Lawrence of Ohio made a strong argument in favor of the constitutionality of the bill.[7] He based his argument to a major extent on the equal protection clause. He reviewed the Civil Rights Act of 1866 and the intent of Congress to make its constitutionality and effectiveness assured by proposing the Fourteenth Amendment. He concluded with an argument that Congress could act even though a State had not acted at all if Congress thought action necessary to protect equal rights.

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[4] *Id.* at pp. 384-6.

[5] Flack, p. 261.

[6] 2 Cong. Rec., 43rd Cong., 1st Sess. (1874) 407.

[7] *Id.* at pp. 412-3.

The constitutional arguments were made by many.[8] Of course, those opposed pointed to the fact that the enactment of the bill would destroy the newly-formed southern educational systems because tax support would be eliminated. But that was an argument of expediency and not of constitutionality.

Finally, General Butler made another long and fiery speech and, on his motion, the bill was sent back to committee.[9] It did not return during that session.

While all of this was occurring in the House, a similar battle was proceeding in the Senate. Sumner was on hand when the session began and his Supplemental Civil Rights Bill was the first bill introduced.[10] On January 27, 1874, he tried to have the bill brought up for consideration without reference to committee. He detailed the history of the bill and asserted that committee consideration was unnecessary.[1] Senators Ferry of Connecticut and Morrill of Maine urged reference to a committee, both stating their views that the bill was unconstitutional.[2] Even Edmunds of Vermont, a staunch radical, argued against Sumner,[3] and at last the bill was referred to the Committee on the Judiciary. It was reported favorably on April 13, 1874,[4] but by that time Sumner had passed from the scene. As reported, the bill provided as follows:

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[8] In addition to those named, Messrs. Ransier (p. 382), Monroe (p. 414), Walls (p. 416), Stowell (p. 425) and Glover (App. p. 4) upheld the constitutional position; Messrs. Durham (p. 405), Blount (p. 410), Bright (p. 414), Herndon (p. 417), Whitehead (p. 427), Buckner (p. 427), Atkins (p. 452-4), Southard (App. p. 1) and Bell (App. p. 3) opposed and generally attacked constitutionality.

[9] *Id.* at pp. 455-8.

[10] *Id.* at p. 2.

[1] *Id.* at p. 945.

[2] *Id.* at pp. 946, 949.

[3] *Id.* at pp. 946-8.

[4] *Id.* at p. 3053.

> ". . . all persons . . . shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances . . . theaters, and other places of public amusement; and also of common schools . . . ; and of cemeteries . . . subject only to conditions and limitations established by law, and applicable alike to citizens of every race and color. . . ."[5]

In the absence of Sumner, Senator Frelinghuysen of New Jersey made the major speech in support of the bill. He referred to the *Slaughter-House Cases* and in some way derived support. He mentioned the Iowa case holding segregated schools unconstitutional under the Iowa constitution and the Ohio case holding segregated schools constitutional under the Federal Constitution, and said that neither provided any satisfactory precedent. He said that the purpose of the bill was "to destroy, not to recognize the distinctions of race." He found constitutional support in the war-time amendments "considered together and in connection with the contemporaneous history," but particularly in the privileges and immunities and equal protection clauses. He added this unusual note:

> "When in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so."[6]

On April 30, 1874, Senator Norwood of Georgia made a speech of two hours. He presented a substantial constitutional argument; he could not find support in the Constitution for Congressional regulation of schools.[7] Senator

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[5] *Id.* at p. 3450.

[6] *Id.* at pp. 3451-4.

[7] *Id.* at App. pp. 233 *et seq.*

Gordon of Georgia on May 5, 1874, moved to strike out school regulation.[8] Senator Flanagan of Texas favored the bill,[9] as did Senator Pratt of Indiana.[10] Senator Thurman of Ohio made a strong constitutional attack on the bill.[1] Senator Morton of Indiana asked him how Congress might enforce the Fourteenth Amendment in accordance with § 5. Thurman answered:

> "Just precisely as it enforces the prohibition against a State that it shall not pass any law impairing the obligation of contracts. . . . It enforces it by providing for the making of a case for the judicial tribunals of the United States. . . ."

Thurman thought that § 5

> ". . . does not add one iota to the power of Congress."

But he was not misled by the meaning of the first section of the bill:

> ". . . the meaning of the section is that there shall be mixed schools."

On May 21, 1874, Senator Johnston of Virginia spoke in opposition, stating that the bill was opposed by Virginia Republicans and Negroes.[2] Senator Morton followed. He thought § 5 applicable and that Congress was the sole judge of the appropriateness of enforcing legislation.[3] Senator

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[8] *Id.* at p. 3596.

[9] *Id.* at App. p. 371.

[10] *Id.* at pp. 4081-2. But Pratt seems to have thought that mixed schools were not required:

> "In this city, for example, the schools are kept separate and will continue to be though this bill become law."

[1] *Id.* at p. 4083.

[2] *Id.* at p. 4114.

[3] *Id.* at App. 318.

Boutwell of Massachusetts supported the bill as authorized by §§ 1 and 5 of the Amendment.[4]

Senator Stockton of New Jersey made a long speech extending into the session of May 22.[5] He focussed on the equal protection clause and supported the separate but equal doctrine: equal did not, in his view, mean the same. He thought the bill beyond constitutional bounds. He was followed by Senator Howe of Wisconsin who took the opposite position: he believed that the Fourteenth Amendment gave proper support.[6] Next came Senator Alcorn of Mississippi who favored the bill because it was favored by the Negroes in his State and they controlled the government there.[7] In regard to schools he said

> ". . . I am not in favor of mixing them and I consider that this bill does not mix them."

He pointed out that schools were not mixed in Mississippi even though the Negroes were in control.

The debate went on; the Senate sat all night long. Senator Sargent of California proposed an amendment to permit segregation by sex or color.[8] Senator Bogy of Missouri concurred with Thurman; the effect of the bill on education would be "demoralization and destruction."[9] Senator Pease of Mississippi opposed the separate but equal doctrine and favored the bill.[10] Senator Cooper of Tennessee thought that it would require amalgamated schools and was both

[4] *Id.* at p. 4115.
[5] *Id.* at pp. 4117, 4143.
[6] *Id.* at p. 4147.
[7] *Id.* at App. p. 302.
[8] *Id.* at p. 4153.
[9] *Id.* at App. pp. 318, 321.
[10] *Id.* at p. 4153.

inexpedient and unconstitutional.[1] Senator Saulsbury of Delaware made a strong legal argument; he thought the bill an interference with the State police power and that the Amendment

> ". . . was not adopted for any such purpose."[2]

Senators Kelly of Oregon, Merrimon of North Carolina and Hamilton of Maryland all opposed the bill on constitutional grounds.[3]

Senator Stewart of Nevada stated that he believed that Congress had the constitutional power to pass the bill but that it would not result in better education for the Negro. He said:

> "I do not think at all events we should take the step to compel mixed schools."[4]

He added that the bill was designed to get Negro votes for the Republican Party.[5]

As the debate ended, Senator Frelinghuysen noted that separate schools might be retained on a voluntary basis,[6] and Senator Sargent of California expressed the view that the Fourteenth Amendment of itself certainly did not require mixed schools.[7]

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[1] *Id.* at p. 4154.

[2] *Id.* at pp. 4157-8.

[3] *Id.* at p. 462, App. pp. 307, 361.

[4] *Id.* at p. 4167. It is obvious that he did not think that the Amendment required mixed schools; he was in the Senate when the Amendment was proposed.

[5] ". . . the prime motive of a majority of those who voted for the bill was political. . . ." Flack, p. 271.

[6] 2 Cong. Rec., 43rd Cong., 1st Sess. (1874) 4168.

[7] *Id.* at p. 4171.

All substantial amendments were voted down. The bill was put upon its passage and passed by a vote of 29 to 16. The Senate adjourned at 7:10 A. M.[8] The bill was never presented for action in the House.

In the election of November 1874, the Democratic Party made sweeping gains. unseating almost 100 Republican House members.[9] As a result, when the lame duck Congress met in December 1874, the Republicans were particularly anxious for some form of civil rights legislation to be enacted while they retained control. On December 16, 1874, General Butler, himself a lame duck, reported the Civil Rights Bill in amended form.[10] As amended, the Bill provided that segregated schools might be maintained so long as they provided "equal educational advantages in all respects."[11] The Republicans then succeeded in modifying the rules of the House in an attempt to restrain filibusters so that passage of the bill might be assisted.[1] Two days after this was done, the House voted to reconsider the vote by which the bill had been recommitted.[2] The debate then began. Mr. Cessna of Pennsylvania moved to substitute the language of the Senate bill.[3] Mr. White of Alabama sought to add a proviso making even more certain the validity of mixed schools.[4] Mr. Kellogg of Connecticut proposed the elimination of all reference to schools.[5] Butler spoke at

[8] *Id.* at p. 4176.

[9] 7 Rhodes, *History of the United States* (1928) 132.

[10] 3 Cong. Rec., 43rd Cong., 2nd Sess. (1874) 116.

[11] *Id.* at p. 1010.

[1] This was accomplished on February 1, 1875. 3 Cong. Rec., 43rd Cong., 2nd Sess. (1875) 890-902.

[2] *Id.* at p. 936.

[3] *Id.* at p. 938.

[4] *Id.* at p. 939.

[5] *Ibid.*

length; his bitterly anti-southern remarks aroused protest.[6] Mr. Lynch joined in support of the bill, stating that the Fourteenth Amendment authorized the elimination of all color distinctions.[7]

Mr. Finck of Ohio spoke in reply. He thought that the bill was unconstitutional, citing the Ohio decision and the *Slaughter-House Cases*. He did not believe that comfort could be obtained from § 5 of the Fourteenth Amendment:

> "I deny that the fifth section of the fourteenth amendment confers any express power upon Congress whatever."[8]

Mr. Hale of New York disagreed with Mr. Finck; he considered that § 5 authorized affirmative Congressional action of the type embodied in the bill.[9]

We cannot recount within any reasonable limit of space all of the speeches on the bill. Many opposed, and most of them combined arguments of constitutional law with those of expediency.[10] Many were in favor of the bill and answered the arguments of its opponents on the same grounds.[1] But their arguments could only cover territory that we have already traversed; there was nothing new to tell.

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[6] *Id.* at pp. 939-41.

[7] *Id.* at p. 943.

[8] *Id.* at pp. 947-8. Finck, it will be recalled, had participated in the debate on proposing the Amendment.

[9] *Id.* at pp. 979-80. Hale also had been in Congress when the Amendment was proposed.

[10] Included in this group were Messrs. Storm (p. 951), Hunton (App. p. 117), Whitehead (p. 952), Smith (App. p. 156), Blount (p. 977), Sener (p. 978), Cain (p. 981), Chittenden (p. 982), White (App. p. 15), Caldwell (p. 982), Eldredge (p. 982), Brown (p. 985), Monroe (p. 998) and Phelps (p. 1001).

[1] These included Messrs. Cain (p. 956), Harris (p. 957), Rainey (p. 959), Hoar (p. 979), Roberts (p. 980), Lewis (p. 998), Burrows (p. 999), Ranier (p. 1001), Williams (p. 1002), Shanks (p. 1003) and Garfield (p. 1004).

In the end, Cessna's and White's amendments were rejected.[2] Kellogg's amendment — to eliminate all reference to schools — was accepted by a very large majority, 128 to 48.[3] As the one who proposed the amendment, his words are of interest. He thought that to require mixed schools would

> ". . . destroy the schools in many of the Southern States. . . ."

But he went further than this:

> "And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation. The States establish schools, raise taxes for that purpose, and they are also aided by private benefactions; and they have a right to expend the money, so raised, in their own way."[4]

After the adoption of Kellogg's amendment, the bill passed the House early in the morning of February 5, 1875, by a vote of 162 to 99.[5] It then went to the Senate. There, the absence of school regulation was not mentioned. The discussion related almost entirely to a provision regarding jurors. Thurman, Bayard, Carpenter, Dennis and Hamilton opposed the bill;[6] Boutwell and Morton supported it.[7] It was passed by the Senate on February 27, 1875, by a vote of 38 to 26,[8] and signed by President Grant on March 1, 1875.[9]

Charles Sumner, had he lived, would have been bitter at the thought that Congress had refused to pass any law at

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[2] *Id.* at pp. 1010-1.
[3] *Id.* at p. 1010.
[4] *Id.* at p. 997.
[5] *Id.* at p. 1011.
[6] *Id.* at pp. 1791, 1861, 1865 and App. pp. 103 and 113.
[7] *Id.* at pp. 1792, 1793.
[8] *Id.* at p. 1870.
[9] *Id.* at p. 2013; 18 Stat. 335 (1875).

all relating to segregation of the races in the public schools. But the crowning blow came even later; that occurred when this Court declared that his Civil Rights Act, bobtailed as it emerged from the Congressional maelstrom, offended the Constitution of the United States.[10]

With Democratic control of Congress, civil rights legislation ceased to be of active concern. But one further footnote must be added. President Grant apparently did not believe that segregated schools were outlawed. When he sent to Congress his message when it convened in 1875. he was concerned about education. He recommended a constitutional amendment making it the "duty" of each State "to establish and forever maintain free public schools . . . irrespective of sex, color, birthplace, religions. . . ."[11] It seems clear that no reference to color would have been required if the Fourteenth Amendment had already made the result clear.

14.

Conclusion

Of the questions that we have here investigated, one is subject to a definite answer. The Congress that proposed the Fourteenth Amendment did not consider that, of itself, it made segregated schools unconstitutional.

This conclusion is easily derived. Almost all agreed that the Amendment was designed to write the Civil Rights Act of 1866 into the Constitution of the United States; some said that the purpose was to make that Act constitutional and others to prevent its repeal, but all agreed on the object. The leader of those who succeeded in enacting the Civil Rights Bill stated specifically on two occasions that it was not designed to require mixed schools and the statements of its other proponents are consistent with his position. In

[10] *Civil Rights Cases,* 109 U. S. 3 (1883).

[11] 7 *Messages and Papers of the Presidents* (1898) 334.

the succeeding years, many efforts were made to enact a statute outlawing segregated schools but none was successful. These attempts, nourished by those who led the struggle for the Fourteenth Amendment, are absolutely inconsistent with any view that school segregation was already unconstitutional.

Could this Court act in the future of its own initiative? That thought never crossed a mind. If anything, the radical leaders were hostile to a Court that, compared to them, was conservative. The answer to this question can be derived from inference only but there is no evidence to support an affirmative position.

Finally, did those Congressmen believe that Congress could properly act to make school segregation illegal? There the evidence is sharply divided. The Congress that proposed the Fourteenth Amendment itself gives no answer to the question. In succeeding Congresses, at one time or another, a majority in the Senate and perhaps in the House would have said yes. But many would have replied with an emphatic negative and they were always equally vocal. The best answer to this question is that no Congress was ever able to muster a majority willing to take the step of outlawing school segregation. And the chief proponent of Congressional action based his constitutional position on a ground that seemed then and seems now completely unsound to all.

In conclusion, one comment must be made. In reviewing the Congressional history, one is always struck by the feeling that it has all been read before. Then the reason becomes apparent. All of the arguments—both for and against segregated schools—which are now being presented, whether they be legal, psychological or sociological, were made in the 1870's, and often in the same words. There is nothing new; the field has been fully explored. This, we consider, makes it all the more clear that what we face is a local legislative and not a judicial problem.

APPENDIX B

THE FOURTEENTH AMENDMENT BEFORE THE STATES

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A.

Introduction

The Fourteenth Amendment was proposed by Congress on June 13, 1866, and was submitted to the States for ratification on June 16, 1866. A final proclamation that the amendment had been ratified was issued by the Secretary of State on July 28, 1868. In this period of slightly more than 2 years and in the 2 years next succeeding, the Amendment came before the legislatures of each of the 37 States then in the Union.

In seeking for evidence as to the relationship between the Amendment and school segregation, we must look to two chief sources. The first is what was said directly about the Amendment at the time that its ratification was under consideration, either by the Governor or some other executive official or by members of the legislatures. As to the latter, we are hampered by the fact that only in Indiana and Pennsylvania are there reports of legislative debates, and even then we must be wary of statements by those who opposed the Amendment for their opinions as to its effect often went enthusiastically beyond the aims of those who favored it.

The second source of information comes from the school systems themselves. If segregated school systems existed both before and after the ratification of the Amendment, it seems to us clear that the legislature did not contemplate that the Amendment of its own force outlawed segregation in the schools. The same is true if the same legislature or one immediately subsequent enacted legislation providing for segregated schools. On the other hand, legislation not providing for segregated schools does not have the same force; the legislature may have thought that the Amendment required amalgamated schools, but equally it may itself have

United States Population (1870)

I State	*II* Aggregate	*III* White	*IV* Colored
Alabama	996,992	521,384	475,510
Arkansas	484,471	362,115	122,169
California	560,247	499,424	4,272
Connecticut	537,454	527,549	9,668
Delaware	125,015	102,221	22,794
Florida	187,748	96,057	91,689
Georgia	1,184,109	638,926	545,142
Illinois	2,539,891	2,511,096	28,762
Indiana	1,680,637	1,655,837	24,560
Iowa	1,194,020	1,188,207	5,762
Kansas	364,399	346,377	17,108
Kentucky	1,321,011	1,098,692	222,210
Louisiana	726,915	362,065	364,210
Maine	626,915	624,809	1,606
Maryland	780,894	605,497	175,391
Massachusetts	1,457,351	1,443,156	13,947
Michigan	1,184,059	1,167,282	11,849
Minnesota	439,706	438,257	759
Mississippi	827,922	382,896	444,201
Missouri	1,721,295	1,603,146	118,071
Nebraska	122,993	122,117	789
Nevada	42,491	38,959	357
New Hampshire	318,300	317,697	580
New Jersey	906,096	875,407	30,658
New York	4,382,759	4,330,210	52,081
North Carolina	1,071,361	678,470	391,650
Ohio	2,665,260	2,601,946	66,213
Oregon	90,923	86,929	346
Pennsylvania	3,521,951	3,456,609	65,294
Rhode Island	217,353	212,219	4,980
South Carolina	705,606	289,667	415,814
Tennessee	1,258,520	936,119	322,331
Texas	818,579	564,700	253,475
Vermont	330,551	329,613	924
Virginia	1,225,163	712,089	512,841
West Virginia	442,014	424,033	17,980
Wisconsin	1,054,670	1,051,351	2,113
Territory			
Arizona	9,658	9,581	26
Colorado	39,864	39,221	456
Dakota	14,181	12,887	94
District of Columbia	131,700	88,278	43,404
Idaho	14,999	10,618	60
Montana	20,595	18,306	183
New Mexico	91,874	90,393	172
Utah	86,786	86,044	118
Washington	23,955	22,195	207
Wyoming	9,118	8,726	183
Total States	38,115,641	33,203,128	4,835,106
Total Territories	442,730	386,249	44,903
Total United States	38,558,371	33,589,377	4,880,009

SOURCE: Ninth Census of the United States—Statistics of Population (Government Printing Office, 1872) Table 1. 63,254 Chinese and 25,731 Indians are not included in Columns III and IV.

desired amalgamated schools without regard to the Amendment.

In this connection, we do not understand the apparent distinction made by Appellants between States where segregation was mandatory and States where the legislature permitted local option. If segregation could be made mandatory by local authorities, it is, so far as that locality is concerned, just as if the legislature itself had made segregation mandatory. A legislature that considered that, as a result of the Fourteenth Amendment, school segregation offended the Constitution, could no more authorize segregation by local option than it could make segregation universally mandatory. We consider it impossible to distinguish mandatory and permissive segregation.

Furthermore, we note that in certain States there is no relevant evidence in the school reports. One main reason for this is that no substantial Negro problem existed in those States. That is apparent from the census figures for 1870, the nearest available census. A table taken from this census is reprinted opposite this page. In Minnesota, for example, there were only 759 Negroes in 1870; it is idle to think that segregated education would even have been considered there. No evidence can be derived from the facts of the school system in such States.

Finally, we must disregard generalized statements. He who stated that the purpose of the Amendment was to preserve liberty and equality for all the people cannot, we conceive, be taken to have meant that segregated schools were to be forever abolished. The statement must hit closer to the mark before it can be considered relevant.[1]

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[1] By the same token, statements of opinion taken from current newspapers are clearly unreliable. The era of reconstruction was one of strong political feelings and those feelings were often reported as general public opinion by newspaper editors of strong political bias. Unless the character of the newspaper is revealed and compared with other newspaper comment, its statements of general opinion are suspect.

In the discussion that follows, we make no attempt at argument. We seek merely to recount the facts as to each State, taken in alphabetical order only for convenience of reference. Before turning to the individual States, however, we must refer briefly to the peculiar circumstances general to all of the States in the south.

B.

The Seceding States

The States that seceded from the Union present a particularly difficult problem, and we outline here that problem in a manner applicable to all of them.

In 1866, when the Fourteenth Amendment was submitted to the States for ratification, there existed in these eleven southern States governments which had been established pursuant to the reconstruction program of the President. They were comparatively representative of all the people. Although Congress had refused the readmission of the senators and representatives from these States, and the Freedmen's Bureau was active in them, no substantial action had been taken to eliminate local self-government.

During the period between proposal and ratification of the Fourteenth Amendment, Congress took a very drastic step. On March 2, 1867, the House and Senate enacted over the veto of President Johnson "An Act to provide for the more efficient Government of the Rebel States."[2] This act recited that legal State governments did not exist in the former Confederate States and that provision for "peace and good order" in those States was necessary until "loyal and republican" governments could be established. It therefore divided the South into five military districts to be com-

[2] 14 Stat. 428 (1867).

manded by officers of the army who were empowered to use such means as they thought necessary to protect persons and property.

Section 5 of the statute provided the mechanics for the readmission to Congress of senators and representatives from the seceding States. There were two basic conditions. The first was that a new constitution should be framed for each State by a convention elected by all male citizens twenty-one years of age or more regardless of race, except felons and those who had participated in the "rebellion", that this constitution should provide for suffrage for all qualified to elect delegates to the convention and that Congress should approve the constitution. The second condition was that the first legislature elected under the new constitution should ratify the Fourteenth Amendment and that the Fourteenth Amendment should have become a part of the Constitution of the United States. This section continued by excluding from the franchise all those excluded from holding office by the third section of the Fourteenth Amendment. Section 6 of this statute proclaimed that, until each State had been readmitted to representation in Congress, its civil government should be deemed provisional only.

Pursuant to this act the existing governments in the southern States were overthrown and new governments were established. A very large percentage of the whites were excluded from participation in these governments and, in several instances, dominion was placed completely in the hands of those who, but a short time ago, had been in servitude.

Naturally, each of the legislatures so elected promptly ratified the Fourteenth Amendment. There was no real alternative; either the Amendment was ratified or the State continued in a position of military subjugation without local

self-government. Any evidence on the question here under consideration derived from these eleven States is thus of diminished significance. In most of them the Fourteenth Amendment was ratified to procure readmission to the Union and little consideration was given by the ratifying legislatures to the particular effect that ratification would have on local rights.

But Appellants have gone on to charge that, in effect, many of the seceding States perpetrated a gigantic fraud on the United States. They adopted constitutions, it is said, designed to establish general school systems which stated nothing about segregation. By doing this, it is alleged, they recognized that the Fourteenth Amendment was designed to outlaw school segregation. Their purpose was to secure readmission of their representatives in Congress. Then, the representatives having been so readmitted and the States having escaped Congressional control, their legislatures, despite their knowledge that school segregation was unconstitutional, immediately established segregated schools.

This assertion is without support in fact. It is based on the assumption that the legislators of many States, all sworn to uphold the Constitution of the United States, willingly and knowingly violated their oaths at once and enacted legislation in bad faith which they knew to be unconstitutional. A mere statement of such a theory is enough to show how far from the truth it must be.

Even more, the assumption has no force in logic. The legislatures that ratified the Amendment in the southern States were not composed of die-hard Confederates still devoted to rebellious causes; in almost every case, they were made up of a majority of loyalists, northern adventurers and Negroes. The governors who recommended school segregation came from as far away as Maine. Legislatures so com-

posed would have no reason to engage in the chicanery which Appellants assume.

One further fact is important. In certain instances, these legislatures were permitted to ratify the Amendment and then to take no further action until Congress had acted to readmit their representatives. Thus in Florida, the legislature followed the advice of the governor and, after ratifying the Amendment (and the Thirteenth Amendment) and electing senators, adjourned until readmission had received Congressional approval.[3] That was because, until Congress had acted, the action of the legislature, under the Reconstruction Act, could be only provisional. So the legislature that ratified the Amendment could not in this instance have acted in regard to schools before readmission.

Finally, what Congress had done was not kept from the States, south or north. Congress had fostered school segregation in the District of Columbia. Congressional leaders had made it clear that the Amendment was not designed to abolish school segregation. Southern leaders knew these facts; they relied on them in good faith as they were entitled to do.

We reject the obnoxious proposition advanced by Appellants and are confident that the Court will reject it. Where a legislature ratified the Amendment and thereafter established segregated schools, either on a mandatory or a permissive basis, we conclude that, without regard to intervening readmission of representatives to Congress, the legislature did not consider that the Amendment abolished school segregation.

We turn now to the individual States.

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[3] Fla. Sen. J. (1868) 32-3.

C.

The Individual States

1. Alabama

The Governor of Alabama submitted the Amendment to the legislature on November 12, 1866, recommending its rejection,[4] and the legislature promptly followed his recommendation, the vote in the Senate being 21 to 9 and in the House 52 to 33.[5] One month later, the Governor changed his mind; he thought that only by ratification could Alabama obtain readmission of its senators and representatives in Congress.[6] But the legislature refused this recommendation and rejected the Amendment by larger majorities than before.[7] In none of the records of these proceedings is the school system mentioned.

The Alabama government was then reorganized under Federal military rule. A new constitution of 1868 was adopted; this did not require segregated schools, but instead directed the authorities to establish in each school district "one or more schools."[8] The Amendment was promptly ratified by overwhelming majorities, 67 to 4 in the House and unanimously in the Senate.[9] In neither house was the matter debated at all.

The Amendment was ratified on July 13, 1868. Less than a month later, the same legislature on August 11, 1868,

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[4] Ala. Sen. J. (1866-7) 36.

[5] *Id.* at p .155; Ala. House J. (1866-7) 84.

[6] Ala. Sen. J. (1866-7) 176.

[7] The vote was 28 to 3 in the Senate and 69 to 8 in the House. Ala. Sen. J. (1866-7) 182; Ala. House J. (1866-7) 213.

[8] There is evidence that segregation was not mentioned in this constitution because it was recognized that segregation would be practiced. See Bond, *Negro Education in Alabama, A Study in Cotton and Steel* (1939).

[9] Ala. House J. (1868) 10; Ala. Sen. J. (1868) 10.

adopted a general school law.[10] This statute required segregated schools unless all parents consented to amalgamation.[11] Schools were then established, but only on a segregated basis, though the first steps for the Negro schools were slow.[12] Segregation was made mandatory in the next constitution adopted in 1875.[1] Segregated education continues to this day.[2]

The Fourteenth Amendment and segregated education were adopted contemporaneously by the same legislature in Alabama; it must have thought that segregation did not offend the Amendment.

2. Arkansas

Arkansas, like all the other States that seceded, promptly rejected the Fourteenth Amendment when it was first presented.[3] Committee reports are available in both houses and objections to the Amendment were stated in detail, but no indication is given that the Amendment would make school segregation unconstitutional.[4] The same legislature adopted a statute "to declare the rights of persons of African descent," by which segregation in the public schools was specifically required.[5]

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[10] Ala. Acts (1868) 148.

[11] The words were as follows (*ibid.*):

> "That in no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate schools for both white and colored children."

[12] Report of Ala. Superintendent of Public Instruction (1869) 7-8; see also *id.* (1871) 67; (1874) 16; (1875) 64.

[1] Ala. Const. (1875) Art. 13, § 1.

[2] Ala. Const. (1901) Art. 14, § 256.

[3] Ark. Sen. J. (1866) 262; Ark. House J. (1866-7) 291.

[4] Ark. Sen. J. (1866) 258; Ark. House J. (1866-7) 288.

[5] Ark. Stat. (1866-7) 100.

The military constitutional convention met in Little Rock on January 7, 1868, and adopted a constitution that was ratified by the people on March 13, 1868. It provided for the establishment of a system of free schools for the instruction of all and contained a provision quite similar to Section 1 of the Fourteenth Amendment.[6] The military legislature, elected pursuant to this constitution, ratified the Fourteenth Amendment, the vote being unanimous both in the Senate and in the House.[7]

The Fourteenth Amendment was ratified on April 6, 1868. On July 23, 1868, the same military legislature passed a statute to establish the public school system. Section 107 of this statute directed the State Board of Education to "make the necessary provisions for establishing separate schools for white and colored children."[8] Segregation was continued by the next school law enacted in 1873.[9]

Let us now comment on Appellants' discussion of Arkansas. They report that the 1868 constitution which did not require segregation "was adopted to nullify" the segregation law of 1867 (Brief, p. 143); they quote an authority that does not support this statement. They say that the 1867 law was repealed prior to readmission of Arkansas representatives to Congress; there is nothing in the record to support this statement. They imply that an unsegregated law was then proposed; nothing supports this statement. No school law or amendment was passed before July 1868, a time after readmission, and it was done on the recommendation of the Republican governor who came from Pennsylvania and Kansas.[10]

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[6] Ark. Const. (1868) Art. I, § 3; Art. IX, § 1.

[7] Ark. Sen. J. (1868-9) 24; Ark. House J. (1868) 22.

[8] Ark. Stat. (1868) No. LII, § 107.

[9] Ark. Stat. (1873) Ch. CXXX, § 108.

[10] Clayton, *The Aftermath of the Civil War* (1915) 226-7.

Since the same legislature that ratified the Fourteenth Amendment adopted segregated schools, we consider that there is affirmative evidence that in Arkansas the Fourteenth Amendment was not considered to require the abandonment of school segregation.

3. California

California never ratified the Fourteenth Amendment. The House elected in 1867 was strongly Democratic and the new Democratic governor was firmly opposed to the reconstruction policy of Congress.[11] The House received a report recommending rejection of the Fourteenth Amendment.[1] The Senate, which remained under Republican control, received a report from its committee recommending ratification.[2] The Houses were thus at a deadlock and nothing further was ever done.

All during this period California's school system, first established pursuant to its constitution of 1849,[3] permitted segregated schools. Thus the Superintendent of Public Instruction in 1867 spoke of the establishment of separate schools for other than white children as one of the more important improvements recently effected in the school laws.[4] In the same report he stated:

> "The people of this state are decidedly in favor of separate schools for colored children."[5]

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[11] Cal. Sen. J. (1867-8) 105.

[1] Cal. Assembly J. (1867-8) 611.

[2] Cal. Sen. J. (1867-8) 676.

[3] Art. IX, § 3.

[4] Report of the Cal. Superintendent of Public Instruction (1866-7) 14.

[5] *Id.* at p. 22.

Provisions for separate schools for Negroes and others of color were enacted by the California legislatures in 1863, 1864, 1866 and 1870.[6] All of these statutes provided that Negro children should not be admitted to white public schools but that separate schools should be established for them under conditions specified in the acts.[7]

California thus had provisions for segregated education all during the reconstruction period. Even though California refused to ratify the Fourteenth Amendment, it is clear that its legislature did not consider that the fact that the Amendment had become a part of the Constitution required disregard of the laws providing for segregated schools.

4. Connecticut

Connecticut was the first state to ratify the Fourteenth Amendment. The legislature was in session in 1866 when the proposed Amendment was communicated by the Secretary of State. The governor recommended its ratification and this was done without extended discussion in the Senate on July 25, 1866, by a vote of 11 to 6 and in the House on the next day by a vote of 131 to 92.[8]

The public school system in Connecticut dates back to 1644. As early as 1818 legislation to protect the school fund was enacted.[9] A statute of 1835 prohibited the establishment of schools for Negroes who were not inhabitants of Connecticut.[10] As Appellants show (Brief, p. 159), segregated

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[6] Cal. Stat. (1863) Ch. CLIX, § 68; (1864) Ch. CCIX, § 13; (1866) Ch. CCCXLII, §§ 57-59; (1870) Ch. DLVI, §§ 56-57.

[7] These statutes were upheld at an early date against attack under the Fourteenth Amendment by the California Supreme Court. *Ward* v. *Flood*, 48 Cal. 36 (1874).

[8] Conn. Sen. J. (1866) 135, 375; Conn. House J. (1866) 410.

[9] Conn. Public Acts (1818) Art. VIII, § 2.

[10] Conn. Gen. Stat. (1835) 321.

schools were authorized by law in parts of Connecticut as late as 1867 after its ratification of the Amendment. But in 1868 the legislature outlawed segregation in schools on account of race or color.[11]

In 1865 the Connecticut voters turned down an amendment to its constitution giving Negroes the right to vote.[1] A similar statutory prohibition against Negro voting was not repealed until 1871.[2] The constitutional provision had not been removed when the adoption of the Fifteenth Amendment made it inoperative.

Connecticut had few Negroes during this period. There is nothing to indicate that the adoption of the Fourteenth Amendment had any relation to school segregation in Connecticut.

5. Delaware

Delaware is another State that refused at first to ratify the Fourteenth Amendment. The governor in his inaugural address on January 15, 1867, pointed to the danger of encroachment on the rights of the State governments which he thought inherent in the Amendment.[3] Subsequently, the Amendment was rejected by the Delaware House by a vote of 15 to 6 and by the Senate by a vote of 6 to 3.[4] Delaware ratified the Amendment more than 30 years later in 1901.[5]

The Delaware constitution of 1831 directed the legislature to establish schools[6] and prior to the war the legislature pro-

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[11] Conn. Public Acts (1868) Ch. CVIII.

[1] Annual Message of the Governor of Conn. (1866) 15.

[2] Conn. Public Acts (1871) Ch. CXXXVI.

[3] Del. House J. (1867) 95.

[4] Del. House J. (1867) 226; Del. Sen. J. (1867) 176.

[5] Del. Laws (1901) Ch. 235.

[6] Art. VII, § 11.

vided free schools for all white children.[7] Schools for Negro children after the Civil War were supported by contributions voluntarily made by the Negroes and donations by the Delaware Association of Colored Schools. It was not until 1881 that the first direct appropriation from the State treasury was made for the benefit of Negro schools.[8] Segregation in the schools was permitted by a statute enacted in 1874.[9] The constitution of 1897, in effect when Delaware ratified the Amendment in 1901, required the maintenance of separate schools.[10]

It is clear that Negro children were not admitted to the white public schools in Delaware during the reconstruction period. Ratification of the Fourteenth Amendment was not considered to abolish school segregation.

6. Florida

The governor of Florida on November 4, 1866, recommended rejection of the Fourteenth Amendment in a message of some length that does not refer to school segregation.[11] In both houses long committee reports were returned, but there is no mention of schools except that in the House report it is stated that a separate school system had been established for the Negroes although there was no public school system for the whites.[12] Both Houses unanimously rejected the Fourteenth Amendment in the first few days of December, 1866.[1]

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[7] Del. Rev. Stat. (1852) Ch. 42, §11.

[8] See Report of the Actuary for the Delaware Association on Colored Schools contained in the 11th Annual Report of the Superintendent of Free Schools of Delaware (1887) App. p. 57.

[9] Del. Rev. Stat. (1874) Ch. 42, § 12.

[10] Del. Const. (1897) Art. 10, § 2.

[11] Fla. Sen. J. (1866) 8.

[12] Fla. Sen. J. (1866) 101; Fla. House J. (1866) 75, 78.

[1] Fla. Sen. J. (1866) 111; Fla. House J. (1866) 149.

In 1868, under the pressure of the Reconstruction Act, Florida adopted a new constitution which neither required nor prohibited segregation.[2] The Fourteenth Amendment was ratified on June 9, 1868.[3] Again nothing was said about schools.

The report of the Superintendent of Public Schools for Freedmen for 1866 noted that there were in existence 35 day schools and 30 night schools for Negroes with 2,700 pupils. These were the schools for Negro children supported by Florida at a time when there were no schools for white children. A uniform system of public schools was the subject of a bill introduced in the legislature of 1868, the same legislature that ratified the Fourteenth Amendment. The bill passed the House without mention of segregated schools.[4] In the Senate an amendment to require segregation was adopted but the bill was never passed.[5] A general school law was enacted in 1869.[6] Nothing is contained in this act or in the constitution of 1868 requiring school segregation. Segregation was prohibited by statute in 1873.[7] But, according to the Attorney General of Florida, this statute was not enforced in practice, and segregated schools were the general

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[2] Fla. Const. (1868) Art. VIII, § 1.

[3] Fla. Sen. J. (1868) 9; Fla. House J. (1868) 9. It is of interest to note how this legislature was constituted. The following appears on page 86 of Senate Journal: "The ladies of the African Church will give a grad [*sic*] Festival in the Capitol to-night, June 23rd; the members of both Houses are respectfully invited to attend. Admission free." In fact the legislature contained 23 Democrats, 13 carpetbaggers (visitors from the North), 21 scalawags (Southern loyalists) and 19 Negroes. Davis, *Civil War and Reconstruction in Florida* (1913) 259.

[4] Fla. House J. (1868) 205.

[5] Fla. Sen. J. (1868) 225-7.

[6] Fla. Laws (1869) Ch. 1686.

[7] Fla. Laws (1873) Ch. 1947.

custom. School segregation was not required by law until a new Florida constitution became effective in 1887.[8]

There is no affirmative evidence that ratification of the Fourteenth Amendment was considered in Florida to outlaw segregation in the schools.

7. Georgia

The Fourteenth Amendment was presented to the Georgia legislature by the governor on November 1, 1866, in a speech in which he opposed ratification.[9] It was accordingly rejected by a vote of 147 to 2 in the House and 38 to 0 in the Senate.[10]

The government of Georgia was then reorganized under military rule. A new constitution was adopted in 1868. As the article on education was proposed, it would have permitted segregation in the schools.[11] As adopted, the article on education was simplified and no mention of segregation was made.[12] Provisional Governor Bullock recommended ratification of the Fourteenth Amendment to the first legislature assembled under this constitution on July 24, 1868.[13] Ratification was accomplished by a vote of 89 to 69 in the House and 27 to 14 in the Senate.[1] Congress did not, however, recognize this ratification since Negroes had been

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[8] Art. XII, § 12.

[9] Ga. House J. (1866) 7.

[10] Ga. House J. (1866) 68; Ga. Sen. J. (1866) 72.

[11] The implication of Appellants to the contrary (Brief, p. 150) is erroneous. See § 2 of the proposed article. Journal of the Constitutional Convention of Georgia (1867-8) 151; Orr, *History of Education in Georgia* (1950) 187-8. Furthermore, there is no evidence to support Appellants' charge that ". . . several efforts to include provisions requiring segregated schools were defeated."

[12] Ga. Const. (1868) Art. VI.

[13] Ga. House J. (1866) 60.

[1] Ga. House J. (1868) 50; Ga. Sen. J. (1868) 46.

excluded from their seats in the 1868 legislature. At the 1870 session the governor called on the legislature to ratify the Fourteenth Amendment again and to ratify the Fifteenth Amendment at the same time.[2] The legislature ratified the Fourteenth Amendment again by a vote of 71 to 0 in the House and 24 to 10 in the Senate.[3]

Bullock was a Republican and a majority in both the Senate and House at the 1870 session were Republicans. Furthermore, it was at this same session that the first law establishing a system of public schools in Georgia was enacted.[4] This school act provided that

> ". . . the children of the white and colored races shall not be taught together in any sub-district of the State."[5]

An amendment to eliminate this provision was proposed in the House and rejected.[6]

The legislature that ratified the Fourteenth Amendment also enacted a school law providing for segregated schools. Certainly this legislature could not have thought that the Fourteenth Amendment forbade it to establish separate schools for the races.

8. Illinois

Governor Oglesby recommended ratification of the Fourteenth Amendment when the Illinois legislature met in 1867, stating that the Amendment had received "emphatic ap-

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[2] Message to Special Session of Provisional Assembly, February 2, 1870, 19.

[3] Ga. House J. (1870) 74; Ga. Sen. J. (1870) v. I, p. 74.

[4] Ga. Pub. Laws (1870) 49.

[5] *Id.* at p. 57.

[6] Ga. House J. (1870) 449.

proval and endorsement by the people of the State."[7] The Amendment was ratified by the Senate on January 10, 1867, by a vote of 17 to 8 and by the House on January 15, 1867, by a vote of 62 to 25.[8] There is nothing in the official publications or in the current newspaper reports to indicate any intention by the legislature to affect the public schools.

In the report of the Superintendent of Public Instruction for 1865-6, he notes that there were in Illinois 6,000 Negro children of school age for whom no schools were provided because the law did not contemplate their amalgamation with white children.[9] In his report for the subsequent biennium, the Superintendent said:

> "The question of co-attendance, or of separate schools, is an entirely separate and distinct one, and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of but little importance, and one which need not and cannot be regulated by legislation."[10]

This view apparently was generally shared among Illinois officials. The Illinois constitution of 1870 required education for all children but made no provision for segregated or mixed schools.[11] The governor in his message to the legislature in 1871 urged it to implement this provision and to provide public schools for all children. In the course of this message he stated:

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[7] Message to the Legislature by the Governor of Ill. (1867) 40.

[8] Ill. Sen. J. (1867) 76; Ill. House J. (1867) 134.

[9] Report of Superintendent of Public Instruction of Ill. (1865-6) 28; Ill. Laws (1865) 105.

[10] Report of Superintendent of Public Instruction of Ill. (1867-8) 21.

[11] Ill. Const. (1870) Art. VIII, § 1. Provisions to require segregated schools were proposed and defeated. Journal of the Constitutional Convention of the State of Illinois (1869) 234.

> "The question whether children of different complexions shall be admitted to and instructed in the same school is one of mere local and temporary interest, and may be safely left to those who vote and pay the taxes."[1]

Illinois did not end separate school systems until 1874.[2] It seems clear that the legislature of Illinois did not consider that the ratification of the Fourteenth Amendment required it to abolish school segregation.

9. Indiana

Governor Morton of Indiana delivered his message to the legislature on June 11, 1867. He spoke both of schools and of the Fourteenth Amendment. On the subject of schools he said:

> "The laws of Indiana exclude colored children from the common schools, and make no provision whatever for their education. I would, therefore, recommend that the laws be so amended as to require an enumeration to be made of the *colored* children of the State, and such a portion of the school fund as may be in proportion to their number, be set apart and applied to their education by the establishment of separate schools, under such suitable provisions and regulations as may be proper. I would not recommend that white and colored children be placed together in the same schools, believing, as I do, in the present state of public opinion, that to do so would create dissatisfaction and conflict, and impair the usefulness of the schools . . ."[3]

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[1] Message to the Legislature by the Governor of Ill. (1871) 26.

[2] Ill. Rev. Stat. (1874) Ch. 122, § 100.

[3] Message of the Governor of Ind. to the Legislature, January 11, 1867, p. 21. Morton later went on to the Senate and became a strong supporter of Sumner. See Appendix A.

He spoke in generalities as to the Amendment and recommended its ratification.[4]

The Amendment was debated at some length. The Republicans asserted that the people had already voted in favor of its ratification and that a vote should be taken at once.[5] The Democrats spoke in opposition to the Amendment both in the House and in the Senate. There was much talk that the Amendment would confer the right of suffrage upon the Negro (although it took the Fifteenth Amendment to make this clear) and one opponent stated that the Negroes "would sit with us in the jury box and with our children in the common schools."[6] But to the objection that the first section of the Amendment merely repeated the principles of the Civil Rights Act of 1866, one of the Amendment's supporters replied that those principles should be made permanent by writing them into the fundamental law.[7] None of those who spoke in favor of the Amendment indicated that it would have any effect upon the school system. It was adopted in the Senate by a vote of 29 to 16 and in the House by a vote of 55 to 36.[8]

The School Law of 1865 excused Negroes and mulattoes from payment of the school tax for no schools were provided for their children.[9] That School law had been limited to include only white children by an amendment, the purpose of which was to "gain friends and get the best school laws we can."[10]

No amendment to the School Law of 1865 was successful

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[4] *Id.* at p. 28.

[5] Brevier Legislative Reports (1867) 44.

[6] *Id.* at p. 80.

[7] *Id.* at p. 88.

[8] *Id.* at pp. 58, 90.

[9] Ind. Laws (1865) 3.

[10] Brevier Legislative Reports (1865) 342.

at the 1867 session, although a bill to provide separate schools for Negroes when any taxpayer objected to their admission to the white schools was passed by the Senate.[11]

The 1865 law was, however, changed in 1869 when taxation for common school purposes was made uniform and the education of Negro children was provided for in separate schools.[1] Extended debates are found on this statute.[2] This debate does not indicate that the Fourteenth Amendment at any time entered into the consideration of the legislators. Some opposed educating the Negro at all; some were for separate schools because they believed that the Indiana constitution required education for the Negro; and some wanted to have amalgamated schools because they considered segregated schools a violation of the Indiana constitution. But none indicated that he believed that segregated schools violated the Fourteenth Amendment.

Segregated schools were made permissive by a further statute of 1877.[3]

In Indiana we have for the first time an assertion that the Fourteenth Amendment did outlaw school segregation. It was made by a member of the minority who obviously intended to paint as black a picture of the Amendment as could possibly be described. On the other hand, Indiana had

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[11] Brevier Legislative Reports (1867) 267-268, 353, 444; *cf. id.* at pp. 356, 444.

[1] Ind. Laws (1869) 41.

[2] Brevier Legislative Reports (1869) 34, 341-2, 491-6, 506-12, 533.

[3] Ind. Laws (1877) 124. The argument that separate schools violated the Fourteenth Amendment was not accepted by the Supreme Court of Indiana in 1874. *Cory* v. *Carter,* 48 Ind. 327 (1874). The Court considered the matter in detail and pointed to the contemporaneous act of Congress providing segregated schools for Negroes in the District of Columbia. It concluded that classifications on the basis of color and education in separate schools "involve questions of domestic policy which are within the legislative discretion and control . . ." The same result was reached by that court as late as 1926. *Greathouse* v. *Board of School Commissioners,* 198 Ind. 95, 151 N. E. 411 (1926).

excluded Negroes from the public schools before the Fourteenth Amendment and immediately thereafter established separate Negro schools. We think it clear that the Indiana legislature considered that it created no constitutional prohibition of separate schools when it ratified the Fourteenth Amendment.

10. Iowa

Iowa did not consider the Amendment until 1868. At the opening of the legislature in that year, the governor referred to the Amendment in general terms and recommended its ratification.[4] The new governor, in his inaugural address a few days later, noted the fact that the Iowa constitution had abolished all distinction on the basis of race and color and asked for the vote for the Negro.[5] The Amendment was ratified in Iowa with ease by a vote of 68 to 12 in the House and 34 to 9 in the Senate.[6]

The Iowa constitution of 1857 required the Board of Education to provide schools for all of the children of the State.[7] In 1858 the legislature required the District School Board of Directors to provide separate schools for Negro children unless all parents in the district agreed to amalgamation.[8] The Superintendent of Public Instruction considered this statute offensive to the State constitution as impinging on the duties of the Board of Education.[9] In fact, a similar law had earlier been held by the Supreme Court of

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[4] Iowa Sen. J. (1868) 33.

[5] Iowa Sen. J. (1868) 48.

[6] Iowa Sen. J. (1868) 264; Iowa House J. (1868) 132.

[7] Art. IX, § 12. At an earlier date, Iowa had limited public education to whites and exempted the property of Negroes from school taxes. Iowa Code (1851) §§ 1127, 1160.

[8] Iowa Laws (1858) Ch. 52, § 30.

[9] Report of the Superintendent of Public Instruction of Iowa (1864) 102; *id.* (1866) 97.

Iowa to offend the State constitution.[10] Segregated education, when attempted after the Fourteenth Amendment came on the scene, was held to violate Iowa's statutes, but no mention at any time was made of the Fourteenth Amendment.[11]

There is no evidence from Iowa on the point here in question.

11. Kansas

Governor Crawford recommended ratification of the Fourteenth Amendment to the legislature of Kansas that met on January 8, 1867. He stated that the Amendment had been approved by the people at the preceding election, and he asked for a unanimous vote. The governor did not mention schools.[1] The Senate did ratify the Amendment unanimously, and the House approved by a vote of 76 to 7.[2]

Ratification of the Amendment was accomplished by the legislature of 1867; the same legislature authorized segregated schools in cities of the second class[3] and the legislature of 1868 authorized segregated schools in cities of the first class. The second statute gave to Boards of Education in cities of the first class the right "to organize and maintain separate schools for the education of white and colored children."[4] This act was passed by the House by a vote of

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[10] *District* v. *City of Dubuque,* 7 Iowa 262 (1858).

[11] *Clark* v. *Board of Directors,* 24 Iowa 266 (1868).

[1] Kans. Sen. J. (1867) 43.

[2] Kans. Sen. J. (1867) 76, 128; Kans. House J. (1867) 79.

[3] Kans. Laws (1867) Ch. 49, § 7. A statute passed by this legislature (Ch. 125) provided, as Appellants assert (Brief, p. 179), a penalty for the exclusion of "any" child from the schools, but this had no relation to segregation. It is discussed at length in the brief for the State of Kansas in *Brown* v. *Board of Education of Topeka,* October Term, 1953, No. 1.

[4] Kans. Gen. Stat. (1868) Ch. 18, Art. V, § 75.

72 to 1, more nearly unanimous than the vote on the Fourteenth Amendment, and was unanimously adopted by the Senate.[5] Such permissive segregation has continued at all times since it was originally adopted except for the 3-year period between 1876 and 1879.[6]

The legislature of Kansas certainly did not consider that ratification of the Fourteenth Amendment abolished the power of the State to segregate schools by race or color.

12. Kentucky

The governor of Kentucky recommended rejection of the Fourteenth Amendment when he sent it to the legislature on January 3, 1867.[7] He did not discuss its merits. The Amendment was rejected by the House by a vote of 67 to 27 and by the Senate by a vote of 24 to 9.[8] Nothing in these proceedings gives any indication that school segregation was an issue.[9] Kentucky never considered the Amendment again.

The same legislature enacted a statute permitting the establishment of schools for Negroes to be supported by taxes collected from Negroes.[10] Additional legislation on this subject was recommended by the governor to the legislature in 1871.[1]

The constitution of 1891 required segregated schools.[2] In

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[5] Kans. House J. (1868) 637; Kans. Sen. J. (1868) 389, 391, 399.

[6] Kans. Laws (1876) Ch. 122; Kans. Laws (1879) Ch. 81; Kans. Gen. Stat. (1949) §§ 72-1724.

[7] Ky. House J. (1867) 19.

[8] *Id.* at p. 63; Ky. Sen. J. (1867) 64.

[9] "There was no occasion for debate upon a question on which everybody's mind was made up, and it was felt that this was no occasion for mere idle display." Louisville Daily Courier, January 9, 1867, p. 1, Column 9.

[10] Ky. Acts (1867) 94.

[1] Message of the Governor of Ky. to the General Assembly, December 4, 1871, p. 20.

[2] Section 187.

fact, no real system of Negro education existed prior to 1882, and schools in Kentucky have been segregated ever since education of the Negro was begun.[3]

It is clear that Kentucky did not consider the effectiveness of the Fourteenth Amendment to outlaw school segregation.

13. Louisiana

The situation in Louisiana in the years immediately following the war can only be described as chaos. The governor in 1867 recommended adoption of the Amendment, but he was a Union man and he stated that the legislature would probably disagree with him.[4] Even he sought separate schools for Negro children in this same address.[5] The governor was correct in his forecast; the Fourteenth Amendment was rejected unanimously by both Houses of the 1867 legislature.[6]

Then came reconstruction. A provisional governor was appointed "in obedience to instruction from the general commanding the army."[7] The new legislature of 1868, composed mainly of Negroes, enthusiastically adopted the Amendment. The vote was 57 to 3 in the House and 22 to 11 in the Senate.[8]

In the same year Louisiana adopted a new constitution. This provided that there should be no segregation in the public schools.[9] The Journal of this convention is interesting. The provision in regard to education was adopted by a vote of 61 to 12, and a number of the members went to some

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[3] Trout, *Negro Education in Kentucky* (Courier Journal, May 1953).

[4] La. Sen. J. (1867) 5.

[5] *Id.* at p. 7.

[6] *Id.* at p. 20; La. House J. (1867) 23.

[7] La. Sen. J. (1868) 3.

[8] La. House J. (1868) 8; La. Sen. J. (1868) 21.

[9] La. Const. (1868) Art. 135.

lengths to express the reason for their vote. Not one of them mentions the Fourteenth Amendment.[10]

The result of this constitutional provision was confusion and riot.[1] No effective schools were established while this constitution was in effect.[2] The requirement for mixed schools was eliminated nine years later by the Louisiana constitution of 1879,[3] and since that time segregated schools have generally existed in Louisiana.

It is difficult to derive any intention from the Louisiana record. It may best be summed up by saying that no affirmative evidence exists that the Fourteenth Amendment was considered to have placed school segregation beyond the constitutional pale.

14. Maine

There is little to be gleaned from Maine. The Governor recommended ratification of the Fourteenth Amendment in generalities, and a resolution to that end was adopted by overwhelming votes, 126 to 12 in the House and unanimously in the Senate.[4]

Negroes constituted approximately one-quarter of one percent of the Maine population at this time and Maine never required segregation in its public schools.[5]

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[10] Journal of the La. Constitutional Convention of 1868, pp. 200-1.

[1] Annual Report of the La. State Superintendent of Public Education (1874) LIII-LXXVI; *id.* (1875) 40-73.

[2] Annual Report of the La. State Superintendent of Public Education (1877) IV.

[3] Art. 224; *cf.* Art. 231.

[4] Maine House J. (1867) 20, 78; Maine Sen. J. (1867) 101.

[5] *Cf.* Maine Laws (1873) Ch. 124, § 4. It is interesting to note, however, that marriages between whites and Negroes were prohibited in Maine as late as 1895. See Maine Rev. Stat. (Supp. 1885-95) Ch. 59, § 2.

15. Maryland

Maryland never ratified the Fourteenth Amendment. The governor submitted it to the legislature in 1867[6] without mention of education, and no reference to the school system is found in the lengthy report of the Joint Committee on Federal Relations to which the Amendment was referred.[7] The Senate rejected the Fourteenth Amendment by a vote of 13 to 4 and the House took similar action by a vote of 47 to 10.[8] No further action on the Amendment was ever taken in Maryland.

In Maryland, as in a number of other States, the educational issue of the times was not whether the Negroes should have separate schools, but whether they should be educated at all. In the Maryland Constitutional Convention of 1864, it was made clear that the delegates thought that education for the Negro was not yet appropriate although a separate system for his education might be appropriate in the future.[9] The Superintendent of Public Instruction recommended separate schools for Negroes in his report of 1865.[10]

Maryland held another constitutional convention in 1867. No requirement for segregation is contained in the constitution then drafted, but the debates make it clear that amalgamated schools were so far from the minds of the Maryland people that the delegates did not think them even necessary for discussion, much less prohibition.[1]

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[6] Message of the Governor of Md. to the Legislature of 1867, p. 22.

[7] Documents of the General Assembly of Md., Regular Session, 1867.

[8] Md. Sen. J. (1867) 808; Md. House J. (1867) 1141.

[9] Debates of the Md. Constitutional Convention of 1864, pp. 1250-6.

[10] First Report of the Md. Superintendent of Public Instruction (1865) 22-3; see also *id.* (1866) 64.

[1] Debates of the Md. Constitutional Convention of 1867, pp. 199-203, 243-8, 251-7.

The first comprehensive school system was set up by a law effective April 1, 1868.[2] This statute provided that free schools should be available to all white children between 6 and 18 and continued as follows:

> "The total amount of taxes paid for school purposes by the colored people of any county, or in the city of Baltimore, together with any donations that may be made for the purpose, shall be set aside for maintaining the schools for colored children; and such schools shall be subject to such rules and regulations as the local school boards may prescribe."[3]

The establishment of segregated schools was substantially contemporaneous with consideration of the Fourteenth Amendment in Maryland. We think it clear that Maryland did not consider that the fact that the Amendment became a part of the Constitution prohibited school segregation by race. Such segregated schools still exist in Maryland.[4]

16. Massachusetts

The governor of Massachusetts, in an address on January 4, 1867, recommended ratification of the Fourteenth Amendment.[5] The governor reviewed the Amendment in some detail but mentioned no relationship to the school system. With reference to the first section of the Amendment, he observed that it was advisable thus to incorporate the Civil Rights Act in the Constitution. The Committee on Federal Relations of the House returned two reports; the majority rec-

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[2] Md. Laws (1868) Ch. 407.

[3] *Id.* at p. 766.

[4] Md. Ann. Code. (1951), Art. 77, Ch. 9, § 124; Ch. 18, § 207.

[5] Message of the Governor of Mass. to the General Court, January 4, 1867, pp. 67 *et seq.*

ommended that the Amendment be rejected on the ground that it did not go far enough, stating that

> ". . . this first section is, at best, mere surplussage . . ."

while the minority thought that the Amendment was an

> ". . . advance in the direction of establishing unrestricted popular rights . . ."[6]

The Amendment was nevertheless ratified by the House on March 15, 1867, and by the Senate on March 20, 1867.[7]

The City of Boston had separate schools for Negroes in 1827, pursuant to a regulation of its school committee,[8] and this segregation was held inoffensive to the Massachusetts constitution in *Roberts* v. *City of Boston,* 5 Cush. 198 (1849). Segregated education was prohibited by statute in Massachusetts in 1855.[9]

We conclude that no evidence on the question here under consideration can be derived from the Massachusetts history.

17. Michigan

The Fourteenth Amendment was discussed by the governor in his message to the Michigan legislature of January 2, 1867, in which he describes the purposes of the Amendment but makes no mention of schools.[10] Ratification was accomplished swiftly. In the Senate the vote was 25 to 1 in

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[6] Mass. General Court Doc. (1867) House No. 149, pp. 3-4, 16, 25-6.

[7] Mass. Acts and Resolves (1867) 788.

[8] Regulations of the School Committee of the City of Boston (1827), § II, par. 8.

[9] Mass. Acts and Resolves (1855) Ch. 256.

[10] Message of the Governor of Mich. to the Legislature, January 2, 1867, pp. 47-8.

favor of ratification on January 15, 1867, and in the House the vote was 77 to 15 on the next day.[11] The newspapers of the time reported little of the proceedings.[1]

Separate schools for Negroes were established in Detroit as early as 1839 and continued until the late '60's.[2] In 1867 Michigan passed a statute relating to schools containing the following provision:

> "§ 28. All residents of any district shall have an equal right to attend any school therein . . ."[3]

The parents of a Negro child in Detroit sought a writ of mandamus to require his admission to a white school. This action came before the Supreme Court of Michigan in 1869.[4] Chief Justice Cooley determined that the writ should issue on the basis of the 1867 statute. His opinion is a substantial one, but the Fourteenth Amendment is not mentioned. Provisions explicitly forbidding segregation were adopted in 1871.[5]

We conclude that there is no evidence that Michigan considered that the Fourteenth Amendment outlawed segregation.

18. Minnesota

Minnesota is one of the six states that had a Negro population of less than 1,000. Segregation was never a problem there, and the evidence at hand is non-existent.

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[11] Mich. Sen. J. (1867) 125; Mich. House J. (1867) 180-2.

[1] *Cf.* Detroit Free Press, January 10, 1867, a report on the message from the governor to the legislature.

[2] Farmer, *The History of Detroit and Michigan* (1884) 750-1.

[3] 1 Mich. Laws (1867) 43.

[4] *People* ex rel. *Workman* v. *Board of Education of Detroit,* 18 Mich. 400 (1869).

[5] 1 Mich. Laws (1871) 274.

The governor recommended ratification of the Fourteenth Amendment on January 10, 1867, in the same message in which he urged that the color distinction as to voting be removed from the State constitution.[6] His remarks as to the Fourteenth Amendment were in general terms. The Senate and House approved ratification within a week by overwhelming majorities.[7]

Minnesota had outlawed school segregation in 1864, before the Fourteenth Amendment was proposed.[8]

The Minnesota record gives us no clue as to the intention of its legislature.

19. Mississippi

The Mississippi record is very clear.

The governor in 1867 advised the legislature that the Amendment was

> ". . . an insulting outrage . . . a mere reading of it will cause its rejection by you."[9]

The two houses considered a long adverse report by a joint committee, and both unanimously voted for rejection.[10]

Then came reconstruction by the military. On January 15, 1870, the provisional governor, who signed his message as Major General, U. S. Army, recommended ratification of both the Fourteenth and Fifteenth Amendments.[1] Within

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[6] Message of the Governor of Minn. to the Legislature, January 10, 1867, pp. 25-6.

[7] Minn. Sen. J. (1867) 23; Minn. House J. (1867) 26.

[8] Minn. Laws (1864) 25-6.

[9] Miss. House J. (1867) 8.

[10] Miss. House J. (1867) 201-2, App. p. 77; Miss. Sen. J. (1867) 195-6.

[1] Miss. House J. (1870) 13.

two days ratification had been accomplished by an overwhelming vote.[2]

The Mississippi constitution of 1868 contains no mention of segregated schools.[3] Legislation to establish a free school system was enacted in 1870 by the same legislature that ratified the Fourteenth Amendment.[4] Segregation was not mentioned in this statute. In fact, amendments specifically requiring segregation were defeated twice in the House.[5] This act, however, contained the following section:

> "Sec. 49. *Be it further enacted,* That all the children of this State between the ages of five and twenty-one years, shall have, in all respects, equal advantages in the Public Schools. And it shall be the duty of the School Directors of any District to establish an additional School in any Sub-District thereof, whenever the parents or guardians of twenty-five children of legal school age, and who reside within the limits of such Sub-District, shall make a written application to said Board for the establishment of the same."

This section might not seem to provide for segregation, but in fact it did. That is apparent from the speech of Lieutenant Governor Towers, a Republican, given in the Senate while the act was under consideration.[6] He said:

> "The provisions of this bill are wise in this respect, for while it recognizes no class distinctions (which of itself ought to render *any law* odious in a Republican government), it nevertheless consults the convenience

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[2] Miss. Sen. J. (1870) 19; Miss. House J. (1870) 26.

[3] See Art. VIII relating to Education. The general resolution as to ". . . equality before the law to all men, regardless of race . . ." which Appellants say was adopted (Brief, p. 154), was in fact tabled. Journal of the Mississippi Constitutional Convention (1868) 123, 131, 134.

[4] Miss. Laws (1870) Ch. 1.

[5] Miss. House J. (1870) 464-6, 500-1.

[6] Miss. Sen. J. (1870) 440.

and meets all reasonable demands of the people, by providing for the establishment of an additional school or schools, in any sub-district where the parents or guardians of twenty-five or more children desire it.

"This leaves the details of the law where they rightfully belong—and where they can be readily arranged, and all conflicting interest harmonized—with the people. If the people desire to provide separate schools for white and black, or for good and bad children, or large and small, or male and female children, there is nothing in this law that prohibits it. The widest latitude is granted, and certainly no class of children in the State can be said to be excluded from school advantages by any provision of the bill."

Evidence abounds that the schools established under this statute were almost always segregated schools.[7] School segregation was required by statute in 1878.[8]

There can be no question but that the Mississippi legislature which ratified the Fourteenth Amendment, dominated though it was by Republicans and former slaves, considered that its ratification did not make school segregation illegal.

20. Missouri

Missouri ratified the Fourteenth Amendment in 1867. Its ratification was recommended in general terms by the governor in his message to the legislature of that year. Resolutions for ratification were adopted by substantial majorities in both houses.[9] No reference to the schools is found in these proceedings.

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[7] Message of the Governor of Miss. (1871) 16; Annual Report of the Superintendent of Public Instruction of Miss. (1871) 66, 124-7 (showing that there were, in 1871, 1,739 white schools, 860 colored schools and 2 mixed schools in Mississippi), App. pp. 4-5, 11.

[8] Miss. Laws (1878) Ch. XIV, § 35.

[9] Mo. Sen. J. (1867) 30; Mo. House J. (1867) 50.

Missouri's consistent policy has been for school segregation. In 1856 it was a violation of law to instruct Negroes in reading or writing.[10] The constitution of 1865 specifically permitted establishment of separate schools for Negroes.[1] Statutes implementing this permission or requiring separate schools for Negroes were enacted in 1865, 1868, 1869 and 1874.[2]

The next constitution adopted by Missouri was that of 1875, and it required segregated education.[3] The debates of this constitutional convention have been preserved; and although the draft for the article on education was debated for three days, the only reference in the debates to the section requiring segregated schools is

"Section Three was read and adopted."[4]

Statutes requiring segregated education pursuant to this constitutional provision were enacted in 1879, 1887, and 1889.[5]

There can be no doubt that Missouri believed segregated schools constitutional during this period.

21. Nebraska

Nebraska was admitted to the Union in the early part of 1867, pursuant to an act of Congress which provided that no right should be denied "to any person by reason of race

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[10] Mo. Rev. Stat. (1856) 1100.

[1] Mo. Const. (1865) Art. IX, § 2.

[2] Mo. Laws (1865) 177; (1868) 170; (1869) 86; (1874) 163-4.

[3] Mo. Const. (1875) Art. XI, § 3.

[4] 9 Debates of the Mo. Constitutional Convention of 1875 (1942) 145.

[5] Mo. Rev. Stat. (1879) § 7052; Mo. Laws (1887) 264; Mo. Laws (1889) 226.

or color . . ."[6] While the enabling act was pending, a bill to eliminate racial segregation in the public schools was passed by the legislature but the governor refused to sign (Appellants' Brief, p. 178). Nevertheless, Nebraska was admitted to the Union. Promptly after admission Nebraska ratified the Fourteenth Amendment by substantial majorities.[7] The first school laws enacted after admission in 1867 did not mention segregation,[8] and when the University of Nebraska was established in 1869, the legislature specifically declared that color should not be a bar to admission.[9]

In none of these proceedings is there any record of mention of the Fourteenth Amendment. Nebraska gives us no clue on the question at hand.

22. Nevada

In his message to the legislature on January 10, 1867, Governor Blasdel urged ratification of the Fourteenth Amendment, and in the same message he called attention to the report of the Superintendent of Public Instruction in which the latter stated that the failure to educate Negroes and to establish colored schools violated the Nevada constitution. Neither mentioned the Fourteenth Amendment.[10] Both the House and Senate voted to ratify the Amendment by substantial majorities.[1]

Nevada had previously excluded Negroes and others of color from its public schools, though providing that separate schools might be established for them.[2] In 1867 the

[6] Nebr. Laws (1867) 28.
[7] Nebr. House J. (1867) 15; Nebr. Sen. J. (1867) 174.
[8] Nebr. Laws (1867) 101.
[9] Nebr. Laws (1869) 172, 177.
[10] Nev. Sen. J. (1867) App. p. 9.
[1] Nev. Sen. J. (1867) 47; Nev. Assembly J. (1867) 25.
[2] Nev. Stat. (1864-5) Ch. CXLV, § 50.

same legislature that ratified the Fourteenth Amendment amended this statute to read as follows:

> "Negroes, Mongolians, and Indians shall not be admitted into the public schools, but the Board of Trustees may establish a separate school for their education, and use the Public School funds for the support of the same."[3]

This amendment had been recommended by the standing Committee on Education with a minority report recommending the elimination of color distinction. But there is nothing to indicate that the Fourteenth Amendment played any part in this division of opinion.[4]

In 1872 the Nevada Supreme Court held that a particular statute providing separate schools for Negroes was invalid under the constitution of Nevada though not under the Fourteenth Amendment.[5] In a dissenting opinion the following is found:

> "The case of relator was sought to be maintained on the ground that the statute was in violation of the Fourteenth Amendment to the constitution of the United States. I fully agree with my associates that this proposal of counsel is utterly untenable."

Nevada did not consider segregation abolished by the Fourteenth Amendment.

23. New Hampshire

The Negro population of New Hampshire in 1870 was 580, or less than 0.2% of the total. New Hampshire never had segregated schools.

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[3] Nev. Stat. (1867) 95. The statement by Appellants (Brief, p. 180) that "the legislature took no affirmative action" is manifestly erroneous.

[4] Nev. Assembly J. (1867) 208, 211.

[5] *State* v. *Duffy*, 7 Nev. 342, 8 Am. Rep. 713 (1872).

The Fourteenth Amendment was transmitted to the legislature of New Hampshire by the governor on June 21, 1866, with a short message recommending ratification.[6] In both Houses it was referred to select committees.[7] These committees returned identical reports. The majority report in each instance was quite brief and recommended ratification. The minority report of 13 paragraphs opposed the Amendment on many grounds but contained no reference to school segregation.[8] Discussions ensued of which reports are not available, but resolutions in favor of ratification were adopted in both houses by substantial majorities.[9]

There is no evidence on our question in New Hampshire.

24. New Jersey

The Fourteenth Amendment was ratified in New Jersey at an extra session of the legislature which met in September, 1866. By the end of the second day of the session, ratification had been accomplished by a vote of 34 to 29 in the Assembly and by 11 affirmative votes in the Senate, 10 Democrats not voting.[10]

The control of the New Jersey legislature passed to the Democrats in 1868, and the legislature then adopted a resolution rescinding the ratification of the Fourteenth Amendment.[1] This resolution, which was adopted over the veto of the governor,[2] states a number of objections to the Four-

[6] N. H. House J. (1866) 137.
[7] N. H. House J. (1866) 139; N. H. Sen. J. (1866) 63.
[8] N. H. House J. (1866) 174; N. H. Sen. J. (1866) 70.
[9] N. H. House J. (1866) 231; N. H. Sen. J. (1866) 94.
[10] N. J. Sen. J. (Extra Session, 1866) 14; Minutes of the Assembly (1866) 8, 17.
[1] N. J. Acts (1868) 1225.
[2] N. J. Sen. J. (1868) 249.

teenth Amendment but makes no reference to its effect upon the school system.

New Jersey never had mandatory school segregation by law.[3] Segregation in the public schools was permitted both before and after the ratification of the Amendment.[4] In 1868, the State Superintendent of Schools interpreted the existing law to permit segregated schools.[5] No change was made until 1881 when the legislature enacted a statute prohibiting exclusion from the schools on the ground of color.[6] But in 1894 New Jersey established a manual training school for Negro children which existed at least as late as 1910.[7]

It seems apparent that New Jersey did not consider that ratification outlawed its existing segregated schools.

25. New York

The governor presented the Fourteenth Amendment to the legislature in his annual message for 1867. He stated that he would not "discuss the features of this amendment"[8] and he did not mention schools in its connection. By January 10, 1867, the Amendment had been ratified by both Houses.

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[3] The temper of New Jersey did not differ greatly, however, from that in other states as the following excerpt from the message of the governor to the legislature of 1866 indicates: "The right to hold office will accompany the right to vote. In some of the Southern states the negro population preponderates, and should the elective franchise be extended to them, not only would those states be under their control, but they would be represented in Congress by negroes. Such a mongrel government would never prosper. Two races of men so entirely distinct, so widely separated by the laws of nature that they cannot blend socially, cannot jointly administer public affairs with success." (p. 26)

[4] N. J. Laws (1850) 63.

[5] Annual Report of the State Superintendent of Schools (1868) 41-2.

[6] N. J. Laws (1881) Ch. CXLIX, p. 186.

[7] N. J. Laws (1894) 536; N. J. Comp. Stat. (1709-1910) Schools, Art. XXI.

[8] Message of the Governor of N. Y. to the Legislature (1867) 2.

The vote in the Senate was 23 to 3,[9] while the vote in the House was 71 to 36.[10]

Separate schools had long been permitted in New York. In 1864 a statute authorizing local school authorities to establish separate schools for Negroes was enacted as a part of a general revision of the school law.[11] This act permitting segregation is found in subsequent codifications of the New York Education Law.[12] The New York constitutional convention in 1867 adopted a ringing resolution as to civil rights but did not abolish school segregation.[13]

Not only were separate schools permitted in New York, but separation was in many instances the practice. In 1867 local appropriations for Negro schools exceeded $30,000. New York City had separate Negro schools with almost 2,000 pupils in them.[1] In 1868 expenditures for Negro schools exceeded $55,000, and there were nine separate Negro schools or departments in Brooklyn.[2] Total expenditures for Negro schools in 1869 amounted to almost $65,000, and separate Negro schools were still maintained in Brooklyn and New York.[3] In 1870 expenditures remained about the same and Brooklyn still reported separate Negro schools, there being no report from New York City.[4]

The problem of school segregation and civil rights under

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[9] N. Y. Sen. J. (1867) 34.

[10] N. Y. House J. (1867) 77.

[11] N. Y. Laws (1864) Ch. 555, Title X, § 1. It is interesting to note that similar authorization for separate schools for Indians is found in the same act. *Id.*, Title XII, § 12.

[12] N. Y. Laws (1894) Ch. 556, Title XV, Art. 11; N. Y. Laws (1909) Ch. 21, Art. 40.

[13] N. Y. Const. (1868) Art. IX; Documents of the Convention of the State of New York (1868) No. 15.

[1] Report of the N. Y. Superintendent of Public Education (1867) 75-6, 206, 208-9.

[2] *Id.* (1868) 19, 219-20, 247-9.

[3] *Id.* (1869) 78-9, 202-3, 227.

[4] *Id.* (1870) 97-8, 230.

the Federal Constitution and statutes was early considered by the New York courts. In four cases they upheld the validity of separate schools for Negroes.[5]

New York considered that segregation was constitutional after the adoption of the Fourteenth Amendment.

26. North Carolina

North Carolina first rejected the Fourteenth Amendment. It was submitted to the legislature by the governor on November 19, 1866,[6] considered by a joint committee of both houses with an adverse report,[7] and defeated by overwhelming votes.[8]

Then came reconstruction, as in the other southern States. The provisional governor recommended ratification in a message to the legislature on July 2, 1868, and ratification was accomplished on July 4.[9] Nothing in these proceedings had any relation to school segregation.

It is very clear, however, that North Carolina expected to maintain segregated schools without regard to the Amendment. A new constitution was drafted in 1868, and the constitutional convention on March 16, 1868, adopted a resolution asserting that the interest and happiness of the races would be best promoted by the establishment of separate schools.[10] The constitution of 1868 contained no specific

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[5] *Dallas* v. *Fosdick*, 40 How. Prac. 249 (1869); *People* ex rel. *Dietz* v. *Easton*, 13 Abb. Prac. (N. S.) 159 (1872); *People* ex rel. *King* v. *Gallagher*, 93 N. Y. 438 (1883); *People* ex rel. *Cisco* v. *School Board of Queens*, 161 N. Y. 598, 56 N. E. 81 (1900, showing that the school board in the Borough of Queens maintained separate schools for Negroes at late as 1900).

[6] N. C. House J. (1866-7) 29.

[7] N. C. Sen. J. (1866-7) 96.

[8] *Id.* at p. 138; N. C. House J. (1866-7) 182.

[9] N. C. Laws (1868) 89.

[10] Constitution of the State of North Carolina Together with Ordinances and Resolutions of the Constitutional Convention Assembled in the City of Raleigh, January 14, 1868 (1868) 122.

provision as to segregation in education.[11] Two days after the Fourteenth Amendment was ratified, the governor of North Carolina, in his inaugural address, stated:

> "It is believed to be better for both [races] and more satisfactory to both, that the schools should be distinct and separate."

Less than two weeks after the Amendment was ratified the House and Senate adopted a joint resolution stating that it was the duty of the General Assembly to adopt a system of free schools but that the races should be segregated.[12] In a message to the legislature dated November 17, 1868, less than five months after the ratification of the Amendment, the governor concerned himself with the question of education and said:

> "The schools for the white and colored children should be separate . . ."

Finally North Carolina very promptly adopted legislation with regard to schools in which it was provided as follows:

> "Sec. 50. The school authorities of each and every Township shall establish a separate school or separate schools for the instruction of children and youth of each race . . ."[1]

We are required again to criticize factual statements by Appellants. They assert (Brief, p. 145) that proponents of the 1868 constitution thought that segregated schools should not develop through legislation. They cite a treatise; the pages cited relate to something entirely different that does

[11] N. C. Const. (1868) Art. IX, § 2.
[12] N. C. House J. (1868) 54; N. C. Sen. J. (1868) 237.
[1] N. C. Laws (1868-9) Ch. 184.

not even concern the public school system. It is equally erroneous to assert that the 1868 constitution may have "required" mixed schools (Brief, p. 146); a committee of proponents appointed to win support for the constitution stated at the time that such assertions were "false."[2] The radical Republicans dominated this convention and the succeeding legislatures; they omitted reference to mixed schools in the constitution on the ground that this was a proper subject for legislative or local regulation.[3] The validity of the 1868 statute was not questioned. We reiterate that the brief of Appellants is unfair when, as here, it distorts the facts.

Schools have always been segregated in North Carolina, and it is idle to think that the 1868 legislature thought that the Fourteenth Amendment would have any effect on that condition.

27. Ohio

Ohio ratified the Fourteenth Amendment in 1867. The governor recommended ratification on January 2 of that year in a substantial message to the legislature.[4] Ratification was accomplished in the Senate on January 3, 1867, by a vote of 21 to 12 and in the House on the next day by a vote of 54 to 25.[5] No mention of schools is made in these proceedings.

Ohio reversed its position the following year despite the opposition of the Republican governor, Hayes, later President. He told the legislature that nothing had occurred in the intervening year to indicate that ratification did not repre-

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[2] Noble, *A History of Public Schools in North Carolina* (1930) 297.

[3] *Id.* at p. 299.

[4] Documents of General Assembly of Ohio (1867) 281.

[5] Ohio Sen. J. (1867) 7; Ohio House J. (1867) 12; Ohio Laws (1867) 320.

sent the wishes of the people.[6] A resolution rescinding ratification, nevertheless, was passed by both Houses of the legislature.[7] Again no mention was made of schools.

Ohio had a long tradition of separate schools for Negro children which extended almost 20 years after ratification of the Fourteenth Amendment. A statute establishing common schools for Negroes was enacted as early as 1831.[8] Additional statutes were enacted in 1847 and 1848.[9] By 1860 separate schools for Negro children were required when there were more than 30 children in the school district.[10] A statute of 1874 authorized separate schools in the discretion of the local authorities, and this provision was codified in 1880.[1] Segregation was not outlawed by statute until 1887.[2]

Segregation was practiced in fact as well as in law. In 1867 there were approximately 10,000 pupils in separate Negro schools in 52 of Ohio's 88 counties.[3] Statistics for the separate schools are available all through the next few years.[4] Segregated schools were attacked as contrary to the Fourteenth Amendment in the immediate post-war period but the Ohio court found no constitutional defect in their existence.[5]

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[6] Message of the Governor of Ohio to the General Assembly (1868) 3.

[7] Ohio House J. (1868) 33; Ohio Sen. J. (1868) 39; Ohio Laws (First Session, 1867) 280.

[8] Ohio Laws (1831) 414.

[9] Ohio Laws (1847) 81; (1848) 17.

[10] 2 Ohio Rev. Stat. (1860) 1357.

[1] Ohio Laws (1874) 513; 1 Ohio Rev. Stat. (1880) § 4008.

[2] Ohio Laws (1887) 34.

[3] Report of Commissioner of Common Schools of Ohio (1867) 477, Table B.

[4] See the similar reports for 1868, 1869, and 1870; for example, in 1870 there were 144 teachers employed in separate Negro schools in Ohio. Report (1870) Table U.

[5] *State* ex rel. *Garnes* v. *McCann*, 21 Ohio State 198 (1871).

Ohio believed that segregated schools and the Fourteenth Amendment were compatible.

28. Oregon

There were 346 Negroes in Oregon in 1870. Oregon on various occasions attempted to prohibit the immigration of Negroes and did prohibit intermarriage, but there is no evidence that school segregation was required or prohibited by statute in Oregon.[6]

Ratification of the Fourteenth Amendment was recommended by the governor in his inaugural address in 1866.[7] It was quickly ratified by both Houses.[8] In 1868 Oregon rescinded its ratification of the Fourteenth Amendment.[9] In none of the legislative records in Oregon as to the Fourteenth Amendment is there any mention of school segregation. Oregon provides little evidence as to the question at hand.

29. Pennsylvania

Pennsylvania ratified the Fourteenth Amendment in 1867. The governor recommended its ratification in general terms, stating that the Fourteenth Amendment would secure "just and equal political privileges."[10] In the same speech the governor suggested that special schools be provided for the orphans of colored soldiers.[1]

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[6] Ore. Sen. J. (1866) 151, 242; Ore. House J. (1866) 318; Ore. Gen. Laws (1866) 10. Separate schools apparently existed in fact as late as 1871. Reynolds, *Portland Public Schools* (1932) 33 Ore. Hist. Q. 344.

[7] Ore. Sen. J. (1866) 26.

[8] Ore. Sen. J. (1866) 35; Ore. House J. (1866) 74.

[9] Ore. Sen. J. (1868) 32, 131; Ore. House J. (1868) 271.

[10] Penna. Sen. J. (1867) 16.

[1] *Id.* at p. 19.

The Pennsylvania Senate adopted a resolution ratifying the Amendment on January 11, 1867 by a vote of 21 to 11.[2] Similar action was taken by the House on February 6, 1867, by a vote of 62 to 34.[3]

The debates in Pennsylvania were preserved in full.[4] There was a great deal of discussion on both sides, largely in general terms. One legislator opposing the Amendment stated that

> ". . . all the legal barriers theretofore existing between the white and the black races would be removed . . ."[5]

Any references to schools are entirely in general terms; for example, one senator who approved of the Amendment stated:

> "If [the negro] fills our pulpits, our school-houses, our academies, our colleges, and our Senate Chambers, I bid him God Speed."[6]

Another proponent thought it advisable to give the Civil Rights Act of 1866 further force by "putting it in the Constitution of the United States."[7] A review of these debates in no way makes it clear that the legislature believed that ratification of the Amendment would be the end of school segregation.

In fact, the school authorities in Pennsylvania had since 1854 been required to establish separate schools for Negroes

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[2] Penna. Sen. J. (1867) No. 125.

[3] Penna. House J. (1867) 278.

[4] II Penna. Legislative Records (1867) App.

[5] *Id.* at p. 52.

[6] *Id.* at p. 84. Even this sentence was uttered not in connection with the Amendment but as to a law to regulate railroads.

[7] *Id.* at p. 17.

when 20 or more pupils were available.[8] The Superintendent of Common Schools noted that this statute established a mandatory requirement and that Negro pupils could not be admitted to the white schools unless the requisite number of pupils were not nearby.[9] The legislature in 1869, two years after ratification of the Amendment, required separate schools for Negroes when it reorganized educational matters in Pittsburgh.[10] School segregation was upheld when attacked on constitutional grounds in 1873.[11] School segregation was not abolished in Pennsylvania until 1881.[12]

We conclude that, since segregated education was required in Pennsylvania before and for a substantial period after ratification of the Fourteenth Amendment, it seems fair to state that the Pennsylvania legislature did not think that such ratification would prohibit segregation.

30. Rhode Island

The governor of Rhode Island recommended ratification of the Fourteenth Amendment on January 15, 1867, and the Senate passed a resolution for ratification on February 5, 1867, by a vote of 26 to 2, the House following two days later by a vote of 60 to 9.[1] The resolution for ratification is simple, stating merely that the two houses ratified, confirmed and assented to the Amendment.[2]

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[8] Penna. Laws (1854) 623. Again, Appellants are manifestly in error in asserting that this statute was one only "authorizing" segregated schools (Brief, p. 166).

[9] The Common School Laws of Pennsylvania and Decisions of the Superintendent (1870) 81.

[10] Penna. Laws (1869) No. 133, § 15.

[11] *Commonwealth* v. *Williamson*, 30 Legal Int. 406 (1873).

[12] Act of June 8, 1881, P. L. 76.

[1] 25 Journal of the R. I. Sen. (1865-8) Feb. 5, 1867; 41 Journal of the R. I. House (1866-9) Feb. 7, 1867.

[2] R. I. Acts and Resolves (1867) 161.

In 1800 Rhode Island enacted a statute requiring free schools for white inhabitants in every town, but this act was repealed in 1803.[3] Further school legislation was enacted in 1828 and thereafter. Separate schools for Negroes were established in Providence in 1828 and continued in operation until 1865.[4] Similar schools existed in Bristol and Newport. Segregation was permitted under "general regulation" by a law enacted in 1845.[5] Segregation of Indians was upheld as late as 1864,[6] but all school segregation was abolished by statute in January 1866, a year before the Fourteenth Amendment was proposed.[7]

There is no evidence that school segregation was ever considered in connection with the Fourteenth Amendment in Rhode Island.

31. South Carolina

South Carolina, as is generally known, was perhaps the most turbulent of all the States during the Reconstruction period. Space here does not permit a thorough review of the efforts made during this period to establish a system of public schools. But all of the evidence seems to make it clear that, in spite of the efforts made to establish mixed schools, the Fourteenth Amendment and its meaning did not play a part.

Governor Orr on November 27, 1866, recommended rejection of the Amendment when he transmitted it to the legislature.[8] His message did not mention schools. The Sen-

[3] Carroll, *School Law of Rhode Island* (1914).

[4] Carroll, *Public Education in Rhode Island* (1918) 157-8.

[5] R. I. Acts and Resolves (June 1845), App. § XXII, p. 9.

[6] *Ammons* v. *School District No. 5*, 7 R. I. 596 (1864).

[7] R. I. Acts and Resolves (1866) Ch. 609. But the prohibition of miscegenation was not repealed until 1881. R. I. Acts and Resolves (1881) Ch. 846.

[8] Charleston Daily Courier (Nov. 28, 1866).

ate rejected it unanimously, and in the House the vote was 95 to 1 against its ratification.[9]

Reconstruction then came to South Carolina. A new constitution was adopted in 1868. It required the legislature immediately after its organization to ratify the Fourteenth Amendment.[10] The debates in the constitutional convention indicate that its members realized that ratification of the Amendment (which the legislature only had the power to do) was a prerequisite to readmission to the Union and feared that opponents of the Amendment might control the legislature. For that reason they made ratification mandatory.[11]

This constitution directed the General Assembly to establish a system of free schools,[12] and further required that:

> "All the public schools . . . shall be free and open to all the children and youths in the State, without regard to race or color."[13]

The Fourteenth Amendment was not mentioned in the long debates regarding the adoption of the public school provisions.

Even though it might appear that this constitutional provision was designed to require amalgamated schools, the evidence is that such can hardly be the case. The first session of the legislature met on July 6, 1868, less than three months

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[9] *Id.* (Dec. 20, 1866, and Dec. 22, 1866).

[10] S. C. Const. (1868) Art. IV, § 33.

[11] Proceedings of the Constitutional Convention of South Carolina, Held at Charleston, S. C., Beginning January 14th and Ending March 17, 1868 (1868) 904-6.

[12] Art. X, § 3.

[13] Art. X, § 10. The General Assembly never inaugurated the system of public schools provided for in this constitution, but thereafter established a system "very different from the system contemplated and outlined by the framers of that constitution." *Holler* v. *Rock Hill School District*, 60 S. C. 41, 38 S. E. 220, 221 (1901).

after the adjournment of the Constitutional Convention.[1] The Fourteenth Amendment was promptly ratified.[2] On the day that the legislature met, it received a message from Governor Orr in which he spoke at length about a proposed public school system. In his remarks he stated:

> "If it shall be attempted to establish schools where both races are to be taught, no provision being made for their separation, the whole system will result in a disastrous failure. The prejudices of race, whether just or unjust, exist in full force not more in South Carolina than in New England and the West. In the last named localities separate schools are provided for white and coloured children, and in a community where these prejudices prevail in so strong a degree, how unreasonable it is to attempt the organization of mixed schools. . . . I therefore earnestly recommend that in adopting an educational system, care be taken to provide for the white and coloured youths separate places of instruction. At the same time, in the name of peace and of the happiness of the people I protest against this amalgamation."[3]

Two days later a new governor, Robert K. Scott, of Maine, Brevet Brigadier General, United States Army, was inaugurated. Two paragraphs from his inaugural address contain his views on school segregation:

> "I respectfully recommend that the General Assembly will provide by law for the establishment of at least two schools in each school district when necessary, and that one of said schools shall be set apart and designated as a school for colored children, and the other for

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[1] Charleston Daily Courier (July 7, 1868).

[2] The Amendment was ratified in the Senate on July 7, 1868. Charleston Daily Courier (July 8, 1868). Ratification was completed by the House on July 9, 1868. *Id.* (July 10, 1868).

[3] *Id.* (July 8, 1868).

the white children, the schools fund to be distributed equally to each class, in proportion to the number of children in each between the ages of six and sixteen years. I deem this separation of the two races in the public schools as a matter of the greatest importance to all classes of our people.

"While the moralist and the philanthropist cheerfully recognizes the fact that 'God hath made of one blood all nations of men' yet the statesman in legislating for a political society that embraces two distinct, and in some measure, antagonistic races, in the great body of its electors, must, as far as the law of equal rights will permit, take cognizance of existing prejudices among both. In school districts, where the white children may preponderate in numbers, the colored children may be oppressed, or partially excluded from the schools, while the same result may accrue to the whites, in those districts where colored children are in the majority, unless they shall be separated by law as herein recommended. Moreover, it is the declared design of the Constitution that all classes of our people shall be educated, but not to provide for this separation of the two races, will be to repel the masses of the whites from the educational training that they so much need, and virtually to give to our colored population the exclusive benefit of our public schools. Let us, therefore, recognize facts as they are, and rely upon time and the elevating influence of popular education, to dispel any unjust prejudices that may exist among the two races of our fellow-citizens."[4]

A temporary school law was passed on September 15, 1868, and a statute establishing a general system of public schools was passed on February 16, 1870. A Massachusetts Negro was appointed the first Superintendent of Public Education. He submitted a report to the legislature in 1870.[5]

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[4] *Id.* (July 10, 1868).

[5] Reports and Resolutions of the S. C. General Assembly (1870) 403-87.

This report contained recommendations from local authorities as to the establishment of a public school system. Of the 13 of these local reports referring to the race problem, 12 recommended separate schools.

Despite the fact that the Superintendent of Education was a Negro, no real effort was made to require amalgamated schools in South Carolina in the reconstruction period except in isolated instances. The Superintendent ordered the School for the Deaf, Dumb and Blind amalgamated, and, as a result, the school was closed for 3 years and then reopened on a segregated basis. Efforts to amalgamate the University failed similarly.[6]

There is no indication that, in South Carolina, the Fourteenth Amendment played any part in the question of whether or not the schools should be segregated. In fact, persons in high office during the reconstruction period never once considered that the Fourteenth Amendment required the abolition of segregated schools. We think, therefore, that we are justified in stating that the South Carolina evidence requires the conclusion that the legislature that ratified the Fourteenth Amendment did not consider that its ratification made segregated schools unlawful.

32. Tennessee

The Tennessee record gives an interesting picture of the unrest and violence of the times, but it also makes clear the answer to the question considered here.

The Republican governor called the legislature in special session on July 4, 1866, for the express purpose of considering the Fourteenth Amendment. His address, though strong-

[6] Simkins and Woody, *South Carolina During Reconstruction* (1932) 439-42. Segregation became mandatory in 1895. S. C. Const. (1895) Art. XI, § 5.

ly in favor of ratification, does not mention the school system.[7] In the Senate a senator who opposed the Amendment proposed that there should be added to the ratifying resolution a proviso that the Amendment should not be construed to confer suffrage upon the Negro, or the right to hold office or to sit upon juries, or several other stated rights, but again no reference is found to the schools.[8] His proviso was defeated and the Amendment was ratified by a vote of 14 to 6.[9] The minority then filed a formal protest of some length, but again no mention was made of schools.[10]

The Tennessee House could not obtain a quorum until two members had been arrested and brought to the House floor. They refused to vote, but they were none the less counted as present in order to make a quorum. The Amendment was ratified by a vote of 39 to 15.[1] Again the minority filed a formal protest, but schools were not referred to in it.[2]

The same legislature that ratified the Fourteenth Amendment amended the school law on March 5, 1867, to require segregated education in Tennessee.[3] This act was described by the Republican governor in his second inaugural address as

> "the wise and desirable School Law."

The first report of the Superintendent of Public Instruction, dated October 7, 1869, contains the following comment on this statute:

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[7] Tenn. Sen. J. (Called Sess. 1866) 4.
[8] *Id.* at p. 23.
[9] *Id.* at p. 24.
[10] *Id.* at p. 41.
[1] Tenn. House J. (Called Sess. 1866) 25.
[2] *Id.* at p. 36.
[3] Tenn. Stat. (1866-7) Ch. XXVII, § 17.

> "The old law allowed none but whites to be educated. The new law educates all of *them* and in addition, the blacks are lifted out of ignorance and saved from being a dangerous class." (p. 17)

The requirement for segregation was written into the Tennessee constitution of 1870,[4] and re-enacted in a further amendment to the School Law in 1873.[5] Schools remain segregated in Tennessee to this day.[6]

Since the same legislature that ratified the Fourteenth Amendment established a segregated school system in Tennessee, we think it clear that this legislature did not consider that the Fourteenth Amendment made segregated education unconstitutional.

33. Texas

The governor of Texas merely expressed his unqualified disapproval of the Fourteenth Amendment when he addressed the legislature in 1866.[7] The House and Senate Committees on Federal Relations both returned long reports opposing ratification.[8] These reports pointed out that the proposed Amendment might give the Negro the right to vote, the right to serve on juries, the right to bear arms, and other rights not enumerated; but schools are not mentioned. It should be also noted that those who signed each report viewed with consternation the provisions of Section 5, pointing out that the right given to Congress under this section was likely to destroy the very existence of the State governments.[9] The House rejected the Amendment by a vote of

[4] Art. XI, § 12.
[5] Tenn. Stat. (1873) Ch. XXV, § 30.
[6] Williams' Tenn. Code (1932) §§ 2377, 2393.9.
[7] Texas House J. (1866) 73.
[8] *Id.* at p. 578; Texas Sen. J. (1866) 421.
[9] Texas House J. (1866) 580; Texas Sen. J. (1866) 422.

70 to 5, and the Senate followed by a vote of 27 to 1.[10]

The reconstructed Texas legislature ratified the Amendment on February 18, 1870.[1] There is no record of anything relating to the schools in these proceedings.

The constitution of 1866 provided that school taxes levied on Negroes should be appropriated for the use of Negro schools,[2] but this constitution was not acceptable to Congress. Therefore, another constitution was drafted in 1869. The 1869 constitution required the legislature to establish a free school system but did not mention segregation.[3]

Texas was readmitted to representation in Congress by an act approved March 30, 1870. This statute provided that the Texas constitution should not be amended

> "to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the Constitution of said State."[4]

The same legislature that ratified the Fourteenth Amendment enacted the following statute as to schools:

> "All difficulties arising in any of the public free schools of this State shall be reported by the trustees to the proper board of directors, and said board shall have power to settle same. In order to do this, they may remove teachers or expel students for insubordination; and when, in their opinion, the harmony and success of the school require it, they may make any separation of the students or schools necessary to insure success, so as not to deprive any student or students of scholastic

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[10] Texas House J. (1866) 584; Texas Sen. J. (1866) 471.

[1] The vote was 72 to 1 in the House and 34 to 3 in the Senate. Daily State Journal (Austin, Texas) v. I, No. 19 (Feb. 19, 1870).

[2] Art. X, § 7.

[3] Texas Const. (1869) Art. IX, § IV.

[4] Texas House J. (1870) 5.

benefits, except for such misconduct as demand expulsion."[5]

This law is equivocal on its face, but the report of the committee that recommended its adoption makes its purpose clear. An excerpt from that report is as follows:

> "2. They [the Committee] were perfectly aware of the conflicting views in relation to free schools, and the difficulty of harmonizing those views on a constitutional basis.
>
> "3. They felt constrained to avoid extreme views—mixed schools on the one hand, and separate schools on the other—by legislative enactment.
>
> "4. They concluded that, as all philanthropists and patriots desire the education of all the citizens of the State, without distinction of sex or race, color or previous condition, that our whole citizenship may be elevated, so essential to a republican government, that we might adopt a system based on a compromise of views, in order to [reach] an agreement on some system, as, that without some concession and compromise, we will adjourn and return to our constituents without redeeming our pledges on this subject, to their great disappointment. We have therefore agreed on the following basis, comprehensive and equal, yet plain, simple and economical, essential as we think to a successful inauguration of our system . . .
>
> * * *
>
> "We provide that teachers may be removed for sufficient cause, and students expelled or separated when necessary for the promotion of peace, success and harmony of the institution, so as none shall be deprived of scholastic benefits, except when expelled . . ."[6]

This seems clear: the committee was unwilling to require segregated schools, but it wished to give the local authorities

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[5] Texas Gen. Laws (1870) 113.

[6] Texas Sen. J. (1870) 482.

the right to segregate schools as local conditions made it desirable. We consider, therefore, that this legislature, the same one that ratified the Fourteenth Amendment, did not consider that its ratification made segregated schools unconstitutional.

Segregated schools were required by the constitution of 1876[7] and schools have remained segregated in Texas ever since.

34. Vermont

Governor Dillingham on October 12, 1866, strongly recommended ratification of the Fourteenth Amendment which, he said, was designed to secure "equal rights and impartial liberty."[8] The Vermont Senate unanimously voted to ratify on October 23, 1866.[9] The vote in the House, taken a week later, was 96 to 11 in favor of ratification.[10]

In all these proceedings no mention is made of school segregation. Vermont apparently never had segregated schools. Its Negro population in 1870 was less than 1,000.

The legislative history in Vermont provides no evidence on the question here at issue.

35. Virginia

When the Virginia legislature met in 1867, Governor Pierpont discussed the Fourteenth Amendment at some length, pointing out that the State was not likely to get better terms for the readmission of its senators and representatives to Congress and stating the view that acceptance

[7] Art. VII, § 7.
[8] Vt. Sen. J. (1866) 28.
[9] *Id.* at p. 75.
[10] Vt. House J. (1866) 140.

of the Amendment was not dishonorable.[1] The legislature, however, refused to ratify the Amendment, the vote being unanimous in the Senate and 74 to 1 in the House.[2] No mention of schools is made in these proceedings.

The government of Virginia was then reorganized under the Reconstruction Acts and a new constitution of 1869 adopted. When the first legislature met on October 5, 1869, Governor Walker urged ratification, saying that there was no satisfactory alternative.[3] Ratification was accomplished swiftly by a vote of 132 to 0 in the House and 36 to 4 in the Senate.[4] The resolution is a simple one and nothing in the proceedings refers to the school system.[5]

In their discussion of the Virginia situation, as in many sections of their Brief, Appellants obscure the facts. We therefore state them in some detail here so that there may be no confusion. The Virginia constitution of 1869 directed the legislature at its first session to establish a system of free schools.[6] No provision as to segregation was included. The convention that prepared this constitution was composed of 35 white conservative Virginians, 24 Negroes, 14 white loyalists and 26 who came from outside Virginia.[7] It is reported that there was an agreement between the Negroes and the carpetbaggers; the carpetbaggers would vote for civil rights and the Negroes would put the carpetbaggers in office.[8] This agreement worked long enough to defeat

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[1] Va. House J. (1866-7) Doc. No. 1, pp. 35, 37.

[2] Va. House J. (1866-7) 108; Va. Sen. J. (1866-7) 103; Va. Acts (1866-7) Ch. 46.

[3] Va. House J. (1869-70) 26.

[4] *Id.* at p. 36; Va. Sen. J. (1869-70) 27.

[5] Va. Acts (1869-70) Ch. 2.

[6] Va. Const. (1869) Art. VIII, § 3.

[7] Address of the Conservative Members of the Late State Convention to the Voters of Virginia (1868).

[8] Daily Enquirer and Examiner (Richmond, April 8, 1868).

proposals for segregated schools.[9] But it was a different story when the Negroes proposed to require amalgamated schools.[10] Then the carpetbaggers "crawfished", as it was said, and voted with the conservatives, much to the disgust of the Negroes who accused them of breach of faith.[1] So mixed schools were defeated. The reason for the action of the carpetbaggers, it was said, was their fear that a provision requiring mixed schools would result in defeat of the constitution in the popular election on the question of its ratification.[2] Nothing at all in this discussion as to education made mention of the Fourteenth Amendment.

The first legislature under the 1869 constitution took no action except to ratify the Fourteenth and Fifteenth Amendments; it then adjourned to await readmission of Virginia's representatives to Congress.[3] The legislature then reconvened. It was the same legislature that ratified the Fourteenth Amendment. It promptly proceeded to establish a system of free schools and, in the new school law, it was required that:

> ". . . white and colored persons shall not be taught in the same schools, but in separate schools . . ."[4]

In the course of the debates on the bill which became this statute, a motion was made in the Senate on June 7, 1870, to strike out the provision requiring segregation. This motion was defeated by a vote of 23 to 6.[5] On the next day

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[9] Journal of the Virginia Constitutional Convention (1867-8) 301, 308.

[10] *Id.* at pp. 333, 335-40.

[1] Daily Enquirer and Examiner (Richmond, April 8, 1868).

[2] Address of the Conservative Members of the Late State Convention to the Voters of Virginia (1868).

[3] Va. Acts (1869-70) Ch. 3.

[4] Va. Acts (1869-70) Ch. 259, § 47.

[5] Va. Sen. J. (1869-70) 485.

an amendment was proposed to substitute permissive segregation for the mandatory segregation provision contained in the bill. This was also defeated by a vote of 27 to 3.[6] Similarly, on June 29, 1870, a motion to strike out the segregation provision was defeated in the House by a vote of 80 to 19.[7] The bill was passed by the Senate by a vote of 23 to 3 and by the House by a vote of 72 to 33.[8]

Since the legislature that ratified the Fourteenth Amendment established segregated schools in Virginia and specifically refused to permit amalgamation, it becomes impossible to believe that this legislature thought that its action would contravene the Fourteenth Amendment.[1]

36. West Virginia

The governor recommended ratification of the Fourteenth Amendment in his address to the West Virginia legislature on January 15, 1867.[2] He spoke generally about the "moderation" of the Amendment, and did not refer to any effect that it might have on schools. The Senate without discussion voted to ratify the Amendment on the day of the

[6] *Id.* at p. 489.

[7] Va. House J. (1869-70) 606-7.

[8] Va. Sen. J. (1869-70) 507; Va. House J. (1869-70) 615.

[1] Appellants assert that the article on schools in the 1869 constitution was adopted without mention of segregation in order to avoid offensive Congressional legislation. To support this they cite a treatise. Dabney, *Universal Education in the South* (1936) 143-4. The quotation is a commentary on a letter quoted in the treatise from John B. Minor to William Ruffner in 1870. Minor was not speaking of the 1869 constitution but of the 1870 school law. He was urging passage of the 1870 law (that provided for segregation) over the opposition of those who desired no schools, fearing that failure of passage would result in Congressional action in some way to require Virginia to establish schools.

[2] W. Va. Sen. J. (1867) 19.

governor's address, while the House took similar action the next day.[3]

Ratification of the Fourteenth Amendment was accomplished in West Virginia on January 16, 1867. On February 27, 1867, six weeks later, the same legislature adopted a statute providing that:

> "White and colored persons shall not be taught in the same schools . . ."[4]

This act was merely a continuance of principles established earlier. Although the constitution of 1863 required the establishment of a school system, segregation was not required,[5] but the legislature in 1863, in establishing the school system, required segregation of the races.[6] After the 1867 Act came the new constitution of 1872 which placed the requirement of segregation in the constitution where it remains to this day.[7]

Segregated schools and the Fourteenth Amendment were approved by the same legislature. That legislature could not have thought them incompatible.

37. Wisconsin

The governor of Wisconsin recommended ratification of the Fourteenth Amendment in a message to the legislature when it met in 1867. He described the Amendment and its purposes in terms which today seem somewhat florid, but his detailed description contained no mention of public schools.[8]

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[3] *Id.* at p. 24; W. Va. House J. (1867) 10.

[4] W. Va. Acts (1867) Ch. 98.

[5] W. Va. Const. (1863) Art. X, § 2.

[6] W. Va. Acts (1863) Ch. 137, § 17.

[7] W. Va. Const. (1872) Art. XII, § 8.

[8] Message of the Governor to the Legislature of Wisconsin (1867) XXII *et seq.*

A resolution for ratification was referred to a Senate committee which returned both majority and minority reports. Neither report, though both are quite detailed, mentions schools.[9] The Senate adopted a resolution ratifying the Amendment on January 23, 1867.[10] The House, after a 3-day debate, followed by taking affirmative action on February 7, 1867.[1]

Wisconsin never had segregated education. The Negro population was comparatively quite small. Wisconsin gives no affirmative evidence as to the expected effect of the Fourteenth Amendment on school segregation.

D.

Conclusion

That is the end of our review of the records of the individual States. Though we have discarded a wealth of material in an effort to present only that most directly relevant, the path has nevertheless seemed long. But the conclusion is clear, startling though it may be.

In not one of the 37 States that considered the Fourteenth Amendment is there any substantial evidence that its ratification was considered to outlaw segregation by race in the public schools.

The States may be classified as follows between those where there is substantial affirmative evidence that ratification was *not* considered to require the end of segregation and those presenting no substantial affirmative evidence at all:

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[9] Wis. Sen. J. (1867) 96.

[10] *Id.* at p. 119. The vote was 22 to 10.

[1] Wis. House J. (1867) 223. The vote was 69 to 10.

Segregation Not Considered Abolished

Alabama	New Jersey
Arkansas	New York
California	North Carolina
Delaware	Nevada
Georgia	Ohio
Illinois	Pennsylvania
Indiana	South Carolina
Kansas	Tennessee
Kentucky	Texas
Maryland	Virginia
Mississippi	West Virginia
Missouri	

No Substantial Evidence

Connecticut	Minnesota
Florida	Nebraska
Iowa	New Hampshire
Louisiana	Oregon
Maine	Rhode Island
Massachusetts	Vermont
Michigan	Wisconsin

These results may be tabulated in another form:

Number of States where substantial evidence exists that ratification of the Fourteenth Amendment was not thought to outlaw segregated schools	23
Number of States where no substantial evidence on the question exists	14
Number of States where substantial evidence exists that ratification was thought to outlaw school segregation	0
Total	37

The answer here is irrefutable.

APPENDIX C

RELATIONSHIP OF WHITE AND NEGRO POPULATION 1950 CENSUS

RELATIONSHIP OF WHITE AND NEGRO POPULATION

1950 CENSUS

State Groups	*Total*	*% of Total Population*	*Whites*	*% of Total White Population*	*Negroes*	*% of Total Negro Population*
17 States and D. C. where Segregation Required	51,151,741	33.94	40,405,124	30.02	10,522,495	69.95
	100%		79.19%		20.57%	
4 States where Permissible Segregation Exists	3,626,602	2.41	3,397,692	2.52	110,097	0.73
	100%		93.69%		3.04%	
27 Unsegregated States	95,919,018	63.65	91,038,806	67.46	4,410,100	29.32
	100%		94.92%		4.60%	
TOTAL	150,697,361	100.00	134,941,622	100.00	15,042,692	100.00
	100%		89.54%		9.98%	

PERCENTAGE OF NEGRO POPULATION

National Average per State	9.55%
Average per 17 States and D. C. where Segregation Required	23.09%
Average per State for other 31 States	2.43%

United States Population by Race
1950 Census

State	Total Population	Total White	Total Negro	% of White	% of Negro
Alabama	3,061,743	2,079,591	979,617	68.0	32.0
Arizona	749,587	654,511	25,974	87.3	3.5
Arkansas	1,909,511	1,481,507	426,639	77.6	22.3
California	10,586,223	9,915,173	462,172	93.7	4.4
Colorado	1,325,089	1,296,653	20,177	97.9	1.5
Connecticut	2,007,280	1,952,329	53,472	97.2	2.7
Delaware	318,085	273,878	43,598	86.1	13.7
District of Columbia	802,178	517,865	280,803	64.5	35.0
Florida	2,771,305	2,166,051	603,101	78.1	21.8
Georgia	3,444,578	2,380,577	1,062,762	69.1	30.9
Idaho	588,637	581,395	1,050	98.8	0.2
Illinois	8,712,176	8,046,058	645,980	92.3	7.4
Indiana	3,934,224	3,758,512	174,168	95.6	4.4
Iowa	2,621,073	2,599,546	19,692	99.2	0.8
Kansas	1,905,299	1,828,961	73,158	96.0	3.8
Kentucky	2,944,806	2,742,090	201,921	93.1	6.9
Louisiana	2,683,516	1,796,683	882,428	67.0	32.9
Maine	913,774	910,846	1,221	99.6	0.2
Maryland	2,343,001	1,954,975	385,972	83.4	16.5
Massachusetts	4,690,514	4,611,503	73,171	98.3	1.6
Michigan	6,371,766	5,917,825	442,296	92.9	6.9
Minnesota	2,982,483	2,953,697	14,022	99.0	0.5
Missouri	3,954,653	3,655,593	297,088	92.4	7.5
Mississippi	2,178,914	1,188,632	986,494	54.6	45.3
Montana	591,024	572,038	1,232	96.8	0.2
Nebraska	1,325,510	1,301,328	19,234	98.2	1.5
Nevada	160,083	149,908	4,302	93.7	2.7
New Hampshire	533,242	532,275	731	99.4	0.1
New Jersey	4,835,329	4,511,585	318,565	93.3	6.6
New Mexico	681,187	630,211	8,408	92.5	1.2
New York	14,830,192	13,872,095	918,191	93.5	6.2
North Carolina	4,061,929	2,983,121	1,047,353	73.4	25.8
North Dakota	619,636	608,448	257	98.1	.04
Ohio	7,946,627	7,428,222	513,072	93.5	6.5
Oklahoma	2,233,351	2,032,526	145,503	91.0	6.5
Oregon	1,521,341	1,497,128	11,529	98.4	0.8
Pennsylvania	10,498,012	9,853,848	638,485	93.9	6.1
Rhode Island	791,896	777,015	13,903	98.1	1.8
South Carolina	2,117,027	1,293,405	822,077	61.1	38.8
South Dakota	652,740	628,504	727	96.3	0.1
Utah	688,862	676,909	2,729	98.2	0.4
Tennessee	3,291,718	2,760,257	530,603	83.9	16.1
Texas	7,711,194	6,726,534	977,458	87.2	12.7
Vermont	377,747	377,188	443	99.8	0.1
Virginia	3,318,680	2,581,555	734,211	77.8	22.1
Washington	2,378,963	2,316,496	30,691	97.3	1.3
West Virginia	2,005,552	1,890,282	114,867	94.2	5.7
Wisconsin	3,434,575	3,392,690	28,182	98.8	0.8
Wyoming	290,529	284,009	2,557	97.8	0.9
TOTALS	150,697,361	134,942,028	15,042,286	89.55	9.98

SOURCE: Department of Commerce, 1950 United States Census of Population, General Characteristics (1952), Table 59.

APPENDIX D

THE NEW NEGRO HIGH SCHOOL IN PRINCE EDWARD COUNTY, VIRGINIA

W. IRVING DIXON MACON G. NORMAN

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RICHMOND 19, VIRGINIA

November 16, 1953

The Honorable J. Lindsay Almond, Jr.
Attorney General of Virginia
Richmond, Virginia

Dear General Almond:

This letter is to advise you of the completion of the Robert R. Moton High School in Prince Edward County, Virginia. As you will recall, this school was designed by us and has been constructed under our supervision.

Bids for construction were opened on schedule on May 29, 1952. The successful bidder was Mottley Construction Company of Farmville, Virginia. The amount of the contract was $801,241.00. This amount did not include the cost of movable equipment or architectural fees.

The steel shortage in 1952 delayed construction for some time, but the building has now been completed. The final inspection and approval was made this month. The classroom section of the building, along with the cafeteria and auditorium were occupied by the pupils for the regular 1953-54 school term on September 21, 1953.

In our opinion, this project surpasses in construction and in facilities any high school for either race within a six or seven county area. The finishes incorporated in the construction tend to reduce the cost of maintenance and provide health and safety facilities that would be considered excellent. The functional planning incorporates complete high

school facilities for what is known generally as a comprehensive high school. This includes class rooms for the basic subject of English, Math, History, Social Studies and Languages, Science laboratories, facilities for Art education, Speech, Dramatics and Music, Commercial Rooms, Home Economics Rooms, Vocational Shops in which facilities are provided for instruction in Industrial Arts, Agriculture, Cosmetology, Electricity, Sheet Metal and Building Trades, a Library designed in accordance with the American Library Association's standards, Auditorium to accommodate approximately 650 persons, Cafeteria, Clinic, and all necessary Offices in connection with administration of the building.

The contract also included the construction of sewage disposal facilities and water supply approved by the State Board of Health. The playground and athletic fields were all graded to finish grade providing space for regulation baseball diamond and football field.

In conclusion we wish to advise that we are quite pleased with the finished product. The contractor has done an excellent job and we feel there is nothing lacking in the facilities of this project as of the present time.

Yours very truly,

DIXON AND NORMAN

W. IRVING DIXON

PRINCE EDWARD AND CUMBERLAND
COUNTY PUBLIC SCHOOLS
THOMAS J. McILWAINE, *Superintendent*
FARMVILLE, VIRGINIA

November 16, 1953

Honorable J. Lindsay Almond, Jr.
Attorney General of Virginia
Richmond, Virginia

Dear Judge Almond:

In accordance with your request, I submit below a statement, showing the courses offered at the Robert R. Moton High School and at the Farmville High School for the session 1953-54.

At the Robert R. Moton High School forty-six (46) units are offered. These are tabulated below under the general heads—Academic, 25 Units; Fine Arts, 5 Units; Practical Arts, 16 Units.

Academic — 25 Units		*Fine Arts 5 Units*		*Practical Arts — 16 Units*	
English I	1	Art	1	General Shop	1
English II	1	Music	4	Mechanical Drawing	1
English III	1			Voc. Agriculture I	1½
English IV	1			Voc. Agriculture II	1½
Journalism	1			Voc. Agriculture III	1½
Dramatic Arts I	1			Voc. Agriculture IV	1½
Dramatic Arts II	1			Home Economics I	1
General Math	1			Home Economics II	1
Algebra I	1			Home Economics III	1
Algebra II	1			Home Economics IV	1
Plane Geometry	1			Typing I	1
Solid Geometry	½			Typing II	1
Trigonometry	½			Shorthand	1
General Science	1			Distributive Education	1
Biology	1				
Chemistry	1				
World History	1				
Va. & U. S. History	1				
Va. & U. S. Gov't	1				
Social Problems	1				
Economics	1				
Negro History	1				
Latin I	1				
Latin II	1				
French I	1				
French II	1				

Also Health and Physical Education, including Driver Education—no academic credit.

For the eighth grade, courses in English, Mathematics, General Science, Social Studies, also exploratory courses in shop work, Home Economics and Agriculture are offered without credit. In addition, facilities and teaching personnel are available for the following courses, if and when the need or demand appears:

> Physics, advanced classes in Art, Advanced General Shop, Electricity, Metal Work, Masonry, Bookkeeping, and Office Training.

At the Farmville High School thirty-nine (39) units are offered under the general headings—Academic, 20 Units; Fine Arts, 2 Units; Practical Arts, 17 Units.

Academic — 20 Units		*Fine Arts 2 Units*		*Practical Arts — 17 Units*	
English I	1	Music	2	General Shop	1
English II	1			Wood Work	½
English III	1			Mechanical Drawing	½
English IV	1			Metal Work	1
General Math	1			Machine Shop	1
Algebra I	1			Home Economics I	1
Algebra II	1			Home Economics II	1
Plane Geometry	1			Home Economics III	1
Solid Geometry	½			Home Economics IV	1
Trigonometry	½			Typing I	1
General Science	1			Typing II	1
Biology	1			Shorthand I	1
Chemistry	1			Shorthand II	1
Physics	1			Bookkeeping I	1
World History	1			Diversified Occupations	2
Va. & U. S. History	1			Distributive Education	2
Va. & U. S. Gov't	1				
Latin I	1				
Latin II	1				
Spanish I	1				
Spanish II	1				

Health and Physical Education — no academic credit.

For the eighth grade, courses in English, Mathematics, Science, Social Studies and exploratory courses in Home Economics and shop are offered without credit.

It will be seen from the above tabulations that the offering at the Robert R. Moton High School for Negro Students is definitely broader and more comprehensive than at the Farmville High School for white students and the physical facilities at the Robert R. Moton High School are such that with the growth of the school, still other subjects will be added. Of course, the facilities at the Farmville High School are, as you know, much superior to those at Worsham High School, also for white students, so that no purpose would be served by comparing Robert R. Moton High School with Worsham High School in any respect.

I hope that the foregoing gives a clear statement of the educational offerings at the Prince Edward High Schools.

Respectfully yours,

T. J. McIlwaine
Division Superintendent

ACKNOWLEDGMENTS

It would be misleading to leave the impression that those whose names appear on the cover of this brief did all the research required for its production. We are deeply indebted in two respects:

1. To the Honorable Price Daniel and Messrs. Joe R. Greenhill and Emanuel Jacobson whose monumental brief for the State of Texas in *Sweatt* v. *Painter* includes much of the material contained in this brief; and

2. To the present Attorneys General of those States that composed the Union in 1868 who responded ably to our questions as to legislative history in their respective States.

Ours, of course, is the responsibility for all that the brief contains.