IN THE

Supreme Court of the United States

October Term, 1953

No. 1

OLIVER BROWN, ET AL., *Appellants,*

VS.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

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

VS.

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

No. 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY, *Appellees.*

No. 10

FRANCIS B. GEBHART, ET AL., *Petitioners,*

VS.

ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

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BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

Explanatory Statement

One brief is being filed in these four cases. They fundamentally involve the same questions and issues. As an aid to the Court, we are restating below a full history of each case.

NO. 1

Opinion Below

The opinion of the statutory three-judge District Court for the District of Kansas (R. 238-244) is reported at 98 F. Supp. 797.

Jurisdiction

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants are Negro students eligible to attend and attending elementary schools in Topeka, Kansas, and their parents (R. 3-4). Appellees are state officers empowered to maintain and operate the public schools of Topeka, Kansas (R. 4-5). On March 22, 1951, appellants commenced this class action against appellees to restrain them from enforcing and executing that part of Chapter 72-1724, General Statutes of Kansas, 1949, which permitted racial segregation in public elementary schools, on the ground that it violated the Fourteenth Amendment by depriving the infant appellants of equal educational opportunities (R. 2-7), and for a judgment declaring that the

practice of appellees under said statute of maintaining and operating racially segregated elementary schools is in violation of the Fourteenth Amendment.

Appellees admitted in their answer that they acted pursuant to the statute and that, solely because of their color, the infant appellants were not eligible to attend any of the elementary schools maintained exclusively for white students (R. 12). The Attorney General of the State of Kansas filed a separate answer specifically to defend the constitutional validity of the statute (R. 14).

The court below was convened in accordance with Title 28, United States Code, § 2284, and, on June 25-26, a trial on the merits was held (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238-244), findings of fact (R. 244-246) and conclusions of law (R. 246-247) and entered a final judgment denying the injunctive relief sought (R. 247).

Specification of Errors

The court below erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate public elementary schools for Negro children, solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

NO. 2

Opinions Below

The majority and dissenting opinions of the statutory three-judge District Court for the Eastern District of South Carolina on the first hearing (R. 176-209) are reported in 98 F. Supp. 529-548. The opinion on the second hearing (R. 301-306) is reported in 103 F. Supp. 920-923.

Jurisdiction

The judgment of the court below was entered on March 13, 1952 (R. 306). A petition for appeal was filed below and allowed on May 10, 1952 (R. 309). Probable jurisdiction was noted on June 9, 1952 (R. 316). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants are Negro children who reside in and are eligible to attend the public schools of School District No. 22, Clarendon County, South Carolina, and their respective parents and guardians (R. 4-5). Appellees are the public school officials of said district who, as officers of the state, maintain and operate the public schools of that district (R. 5-6). On December 22, 1950, appellants commenced this class action against appellees to enjoin enforcement of Article XI, Section 7, of the Constitution of South Carolina and Section 5377 of the Code of Laws of South Carolina of 1942, which require the segregation of races in public schools, on the ground that they deny to appellants the equal protection of the laws secured by the Fourteenth Amendment, and for a judgment declaring that said laws violate the Fourteenth Amendment and are invalid (R. 2-11).

Appellees in their answer admitted adherence to the said constitutional and statutory provisions requiring racial segregation in public schools and asserted that such provisions were a reasonable exercise of the police powers of the state and, therefore, were valid (R. 13-17).

A three-judge District Court was convened, pursuant to Title 28, United States Code, §§ 2284, and on July 25, 1951, a trial on the merits was held (R. 30 *et seq.*). On June 23, 1951, the court below filed its opinion (R. 176) and entered a final decree (R. 209): (1) upholding the constitutional validity of the contested state constitutional and statutory provisions; (2) denying the injunctive relief which was sought; (3) requiring appellees to furnish to appellants educational facilities equal to those furnished to white students; and (4) requiring appellees within six months to file a report of action taken toward that end.

An appeal from this judgment was allowed by this Court on July 20, 1951. The report required by the decree of the court below was filed on December 21, 1951, and subsequently forwarded to this Court. On January 28, 1952, this Court vacated the judgment of the court below and remanded the case for the purpose of obtaining the views of the court below on the additional facts in the record and to give it the opportunity to take such action as it might deem appropriate in light of the report. 342 U. S. 350. Mr. Justice Black and Mr. Justice Douglas dissented on the ground that the additional facts in the report were "wholly irrelevant to the constitutional questions presented by the appeal to this Court". 342 U. S. 350.

Pursuant to the mandate of this Court, a second trial was held in the court below on March 3, 1953 (R. 271), at which time the appellees filed an additional report showing progress made since the filing of the original report (R. 273). On March 13, 1952, the court below filed its opinion (R. 301) and entered a final decree (R. 306) again upholding the validity of the contested constitutional and statutory provisions, denying the injunctive relief re-

quested and requiring appellees to afford to appellants educational facilities equal to those afforded to white students.

Specification of Errors

The court below erred:

1. In refusing to enjoin the enforcement of the laws of South Carolina requiring racial segregation in the public schools of Clarendon County on the ground that these laws violate rights secured under the equal protection clause of the Fourteenth Amendment.

2. In refusing to grant to appellants immediate and effective relief against the unconstitutional practice of excluding appellants from an opportunity to share the public school facilities of Clarendon County on an equal basis with other students without regard to race or color.

3. In predicating its decision on the doctrine of *Plessy* v. *Ferguson* and in disregarding the rationale of *Sweatt* v. *Painter* and *McLaurin* v. *Board of Regents*.

NO. 4

Opinion Below

The opinion of the statutory three-judge District Court for the Eastern District of Virginia (R. 617-623) is reported at 103 F. Supp. 337-341.

Jurisdiction

The judgment of the court below was entered on March 7, 1952 (R. 623). A petition for appeal was filed below and allowed on May 5, 1952 (R. 625, 630, 683). Probable jurisdiction was noted on October 8, 1952. —U. S. —, 97 L. ed. (Advance p. 27). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants, high school students residing in Prince Edward County, Virginia, and their parents and guardians, brought a class action against appellees, the County School Board and the Division Superintendent of Schools on May 23, 1951. The complaint (R. 5-30) alleged that said appellees maintained separate public secondary schools for Negro and white children pursuant to Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, section 22-221, of the Code of Virginia of 1950; that the Negro school was inferior and unequal to the white schools; and that it was impossible for the infant appellants to secure educational opportunities or facilities equal to those afforded white children similarly situated as long as said appellees enforce said laws or pursued a policy of racial segregation. It sought a judgment declaratory of the invalidity of said laws as a denial of rights secured by the due process and equal protection clauses of the Fourteenth Amendment, and an injunction restraining said appellees from enforcing said laws and from making any distinction based on race or color among children attending the secondary schools of the County.

Appellees admitted maintenance of said schools, enforcement of said laws, and inequalities as to physical plant and equipment, but denied that the segregation violated the Constitution (R. 32-36). Appellee, the Commonwealth of Virginia, intervened (R. 37) and made the same admissions and defense (R. 37-39).

On March 7, 1952, a three-judge District Court found the Negro school inferior in plant, facilities, curricula and means of transportation (R. 622-623) and ordered appellees forthwith to provide "substantially" equal curricula and transportation facilities and to "proceed with all reasonable diligence and dispatch to remove" the existing inequality "by building, furnishing and providing a high school building and facilities for Negro students" (R. 624). It refused to enjoin enforcement of the constitutional and

statutory segregation provisions on the grounds: (1) that appellants' evidence as to the effects of educational segregation did not overbalance appellees', and that it accepted as "apt and able precedent" *Briggs* v. *Elliott,* 98 F. Supp. 529 (E. D. S. C. 1951) and *Carr* v. *Corning,* 182 F. 2d 14 (C. A. D. C. 1950) which "refused to decree that segregation be abolished incontinently" (R. 619); (2) that nullification of the segregation provisions was unwarranted in view of evidence that racial segregation was not based on prejudice or caprice but, rather, was "one of the ways of life in Virginia" (R. 620); (3) that segregation has begotten greater opportunities for the Negro (R. 621); (4) that elimination of segregation would lessen interest in and financial support of public schools (R. 621); and (5) that, finding "no hurt or harm to either race," it was not for the court "to adjudge the policy as right or wrong" (R. 621-622).

Specification of Errors

The court below erred:

1. In refusing to enjoin the enforcement of Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, Section 22-221, of the Code of Virginia of 1950, upon the grounds that these laws violate rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to forthwith restrain appellees from using race as a factor in determining the assignment of public secondary educational facilities in Prince Edward County, Virginia, after it had found that appellants are denied equality of buildings, facilities, curricula and means of transportation in violation of the due process and equal protection clauses of the Fourteenth Amendment.

3. In refusing to hold that appellants are entitled to equality in all aspects of the public secondary educational

process, in addition to equality in physical facilities and curricula.

4. In issuing a decree ordering appellees to equalize secondary school facilities in the County where such decree cannot be effectively enforced without involving the court in the daily operation and supervision of schools.

NO. 10

Opinions Below

The opinion of the Chancellor of the State of Delaware (A. 338) is reported at 87 A. (2d) 862. The opinion of the Supreme Court of Delaware (R. 37) is reported at 91 A. (2d) 137.*

Jurisdiction

The judgment of the court below was entered on August 28, 1952 (R. 37). On November 13, 1952 petition for writ of certiorari was filed herein. On November 20, 1952, respondents waived the filing of a brief in opposition to the petition for writ of certiorari and moved that, if certiorari were granted, the argument be advanced and heard immediately following argument in Nos. 8, 101 and 191. On November 24, 1952, the petition for writ of certiorari and motion to advance were granted. — U. S. —; 97 L. ed. (Advance, p. 124). Jurisdiction of this Court rests upon Title 28, United States Code, § 1257(3).

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* The record in this case consists of five separate parts: appendix to petitioners' brief in the court below, the supplement thereto, appendix to respondents' brief in the court below, the supplement thereto, and the record of proceedings in the Supreme Court of Delaware. These will be referred to in respondents' brief as follows:

Appendix to petitioners' brief below will be indicated by A; the supplement to the petitioners' appendix below will be referred to as SA; respondents' appendix below will be referred to as RA; the supplement to respondents' appendix below will be referred to as RSA; the record of proceedings in the Supreme Court of Delaware will be referred to as R.

Statement of the Case

No. 10 arises from two separate class actions filed in the Court of Chancery of the State of Delaware by Negro school children and their guardians seeking admittance of the children to two public schools maintained by petitioners exclusively for white children in New Castle County, Delaware. In the courts below, plaintiffs prevailed, and they and members of their class are now attending the schools to which they sought admission, an application for stay of final order having been denied. (Brief of Respondents, No. 448, October Term, 1952, pp. 25-27). Thus, in this case, unlike the other school segregation cases now under consideration, plaintiffs are respondents in this Court. Nevertheless, they file their brief at this time along with appellants in Numbers 1, 2 and 4, because, on the fundamental issues, they take the same position as do those appellants, and because they believe that by so filing they will facilitate the Court's consideration of the matters at bar.

The complaint (A 3-13) in one of the two cases from which No. 10 arises, alleged that respondents residing in the Claymont Special School District were refused admittance to the Claymont High School maintained by petitioner-members of the State Board of Education and members of the Board of Education of the Claymont Special School District solely because of respondents' color. Because of this, these respondents were compelled to attend Howard High School (RA 47), a public school for Negroes only, in Wilmington, Delaware. Howard High School is operated and controlled by the Corporate Board of Public Education in Wilmington, not a party to this case (A 314-15, 352; R 57, RA 203). The second complaint (A 14-30) out of which No. 448 arises alleged that respondent was excluded from Hockessin School No. 29, a public elementary school maintained for white children only, by petitioner-members of the State Board of Education and petitioner-

members of the Board of School Trustees of Hockessin School No. 29. Respondent and the class she represented at the time of the complaint, attended Hockessin School No. 107, maintained solely for Negroes by the State Board of Education. Respondents in both complaints asserted that the aforesaid state-imposed racial segregation required by Par. 2631, Revised Code of Delaware, 1935, and Article X, Section 1 of the Constitution of Delaware: (1) compelled them to attend schools substantially inferior to those for white children to which admittance was sought; and (2) injured their mental health, impeded their mental and personality development and made inferior their educational opportunity as compared with that offered by the state to white children similarly situated. Such treatment, respondents asserted, is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioners' answers (A 31-33, A 34-37) defended the exclusion: (1) upon mandatory constitutional and statutory provisions of the State of Delaware which require separate public schools for white and colored children; and (2) upon the fact that the educational opportunities offered respondents were equal to those offered white children similarly situated.

The two cases were consolidated and tried before the Chancellor. In an opinion (A 348-356; 87 A. (2d) 862) filed on April 1, 1952, the Chancellor found as a fact that in "our Delaware society" segregation in education practiced by petitioners "itself results in Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." However, the Chancellor denied respondents' prayers for a judgment on this ground and refused to declare that the Delaware constitutional and statutory provisions violated respondents' right to equal protection. But the Chancellor did award respondents the relief which they requested because other in-

equalities were found to exist. These included, in the high school, teacher training, pupil-teacher ratio, extra-curricular activities, physical plant and esthetic considerations, and time and distance involved in travel. As to the elementary schools in question, the court found the Negro facilities inferior in building and site, esthetic considerations, teacher preparation and transportation facilities. A more detailed exposition of the facts upon which these findings were based is set forth in respondents' Brief in No. 448, October Term, 1952, pp. 27-44.

The Chancellor, as stated above, ordered that respondents be granted immediate relief in the only way that it was then available, that is, by admission to the superior facilities. On August 28, 1952, the Supreme Court of Delaware affirmed. 91 A. (2d) 137. Its findings on some of the facts were somewhat different than the Chancellor's but, on the whole, it agreed with him. Upholding the Chancellor's determination that the requested relief could not be granted because of the harmful psychological effect of racial segregation, it did not otherwise review his factual findings in this regard. Denying petitioners' plea for time to equalize the facilities in question, the Supreme Court held that in the high school case: (1) a decree ordering petitioners to equalize the facilities in question could have no effect on the legal entity having control of the Wilmington public schools which was not a party to the cause; and (2) that the court did not see how it could supervise and control the expenditure of state funds in a matter committed to the administrative discretion of school authorities. Finally, the court held that it could not issue a decree which would, in effect, deny to plaintiffs what it had held they rightfully deserved. As to the elementary school, the court also noted that defendants had not assumed the burden of showing to what extent remedial legislation had improved or could improve conditions in the future. Alluding to its antecedent discussion of the question of

relief for high school respondents, it affirmed the Chancellor's finding on this issue also.

Stay of the order was denied by the Chancellor and by the Supreme Court of Delaware (Brief of Respondents, No. 448, October Term, 1952, pp. 25-27) and respondents and members of their class are now enjoying their second year of equal educational opportunities under the decree.

This Court's Order

These four cases were argued and submitted to the Court on December 9-11, 1952. Thereafter, on June 8, 1953, this Court entered its order for reargument, as follows, — U. S. —; 97 L. ed. (Advance p. 956):

> *"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:*
>
> *"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?*
>
> *"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment*
>
> *"(a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or*
>
> *"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?*

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

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

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

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

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

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

"(b) if so what specific issues should the decrees reach;

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

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

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

On August 4, 1953, upon motion of the Attorney General of the United States and without objection by the parties,

this Court entered its order postponing the date assigned for reargument of these cases until December 7, 1953.

Summary of Argument

These cases consolidated for argument before this Court present in different factual contexts essentially the same ultimate legal questions.

The substantive question common to all is whether a state can, consistently with the Constitution, exclude children, solely on the ground that they are Negroes, from public schools which otherwise they would be qualified to attend. It is the thesis of this brief, submitted on behalf of the excluded children, that the answer to the question is in the negative: the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race. Both the legal precedents and the judicial theories, discussed in Part I hereof, and the evidence concerning the intent of the framers of the Fourteenth Amendment and the understanding of the Congress and the ratifying states, developed in Part II hereof, support this proposition.

Denying this thesis, the school authorities, relying in part on language originating in this Court's opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, urge that exclusion of Negroes, *qua* Negroes, from designated public schools is permissible when the excluded children are afforded admittance to other schools especially reserved for Negroes, *qua* Negroes, if such schools are equal.

The procedural question common to all the cases is the role to be played, and the time-table to be followed, by this Court and the lower courts in directing an end to the challenged exclusion, in the event that this Court determines, with respect to the substantive question, that exclusion of Negroes, *qua* Negroes, from public schools contravenes the Constitution.

The importance to our American democracy of the substantive question can hardly be overstated. The question is whether a nation founded on the proposition that "all men are created equal" is honoring its commitments to grant "due process of law" and "the equal protection of the laws" to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.

1. Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U. S. 1; *Buchanan* v. *Warley,* 245 U. S. 60. This has been held to be true even as to the conduct of public educational institutions. *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. Whatever other purposes the Fourteenth Amendment may have had, it is indisputable that its primary purpose was to complete the emancipation provided by the Thirteenth Amendment by ensuring to the Negro equality before the law. The *Slaughter-House Cases,* 16 Wall. 36; *Strauder* v. *West Virginia,* 100 U. S. 303.

2. Even if the Fourteenth Amendment did not *per se* invalidate racial distinctions as a matter of law, the racial segregation challenged in the instant cases would run afoul of the conventional test established for application of the equal protection clause because the racial classifications here have no reasonable relation to any valid legislative purpose. See *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Truax* v. *Raich,* 239 U. S. 33; *Smith* v. *Cahoon,* 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535. See also *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 192; *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192.

3. Appraisal of the facts requires rejection of the contention of the school authorities. The educational detriment involved in racially constricting a student's associations has already been recognized by this Court.

Sweatt v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

4. The argument that the requirements of the Fourteenth Amendment are met by providing alternative schools rests, finally, on reiteration of the separate but equal doctrine enunciated in *Plessy* v. *Ferguson*.

Were these ordinary cases, it might be enough to say that the *Plessy* case can be distinguished—that it involved only segregation in transportation. But these are not ordinary cases, and in deference to their importance it seems more fitting to meet the *Plessy* doctrine head-on and to declare that doctrine erroneous.

Candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery. But the primary purpose of the Fourteenth Amendment was to deprive the states of *all* power to perpetuate such a caste system.

5. The first and second of the five questions propounded by this Court requested enlightment as to whether the Congress which submitted, and the state legislatures and conventions which ratified, the Fourteenth Amendment contemplated or understood that it would prohibit segregation in public schools, either of its own force or through subsequent legislative or judicial action. The evidence, both in Congress and in the legislatures of the ratifying states, reflects the substantial intent of the Amendment's proponents and the substantial understanding of its opponents that the Fourteenth Amendment would, of its own force, proscribe all forms of state-imposed racial distinctions, thus necessarily including all racial segregation in public education.

The Fourteenth Amendment was actually the culmination of the determined efforts of the Radical Republican majority in Congress to incorporate into our fundamental law the well-defined equalitarian principle of complete

equality for all without regard to race or color. The debates in the 39th Congress and succeeding Congresses clearly reveal the intention that the Fourteenth Amendment would work a revolutionary change in our state-federal relationship by denying to the states the power to distinguish on the basis of race.

The Civil Rights Bill of 1866, as originally proposed, possessed scope sufficiently broad in the opinion of many Congressmen to entirely destroy all state legislation based on race. A great majority of the Republican Radicals—who later formulated the Fourteenth Amendment—understood and intended that the Bill would prohibit segregated schools. Opponents of the measure shared this understanding. The scope of this legislation was narrowed because it was known that the Fourteenth Amendment was in process of preparation and would itself have scope exceeding that of the original draft of the Civil Rights Bill.

6. The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated upon race or color. The intention of the framers with respect to any specific example of caste state action—in the instant cases, segregated education—cannot be determined solely on the basis of a tabulation of contemporaneous statements mentioning the specific practice. The framers were formulating a constitutional provision setting broad standards for determination of the relationship of the state to the individual. In the nature of things they could not list all the specific categories of existing and prospective state activity which were to come within the constitutional prohibitions. The broad general purpose of the Amendment—obliteration of race and color distinctions—is clearly established by the evidence. So far as there was consideration of the Amendment's impact upon the undeveloped educational systems then existing, both proponents and opponents of the Amend-

ment understood that it would proscribe all racial segregation in public education.

7. While the Amendment conferred upon Congress the power to enforce its prohibitions, members of the 39th Congress and those of subsequent Congresses made it clear that the framers understood and intended that the Fourteenth Amendment was self-executing and particularly pointed out that the federal judiciary had authority to enforce its prohibitions without Congressional implementation.

8. The evidence as to the understanding of the states is equally convincing. Each of the eleven states that had seceded from the Union ratified the Amendment, and concurrently eliminated racial distinctions from its laws, and adopted a constitution free of requirement or specific authorization of segregated schools. Many rejected proposals for segregated schools, and none enacted a school segregation law until after readmission. The significance of these facts is manifest from the consideration that ten of these states, which were required, as a condition of readmission, to ratify the Amendment and to modify their constitutions and laws in conformity therewith, considered that the Amendment required them to remove all racial distinctions from their existing and prospective laws, including those pertaining to public education.

Twenty-two of the twenty-six Union states also ratified the Amendment. Although unfettered by congressional surveillance, the overwhelming majority of the Union states acted with an understanding that it prohibited racially segregated schools and necessitated conformity of their school laws to secure consistency with that understanding.

9. In short, the historical evidence fully sustains this Court's conclusion in the *Slaughter Houses Cases,* 16 Wall. 61, 81, that the Fourteenth Amendment was designed to take from the states all power to enforce caste or class distinctions.

10. The Court in its fourth and fifth questions assumes that segregation is declared unconstitutional and inquires as to whether relief should be granted immediately or gradually. Appellants, recognizing the possibility of delay of a purely administrative character, do not ask for the impossible. No cogent reasons justifying further exercise of equitable discretion, however, have as yet been produced.

It has been indirectly suggested in the briefs and oral argument of appellees that some such reasons exist. Two plans were suggested by the United States in its Brief as *Amicus Curiae.* We have analyzed each of these plans as well as appellees' briefs and oral argument and find nothing there of sufficient merit on which this Court, in the exercise of its equity power, could predicate a decree permitting an effective gradual adjustment from segregated to non-segregated school systems. Nor have we been able to find any other reasons or plans sufficient to warrant the exercise of such equitable discretion in these cases. Therefore, in the present posture of these cases, appellants are unable to suggest any compelling reasons for this Court to postpone relief.

ARGUMENT

PART ONE

The question of judicial power to abolish segregated schools is basic to the issues involved in these cases and for that reason we have undertaken to analyze it at the outset before dealing with the other matters raised by the Court, although formally this means that the first section of this brief comprehends Question No. 3:

> *On the assumption that the answers to question 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?*

I.

Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinctions based upon race or color in affording educational opportunities in the public schools.

This Court in a long line of decisions has made it plain that the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power. Time and again this Court has held that if a state's power has been exercised in such a way as to deprive a Negro of a right which he would have freely enjoyed if he had been white, then that state's action violated the Fourteenth Amendment.

In *Shelley* v. *Kraemer,* 334 U. S. 1, for example, an unanimous Court held that States of Missouri and Michigan had violated the 14th Amendment when their courts ruled that a Negro could not own real property whose ownership it was admitted the state law would have protected him in, had he been white. This, despite the fact

that the state court was doing no more than enforcing a private agreement running with the land. The sole basis for the decision, then, was that the Fourteenth Amendment compels the states to be color blind in exercising their power and authority.

Buchanan v. *Warley,* 245 U. S. 60, was an earlier decision to the same effect. There, this Court invalidated a Louisville, Kentucky ordinance which required racial residential segregation. Though it applied to Negro and white alike, the Court rightly recognized that the ordinance was an exercise of the state's power based on race and race alone. This, the Court ruled, was a violation of the Fourteenth Amendment. To the same effect is *Barrows* v. *Jackson,* — U. S. —, 97 L. ed. Advance p. 261). And see *Oyama* v. *California,* 332 U. S. 633.

This Court has applied the same rigorous requirement to the exercise of the state's power in providing public education. Beginning with *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, this Court has uniformly ruled that the Fourteenth Amendment prohibits a state from using race or color as the determinant of the quantum, quality or type of education and the place at which education is to be afforded. Most recently, this Court in *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, held that rules which made distinctions among students in the same school solely on the basis of color were forbidden by the Fourteenth Amendment. Thus, this Court has made it plain that no state may use color or race as the axis upon which the state's power turns, and the conduct of the public education system has not been excepted from this ban.

This judicial recognition that race is an irrational basis for governmental action under our Constitution has been manifested in many decisions and opinions of this Court. In *Yick Wo* v. *Hopkins,* 118 U. S. 356, this Court struck down local administrative action which differentiated between whites and Chinese. In *Hirabayashi* v. *United States,* 320 U. S. 81, 100, Chief Justice Stone, in a majority

opinion, characterized racial distinctions as "odious to a free people". In *Korematsu* v. *United States*, 323 U. S. 214, 216, the Court viewed racial restrictions as "immediately suspect". Mr. Justice Jackson, concurring in *Edwards* v. *California*, 314 U. S. 180, 185, referred to race and color as "constitutionally an irrelevance". Mr. Justice Douglas, dissenting in *South* v. *Peters*, 339 U. S. 276, 278, considered discriminations based upon race, creed, or color "beyond the pale". In an unanimous opinion in *Henderson* v. *United States*, 339 U. S. 816, 825, the Court, while not reaching the constitutional question raised, described signs, partitions and curtains segregating Negroes in railroad dining cars as emphasizing "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility". Every member of the present Court has from time to time subscribed to this view of race as an irrational premise for government action.

The restrictions placed upon persons of Japanese origin on the West Coast during World War II were sustained in *Hirabayashi* v. *United States, supra,* and in *Korematsu* v. *United States, supra,* as emergency war measures taken by the national government in a dire national peril of the gravest nature. The military decision was upheld as within an implied war power, and the Court was unwilling to interfere with measures considered necessary to the safety of the nation by those primarily responsible for its security. Yet, in upholding these orders, the Court made some of the most sweeping condemnations of governmentally imposed racial and color distinctions ever announced by our judiciary. And while departure from accepted standards of governmental conduct was sustained in order to remove persons of Japanese origin from areas where sabotage and espionage might have worked havoc with the national war effort, once this removal was accomplished and individual loyalty determined, further restrictions based upon race or

color could no longer be countenanced. *Ex Parte Endo,* 323 U. S. 283.

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210, and *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192, while not deciding the constitutional question, left no doubt that the Fifth Amendment had stripped the national government of power to enforce the racial discrimination assailed.

These decisions serve to underscore the constitutional prohibition against Congressional action grounded upon color except in so far as it may have temporary justification to meet an overwhelming national emergency such as that which led to decisions in the *Hirabayashi* and *Korematsu* cases.

The power of states is even more rigidly circumscribed. For there is grave doubt that their acts can be sustained under the exception made in the *Hirabayashi* and *Korematsu* cases with respect to the national government. See *Oyama* v. *California,* 332 U. S. 633. The Fourteenth Amendment has been defined as a broad prohibition against state enforcement of differentiations and discrimination based upon race or color. State action restricting the right of Negroes to vote has been struck down as a violation of the Fourteenth Amendment. *Nixon* v. *Condon,* 286 U. S. 73. Similarly, the Court has refused to sanction the systematic exclusion of Negroes from the petit or grand jury, *Hill* v. *Texas,* 316 U. S. 400; *Pierre* v. *Louisiana,* 306 U. S. 354; their representation on juries on a token or proportional basis, *Cassell* v. *Texas,* 339 U. S. 282; *Shepherd* v. *Florida,* 341 U. S. 50; or any method in the selection of juries susceptible of racial discrimination in practice. *Avery* v. *Georgia,* 345 U. S. 559.

Legislation depriving persons of particular races of an opportunity to pursue a gainful occupation has been held a denial of equal protection. *Truax* v. *Raich,* 239 U. S. 33; *Takahashi* v. *Fish and Games Commission,* 334 U. S. 410. It is now well settled that a state may not make racial dif-

ferences among its employees the basis for salary differentiations. *Alston* v. *School Board,* 112 F. 2d 992 (CA 4th 1940), *cert. denied,* 311 U. S. 693.

Indeed, abhorence of race as a premise for governmental action pervades a wide realm of judicial opinion dealing with other constitutional provisions. Sweeping decisions have enforced the right of Negroes to make effective use of the electoral process consistent with the requirements of the Fifteenth Amendment. *Guinn* v. *United States,* 238 U. S. 347; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461.

It should be added parenthetically that these decisions are not mere *pro forma* applications of the self-evident requirements of the Fifteenth Amendment. On the contrary, the concept of state action has been utilized in a dynamic and expanding fashion as the Court has sought to reach any method or subterfuge with which the state has attempted to avoid its obligation under that constitutional amendment. *Smith* v. *Allwright, supra; Terry* v. *Adams, supra.* See *Rice* v. *Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875 and *Baskin* v. *Brown,* 174 F. 2d 391 (CA 4th 1949), cases holding state non-action violative of the Fifteenth Amendment the principle of which was expressly approved in *Terry* v. *Adams.*

State laws requiring racial segregation in interstate commerce have been declared an invalid invasion of commerce power reserved to the Congress. *Morgan* v. *Virginia,* 328 U. S. 373. But where a state sought to enforce against a carrier engaged in foreign commerce its local non-segregation policy, the state law was upheld. The Court considered it inconceivable that the Congress in the exercise of its plenary power over commerce would take any action in conflict with the local nondiscriminatory regulations imposed. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. These two cases considered together strikingly exemplify this Court's position that fundamental national policy is

offended by a requirement of segregation, but implemented by its prohibition.

The contention by a labor union that a state civil rights law which prohibited racial discrimination in union membership offended the Fourteenth Amendment was dismissed because such a position "would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race and color". *Railway Mail Association* v. *Corsi,* 326 U. S. 88, 94.

Thus, the Court has all but universally made short shrift of attempts to use governmental power to enforce racial distinctions. Yet, where such power has prohibited racial discrimination, it has been sustained even where it has been urged that the state is acting in derogation of other constitutional rights or protected interests.

At the graduate and professional school level, closest to the cases here, racial distinctions as applied have been struck down. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sweatt* v. *Painter,* 339 U. S. 629. In those cases the educational process was viewed as a totality. The faculty of the school, the prestige of the institution, the fact that segregation deprived the Negro applicant of the benefits which he might secure in attending school with representatives of the state's dominant racial majority, the value judgment of the community with respect to the segregated school, and the impact of segregation on the individual were among the factors considered by the Court in determining that equal educational opportunities were not available. Those cases, we submit, control disposition of the cases here.

Since segregation was found to impair and inhibit an adult's ability to study in the *McLaurin* case, it seems clear that such segregation has even more far reaching adverse consequences on the mental development of the children involved here.

Sweatt's isolation from the dominant racial majority in a segregated law school was held to deprive him of an effec-

tive opportunity to learn the law. The basic function of the public school is to instruct each succeeding generation in the fundamental traditions of our democracy. The child can best come to believe in and respect these traditions by learning them in a setting in which they are in practical operation. But to be taught that our society is founded upon a concept of equality in a public school from which those racial groups are excluded which hold pre-eminence in every field in his community makes it all but impossible for such teachings to take root. Segregation here is detrimental to the Negro child in his effort to develop into a useful and productive citizen in a democracy.

The *Sweatt* and *McLaurin* cases teach that the Court will consider the educational process in its entirety, including, apart from the measurable physical facilities, whatever factors have been shown to have educational significance. This rule cannot be peculiar to any level of public education. Public elementary and high school education is no less a governmental function than graduate and professional education in state institutions. Moreover, just as Sweatt and McLaurin were denied certain benefits characteristic of graduate and professional education, it is apparent from the records of these cases that Negroes are denied educational benefits which the state itself asserts are the fundamental objectives of public elementary and high school education.

South Carolina, like the other states in this country, has accepted the obligation of furnishing the extensive benefits of public education. Article XI, section 5, of the Constitution of South Carolina, declares: "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years". Some 410 pages of the Code of Laws of South Carolina deal with "education". Title 31, Chapters 122-23, S. C. Code, pp. 387-795 (1935). Provision is made for the entire state-supported system of public schools, its administration and

organization, from the kindergarten through the university. Pupils and teachers, school buildings, minimum standards of school construction, and specifications requiring certain general courses of instruction are dealt with in detail. In addition to requiring that the three "R's" must be taught, the law compels instruction in "morals and good behaviour" and in the "principles" and "essentials of the United States Constitution, including the study of and devotion to American institutions". Title 31, Chapter 122, sections 5321, 5323, 5325, S. C. Code (1935). The other states involved here are attempting to promote the same objectives.

These states thus recognize the accepted broad purposes of general public education in a democratic society. There is no question that furnishing public education is now an accepted governmental function. There are compelling reasons for a democratic government's assuming the burden of educating its children, of increasing its citizens' usefulness, efficiency and ability to govern.

In a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, even more than the family, the church, business institutions, political and social groups and other institutions, has become an effective agency for giving to all people that broad background of attitudes and skills required to enable them to function effectively as participants in a democracy. Thus, "education" comprehends the entire process of developing and training the mental, physical and moral powers and capabilities of human beings. See *Weyl* v. *Comm. of Int. Rev.*, 48 F. 2d 811, 812 (CA 2d 1931); *Jones* v. *Better Business Bureau*, 123 F. 2d 767, 769 (CA 10th 1941).

The records in instant cases emphasize the extent to which the state has deprived Negroes of these fundamental educational benefits by separating them from the rest of the school population. In the case of *Briggs* v. *Elliott* (No. 101), expert witnesses testified that compulsory racial

segregation in elementary and high schools inflicts considerable personal injury on the Negro pupils which endures as long as these students remain in the segregated school. These witnesses testified that compulsory racial segregation in the public schools of South Carolina injures the Negro students by: (1) impairing their ability to learn (R. 140, 161); (2) deterring the development of their personalities (R. 86, 89); (3) depriving them of equal status in the school community (R. 89, 141, 145); (4) destroying their self-respect (R. 140, 148); (5) denying them full opportunity for democratic social development (R. 98, 99, 103); (6) subjecting them to the prejudices of others (R. 133) and stamping them with a badge of inferiority (R. 148).

Similar testimony was introduced in each of the other three cases here involved, and that testimony was undisputed in the case of *Briggs* v. *Elliott* (No. 101); *Brown* v. *Board of Education of Topeka, et al.* (No. 8); *Gebhart* v. *Belton* (No. 448). In *Davis* v. *County School Board* (No. 191), while witnesses for the appellees disputed portions of the testimony of appellants' expert witnesses, four of appellees' witnesses admitted that racial segregation has harmful effects and another recognized that such segregation could be injurious.

In the *Gebhart* case (No. 448) the Chancellor filed an opinion in which he set forth a finding of fact, based on the undisputed oral testimony of experts in education, sociology, psychology, psychiatry and anthropology (A. 340-341) that in "our Delaware society", segregation in education practiced by petitioners as agents of the state "itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated".

And the court below in the *Brown* case (No. 8) made the following Finding of Fact (R. 245-246):

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored chil-

> dren. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

The testimony of the expert witnesses in the cases now under consideration, the Opinion of the Chancellor in the Delaware case and the Finding of Fact by the lower court in the Kansas case are amply supported by scientific studies of recognized experts. A compilation of these materials was assembled and filed as an Appendix to the briefs in these cases on the first hearing. The observation of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 that public school children, being educated for citizenship, must be scrupulously protected in their constitutional rights, "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", while made in somewhat different context, appropriately describes the high public interest which these cases involve.

In sum, the statutes and constitutional provisions assailed in these cases must fall because they are contrary to this Court's basic premise that, as a matter of law, race is not an allowable basis of differentiation in governmental action; they are inconsistent with the broad prohibition of the Fifth and Fourteenth Amendments as defined by this Court; they are clearly within that category of racism in state action specifically prohibited by the *McLaurin* and *Sweatt* decisions.

II.

The statutory and constitutional provisions involved in these cases cannot be validated under any separate but equal concept.

The basic principles referred to in Point I above, we submit, control these cases, and except for the mistaken belief that the doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, is a correct expression of the meaning of the Fourteenth Amendment, these cases would present no difficult problem.

This Court announced the separate but equal doctrine in a transportation case, and proponents of segregation have relied upon it repeatedly as a justification for racial segregation as if "separate but equal" had become *in haec verba* an amendment to the Fourteenth Amendment, itself. Under that anomalous doctrine, it is said that racial differentiations in the enjoyment of rights protected by the Fourteenth Amendment are permitted as long as the segregated facilities provided for Negroes are substantially equal to those provided for other racial groups. In each case in this Court where a state scheme of racism has been deemed susceptible of rationalization under the separate but equal formula, it has been urged as a defense.

A careful reading of the cases, however, reveals that this doctrine has received only very limited and restricted application in the actual decisions of this Court, and even that support has been eroded by more recent decisions. See particularly *McLaurin* v. *Oklahoma State Regents; Sweatt* v. *Painter.* Whatever appeal the separate but equal doctrine might have had, it stands mirrored today as the faulty conception of an era dominated by provincialism, by intense emotionalism in race relations caused by local and temporary conditions and by the preaching of a doctrine of racial superiority that contradicted the basic concept upon which our society was founded. Twentieth century America, fighting racism at home and abroad, has rejected the race

views of *Plessy* v. *Ferguson* because we have come to the realization that such views obviously tend to preserve not the strength but the weaknesses of our heritage.

A. Racial Segregation Cannot Be Squared With the Rationale of the Early Cases Interpreting the Reach of the Fourteenth Amendment.

In the *Slaughter House Cases,* 16 Wall. 36—the first case decided under the Fourteenth Amendment—the Court, drawing on its knowledge of an almost contemporaneous event, recognized that the Fourteenth Amendment secured to Negroes full citizenship rights and prohibited any state action discriminating against them as a class on account of their race. Thus, addressing itself to the intent of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court said at pages 71 and 72:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

The real purpose of the equal protection clause was discussed in these terms at page 81:

> "In the light of the history of these amendments, and the pervading purpose of them, which we have

> already discussed, it is not difficult to give a meaning to this clause. *The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.*" (Emphasis supplied).

So convinced was the Court that the overriding purpose of the Fourteenth Amendment was to protect the Negro against discrimination that it declared further at page 81:

> "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

In *Strauder* v. *West Virginia,* 100 U. S. 303, the Court, on page 306, viewed the Fourteenth Amendment in the same light and stated that its enactment was aimed to secure for the Negro all the civil rights enjoyed by white persons:

> "It was in view of these considerations the 14th Amendment was framed and adopted. *It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons,* and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but *it denied to any State the power to withhold from them the equal protection of the laws,* and authorized Congress to enforce its provisions by appropriate legislation." (Emphasis supplied).

Clearly recognizing the need to construe the Amendment liberally in order to protect the Negro, the Court noted at page 307:

> "If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside)."

It was explicitly stated at pages 307, 308 that the Amendment prevented laws from distinguishing between colored and white persons:

> "What is this but declaring *that the law in the States shall be the same for the black as for the white;* that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." **(Emphasis supplied).**

Any distinction based upon race was understood as constituting a badge of inferiority, at page 308:

> "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race preju-

> dice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

There was no doubt that this new constitutional provision had changed the relationship between the federal government and the states so that the federal courts could and should now protect these new rights. At page 309 the Court said:

> "The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that, through prejudice, they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the National Government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the Amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

That law must not distinguish between colored and white persons was the thesis of all the early cases. *United States* v. *Cruikshank,* 92 U. S. 542, 554, 555; *Virginia* v. *Rives,* 100 U. S. 313; *Ex Parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370, 386; *Bush* v. *Kentucky,* 107 U. S. 110; *Civil Rights Cases,* 109 U. S. 3, 36, 43. As early as *Yick Wo* v. *Hopkins,* 118 U. S. 356, it became settled doctrine that the Fourteenth Amendment was a broad prohibition against state enforcement of racial differentiations or discrimination—a prohibition totally at war with any separate but equal notion. There can be no doubt, we submit, that, had the state regulation approved in *Plessy* v. *Fergu-*

son been before the Court that rendered the initial interpretations of the Fourteenth Amendment, the regulation would have been held a violation of the Federal Constitution.

B. The First Time the Question Came Before the Court, Racial Segregation In Transportation Was Specifically Disapproved.

In *Railroad Co.* v. *Brown*, 17 Wall. 445, the first case involving the validity of segregation to reach this Court after the adoption of the Fourteenth Amendment, segregation was struck down as an unlawful discrimination. While the Fourteenth Amendment was not before the Court, the decision in the *Brown* case was in line with the spirit of the new status that the Negro had gained under the Thirteenth, Fourteenth and Fifteenth Amendments.

The problem before the Court concerned the validity of the carrier's rules and regulations that sought to segregate its passengers because of race. The pertinent facts are described by the Court as follows at page 451:

> "In the enforcement of this regulation, the defendant in error, a person of color, having entered a car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons. This she refused to do, and this refusal resulted in her ejectment by force and with insult from the car she had first entered."

The Court characterized the railroad's defense that its practice of providing separate accommodations for Negroes was valid, as an ingenious attempt at evasion, at page 452:

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.
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> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the

> interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion, in legislating for a railroad corporation, to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of anyone an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—South as well as North—to transport, if paid for it, all persons whether white or black, who should desire transportation."

The Court stressed with particularity the fact that the discrimination prohibited was discrimination in the use of the cars, at pages 452-453:

> "It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road in the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."

The regulation that was struck down in the *Brown* case sought to accomplish exactly what was achieved under a state statute upheld subsequently in *Plessy* v. *Ferguson*—the segregation of Negro and white passengers. It is clear, therefore, that in this earlier decision the Court considered segregation *per se* discrimination and a denial of equality.

C. The Separate But Equal Doctrine Marked An Unwarranted Departure From the Main Stream of Constitutional Development and Permits the Frustration of the Very Purposes of The Fourteenth Amendment As Defined by This Court.

In *Plessy* v. *Ferguson,* this Court for the first time gave approval to state imposed racial distinctions as consistent with the purposes and meaning of the Fourteenth Amendment. The Court described the aims and purposes of the Fourteenth Amendment in the same manner as had the earlier cases, at page 543:

> ". . . its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states."

But these defined aims and purposes were now considered consistent with the imposition of legal distinctions based upon race. The Court said at 544, 551-552:

> "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.
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> * * *
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> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

And reasonableness of the regulation was found in established social usage, custom and tradition, at page 550:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In *Plessy*, through distortion of the concept of "social" rights as distinguished from "civil" rights, the right to civil equality as one of the purposes of the Fourteenth Amendment was given a restricted meaning wholly at variance with that of the earlier cases and the intent of the framers as defined by this Court. Indeed, civil rights, as defined by that Court, seem merely to encompass those rights attendant upon use of the legal process and protection against complete exclusion pursuant to state mandate. Race for the first time since the adoption of the Fourteenth Amendment was sanctioned as a constitutionally valid basis for state action, and reasonableness for the racial distinctions approved was found in the social customs, usages and traditions of a people only thirty-one years removed from a slave society.

Under this rationale the Court sought to square its approval of racial segregation with the *Slaughter House Cases, Strauder* v. *West Virginia* and the other precedents. It is clear, however, that the early cases interpreted the Fourteenth Amendment as encompassing that same category of rights which were involved in *Plessy* v. *Ferguson*—the right to be free of a racial differentiation imposed by the state in the exercise of any civil right. And the Court's attempt to distinguish *Railroad Co.* v. *Brown,* as a case of

exclusion, was the very argument that has been specifically rejected in the *Brown* case as a sophisticated effort to avoid the obvious implications of the Congressional requirement. Thus, the separate but equal doctrine is a rejection of the precedents and constitutes a break in the development of constitutional law under which the Fourteenth Amendment has been interpreted as a fundamental interdiction against state imposed differentiations and discriminations based upon color.

D. The Separate But Equal Doctrine Was Conceived in Error.

The separate but equal doctrine of *Plessy* v. *Ferguson*, we submit, has aided and supported efforts to nullify the Fourteenth Amendment's undoubted purpose—equal status for Negroes—as defined again and again by this Court. The fallacious and pernicious implications of the doctrine were evident to Justice Harlan and are set out in his dissenting opinion. It is clear today that the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order does not suffice to give constitutional validity to the state's action. What the doctrine has in fact accomplished is to deprive Negroes of the protection of the approved test of reasonable classifications which is available to everyone else who challenges legislative categories or distinctions of whatever kind.

1. The Dissenting Opinion of Justice Harlan in Plessy v. Ferguson.

Justice Harlan recognized and set down for history the purpose of segregation and the implications of the separate but equal doctrine and evidenced prophetic insight concerning the inevitable consequences of the Court's approval of racial segregation. He said at page 557: "The thing to accomplish was, under the guise of giving equal accommoda-

tions for whites and blacks to compel the latter to keep to themselves while traveling in railroad passenger coaches."

He realized at page 560, moreover, that the approved regulations supported the inferior caste thesis of *Scott* v. *Sandford*, 19 How. 393, supposedly eradicated by the Civil War Amendments: "But it seems that we have yet, in some of the states, a dominant race, a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, on the basis of race." And at page 562: "We boast of the freedom enjoyed by our people above all other people. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law."

While the majority opinion sought to rationalize its holding on the basis of the state's judgment that separation of races was conducive to public peace and order, Justice Harlan knew all too well that the seeds for continuing racial animosities had been planted. He said at pages 560-561:

> "The sure guaranty of peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned."

"Our Constitution", said Justice Harlan at 559, "is color-blind, and neither knows nor tolerates classes among citizens." It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy* v. *Ferguson*, that is in keeping with the scope and meaning of the Fourteenth Amendment as consistently defined by this Court both before and after *Plessy* v. *Ferguson*.

2. Custom, Usage and Tradition Rooted in the Slave Tradition Cannot Be the Constitutional Yardstick for Measuring State Action Under the Fourteenth Amendment.

The analysis by Justice Harlan of the bases for the majority opinion in *Plessy* v. *Ferguson* was adopted by this Court in *Chiles* v. *Chesapeake & Ohio Railroad Company,* 218 U. S. 71, 77, 78. There this Court cited *Plessy* v. *Ferguson* as authority for sustaining the validity of legislative distinctions based upon race and color alone.

The importance of this case is its clear recognition and understanding that in *Plessy* v. *Ferguson* this Court approved the enforcement of racial distinctions as reasonable because they are in accordance with established social usage, custom and tradition. The Court said at pages 77, 78:

> "It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people,' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of reasonableness of the regulations of a carrier, made for like purposes and to secure like results."

But the very purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established usages, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man. As we will demonstrate, post Civil War reestablishment of ante-bellum custom and usage, climaxed by the decision in *Plessy* v. *Ferguson,* reflected a constant effort to return the Negro to his pre-Thirteenth, Fourteenth Amendment inferior status.

When the Court employed the old usages, customs and traditions as the basis for determining the reasonableness of segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the Amendment, and made a travesty of the equal protection clause of the Fourteenth Amendment.

Here, again, the *Plessy* v. *Ferguson* decision is out of line with the modern holdings of this Court, for in a variety of cases involving the rights of Negroes it has constantly refused to regard custom and usage, however widespread, as determinative of reasonableness. This was true in *Smith* v. *Allwright,* of a deeply entrenched custom and usage of excluding Negroes from voting in the primaries. It was true in *Shelley* v. *Kraemer,* of a long standing custom excluding Negroes from the use and ownership of real property on the basis of race. In *Henderson* v. *United States,* a discriminatory practice of many years was held to violate the Interstate Commerce Act. In the *Sweatt* and *McLaurin* decisions, the Court broke a southern tradition of state-enforced racial distinctions in graduate and professional education—a custom almost as old as graduate and professional education, itself.

In each instance the custom and usage had persisted for generations and its durability was cited as grounds for its validity. If this were the only test, ours indeed would become a stagnant society. Even if there be some situations in which custom, usage and tradition may be considered in testing the reasonableness of governmental action, customs, traditions and usages rooted in slavery cannot be worthy of the constitutional sanction of this Court.

3. Preservation of Public Peace Cannot Justify Deprivation of Constitutional Rights.

The fallacy underlying *Plessy* v. *Ferguson* of justifying racially-discriminatory statutes as essential to the public peace and good order has been completely exposed by

Frederick W. Lehmann, a former Solicitor General of the United States, and Wells H. Blodgett in their Brief as *amici curiae* in *Buchanan* v. *Warley*, 245 U. S. 60. Their statements warrant repetition here:

> "The implication of the title of the ordinance is, that unless the white and colored people live in separate blocks, ill feeling will be engendered between them and conflicts will result and so it is assumed that a segregation of the races is necessary for the preservation of the public peace and the promotion of the general welfare. There is evidence in the record that prior to the enactment of the ordinance there were instances of colored people moving into white blocks and efforts by the white people to drive them out by violence. So to preserve the peace, the ordinance was enacted not to repress the lawless violence, but to give the sanction of the law to the motives which inspired it and to make the purpose of it lawful.
>
> "The population of Louisville numbers two hundred and fifty thousand, of whom about one-fifth are colored. The ordinance, almost upon its face, and clearly by the evidence submitted and the arguments offered in support of it is a discriminating enactment by the dominant majority against a minority who are held to be an inferior people. It cannot be justified by the recitals of the title, even if they are true. Many things may rouse a man's prejudice or stir him to anger, but he is not always to be humored in his wrath. The question may arise, 'Dost thou well to be angry?' " (*Brief Amici Curiae*, pp. 2 and 3).

Accepting this view, the Court in *Buchanan* v. *Warley* rejected the argument that a state could deny constitutional rights with impunity in its efforts to maintain the public peace:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be

> accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution'' (245 U. S. 60, 81).

Accord, *Morgan* v. *Virginia, supra; Monk* v. *City of Birmingham,* 185 F. 2d 859 (CA 5th 1950), *cert. denied,* 341 U. S. 940.

Thus, the bases upon which the separate but equal doctrine was approved in the *Plessy* v. *Ferguson* case have all been uprooted by subsequent decisions of this Court. All that remains is the naked doctrine itself, unsupported by reason, contrary to the intent of the framers, and out of tune with present notions of constitutional rights. Repudiation of the doctrine itself, we submit, is long overdue.

4. The Separate but Equal Doctrine Deprives Negroes of That Protection Which the Fourteenth Amendment Accords Under the General Classification Test.

One of the ironies of the separate but equal doctrine of *Plessy* v. *Ferguson* is that under it, the Fourteenth Amendment, the primary purpose of which was the protection of Negroes, is construed as encompassing a narrower area of protection for Negroes than for other persons under the general classification test.

Early in its history, the Fourteenth Amendment was construed as reaching not only state action based upon race and color, but also as prohibiting all unreasonable classifications and distinctions even though not racial in character. *Barbier* v. *Connolly,* 113 U. S. 27, seems to be the earliest case to adopt this concept of the Amendment. There the Court said on page 31:

> ''The Fourteenth Amendment . . . undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.''

Accord: *Minneapolis & St. Louis Ry. Co.* v. *Beckwith,* 129 U. S. 26, 28, 29; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *McPherson* v. *Blacker,* 146 U. S. 1, 39; *Yesler* v. *Board of Harbor Line Commissioners,* 146 U. S. 646, 655; *Giozza* v. *Tiernan,* 148 U. S. 657, 662; *Marchant* v. *Pennsylvania R. Co.,* 153 U. S. 380, 390; *Moore* v. *Missouri,* 159 U. S. 673, 678.

In effectuating the protection afforded by this secondary purpose, the Court has required the classification or distinction used be based upon some real or substantial difference pertinent to a valid legislative objective. *E.g., Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Truax* v. *Raich,* 239 U. S. 33; *Smith* v. *Cahoon,* 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535. See also *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, 186.

Justice Holmes in *Nixon* v. *Herndon,* 273 U. S. 536, 541, recognized and restated a long established and well settled judicial proposition when he described the Fourteenth Amendment's prohibition against unreasonable legislative classification as less rigidly proscriptive of state action than the Amendment's prohibition of color differentiation. There he concluded:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

But the separate but equal doctrine substitutes race for reasonableness as the constitutional test of classification. We submit, it would be a distortion of the purposes and intendment of the Fourteenth Amendment to deny to those persons for whose benefit that provision was primarily intended the same measure of protection afforded by a rule of construction evolved to reach the Amendment's subsidiary and secondary objectives. We urge this Court to

examine the segregation statutes in these cases to determine whether the statutes seek to serve a permissible legislative objective; and, if any permissible objective is found, whether color differentiation has pertinence to it. So examined, the constitutional provisions and statutes involved here disclose unmistakably their constitutional infirmity.

E. The Separate But Equal Doctrine Has Not Received Unqualified Approval in This Court.

Even while the separate but equal doctrine was evolving, this Court imposed limitations upon its applications. In *Buchanan* v. *Warley,* the Court, after reviewing the limited acceptance which the doctrine had received, concluded that its extension to approve state enforced segregation in housing was not permissible.

Ten years later in *Gong Lum* v. *Rice,* 275 U. S. 78, 85, 86, without any intervening development in the doctrine in this Court, sweeping language was used which gave the erroneous impression that this Court already had extended the application of the doctrine to the field of education. And in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, the doctrine is mentioned in passing as if its application to public education were well established. But, what Justice Day was careful to point out in *Buchanan* v. *Warley,* was true then and is true now—the separate but equal doctrine has never been extended by this Court beyond the field of transportation in any case where such extension was contested.

While the doctrine itself has not been specifically repudiated as a valid constitutional yardstick in the field of public education, in cases in which this Court has had to determine whether the state had performed its constitutional obligation to provide equal education opportunities—the question presented here—the separate but equal doctrine has never been used by this Court to sustain the validity of the state's separate school laws. *Missouri ex rel. Gaines* v. *Canada; Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter; McLaurin* v. *Oklahoma State Regents.*

Earlier educational cases, not concerned with equality, did not apply the doctrine. In *Cumming* v. *County Board of Education,* 175 U. S. 528, the question was explicitly beyond the scope of the decision rendered. In *Berea College* v. *Kentucky,* 211 U. S. 45, the question was reserved. In *Gong Lum* v. *Rice,* the separate but equal doctrine was not put in issue. Instead of challenging the validity of the Mississippi school segregation laws, the Chinese child merely objected to being classified as a Negro for public school purposes.

Even in the field of transportation, subsequent decisions have sapped the doctrine of vitality. *Henderson* v. *United States* in effect overruled *Chiles* v. *Chesapeake & Ohio Railway Co.,* 218 U. S. 71. See *Chance* v. *Lambeth,* 186 F. 2d 879 (CA 4th 1951), *cert. denied,* 341 U. S. 91. *Morgan* v. *Virginia* places persons traveling in interstate commerce beyond the thrust of state segregation statutes. Thus, the reach of the separate but equal doctrine approved in the *Plessy* case has now been so severely restricted and narrowed in scope that, it may be appropriately said of *Plessy* v. *Ferguson* as it was said of *Crowell* v. *Benson,* 285 U. S. 22, "one had supposed that the doctrine had earned a deserved repose." *Estep* v. *United States,* 327 U. S. 114, 142 (concurring opinion).

F. The Necessary Consequence of the Sweatt and McLaurin Decisions is Repudiation of the Separate But Equal Doctrine.

While *Sweatt* v. *Painter* and *McLaurin* v. *Oklahoma State Regents* were not in terms rejections of the separate but equal doctrine, their application in effect destroyed the practice of segregation with respect to state graduate and professional schools. *Wilson* v. *Board of Supervisors,* 92 F. Supp. 986 (E. D. La. 1950), *aff'd,* 340 U. S. 909; *Gray* v. *Board of Trustees of University of Tennessee,* 342 U. S. 517; *McKissick* v. *Carmichael,* 187 F. 2d 949 (CA 4th 1951), *cert. denied,* 341 U. S. 951; *Swanson* v. *University of Virginia,* Civil Action #30 (W. D. Va. 1950) unreported;

Payne v. *Board of Supervisors,* Civil Action #894 (E. D. La. 1952) unreported; *Foister* v. *Board of Supervisors,* Civil Action #937 (E. D. La. 1952) unreported; *Mitchell* v. *Board of Regents of University of Maryland,* Docket #16, Folio 126 (Baltimore City Court 1950) unreported.[1]

In the *Sweatt* case, the Court stated that, with members of the state's dominant racial groups excluded from the segregated law school which the state sought to require Sweatt to attend, "we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas." If this consideration is one of the controlling factors in determining substantial equality at the law school level, it is impossible for any segregated law school to be an equal law school. And pursuant to that decision one of the oldest and best state-supported segregated law schools in the country was found unequal and Negro applicants were ordered admitted to the University of North Carolina. *McKissick* v. *Carmichael.* Thus, substantial equality in professional education is "substantially equal" only if there is no racial segregation.

In the *McLaurin* case, the racial distinctions imposed in an effort to comply with the state's segregation laws were held to impair and inhibit ability to study, to exchange views with other students and, in general, to learn one's

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[1] Negroes are now attending state graduate and professional schools in West Virginia, Maryland, Arkansas, Delaware, Oklahoma, Kentucky, Texas, Missouri, North Carolina, Virginia, and Louisiana. See (Editorial Comment), THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952).

Negroes are also now attending private universities and colleges in Missouri, Georgia, Kentucky, Louisiana, Texas, Maryland, West Virginia, North Carolina, District of Columbia, and Virginia. See THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952); SOME PROGRESS IN ELIMINATION OF DISCRIMINATION IN HIGHER EDUCATION IN THE UNITED STATES, 19 J. NEG. EDUC. 4-5 (1950); LEE AND KRAMER, RACIAL INCLUSION IN CHURCH-RELATED COLLEGES IN THE SOUTH, 22 J. NEG. EDUC. 22 (1953); A NEW TREND IN PRIVATE COLLEGES, 6 NEW SOUTH 1 (1951).

profession. The state, therefore, was required to remove all restrictions and to treat McLaurin the same way as other students are treated. Consequently these decisions are a repudiation of the separate but equal doctrine.

III.

Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the Fourteenth Amendment.

The history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and an inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery. Inevitably, segregation in its operation and effect has meant inequality consistent only with the belief that the people segregated are inferior and not worthy, or capable, of enjoying the facilities set apart for the dominant group.

Segregation originated as a part of an effort to build a social order in which the Negro would be placed in a status as close as possible to that he had held before the Civil War. The separate but equal doctrine furnished a base from which those who sought to nullify the Thirteenth, Fourteenth and Fifteenth Amendments were permitted to operate in relative security. While this must have been apparent at the end of the last century, the doctrine has become beclouded with so much fiction that it becomes important to consider the matter in historical context to restore a proper view of its meaning and import.

A. The Status of the Negro, Slave and Free, Prior to the Civil War.

One of the basic assumptions of the slave system was the Negro's inherent inferiority.[2] As the invention of the

[2] For an illuminating discussion of these assumptions, see JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, 1876-1910, IN ESSAYS IN SOUTHERN HISTORY PRESENTED TO JOSEPH GREGOIRE DEROULHAC HAMILTON, GREEN ED., 124-156 (1949).

cotton gin rendered slavery essential to the maintenance of the plantation economy in the South, a body of pseudo-scientific thought developed in passionate defense of slavery, premised on the Negro's unfitness for freedom and equality.[3] Thus, the Negro's inferiority with respect to brain capacity, lung activity and countless other physiological attributes was purportedly established by some of the South's most respected scientists.[4] In all relationships between the two races the Negro's place was that of an inferior, for it was claimed that any other relationship status would automatically degrade the white man.[5]

This concept of the Negro as an inferior fit only for slavery was complicated by the presence of several hundred thousand Negroes, who although not slaves, could not be described as free men.[6] In order that they would not

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[3] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 243 (1935); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION 5-15 (1930).

[4] See VAN EVRIE, NEGROES AND NEGRO SLAVERY 120 ff, 122 ff, 214 ff (1861); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACE, 2 DEBOW, THE INDUSTRIAL RESOURCES, ETC., OF THE SOUTHERN AND WESTERN STATES 315-329 (1852); NOTT, TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES (1866); VAN EVRIE, NEGROES AND NEGRO "SLAVERY"; THE FIRST AN INFERIOR RACE—THE LATTER ITS NORMAL CONDITION (1853); VAN EVRIE, SUBGENATION: THE THEORY OF THE NORMAL RELATION OF THE RACES (1864); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACES, 9 DEBOW'S REVIEW 64-69 (1851); CARTWRIGHT, ESSAYS, BEING INDUCTIONS DRAWN FROM THE BACONIAN PHILOSOPHY PROVING THE TRUTH OF THE BIBLE AND THE JUSTICE AND BENEVOLENCE OF THE DECREE DOOMING CANAAN TO BE A SERVANT OF SERVANTS (1843).

[5] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 242 ff (1935); THE PRO-SLAVERY ARGUMENT, especially HARPER'S MEMOIR ON SLAVERY, pp. 26-98; and SIMMS, THE MORALS OF SLAVERY, pp. 175-275 (1835); JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2 at 135.

[6] See FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 213-238 (1947).

constitute a threat to the slave regime, free Negroes were denied the full rights and privileges of citizens. They enjoyed no equality in the courts, their right to assemble was denied, their movements were proscribed, and education was withheld.[7] Their plight, in consequence of these proscriptions, invited the unfavorable comparison of them with slaves and confirmed the views of many that Negroes could not profit by freedom. They were regarded by the white society as the "very drones and pests of society," pariahs of the land, and an incubus on the body politic.[8] Even this Court, in *Scott* v. *Sanford,* recognized this substantial body of opinion to the effect that free Negroes had no rights that a white man was bound to respect.

The few privileges that free Negroes enjoyed were being constantly whittled away in the early nineteenth century. By 1836, free Negroes were denied the ballot in every southern state and in many states outside the South.[9] In some states, they were denied residence on penalty of enslavement; and in some, they were banned from the mechanical trades because of the economic pressure upon the white artisans.[10] Before the outbreak of the Civil War, the movement to reenslave free Negroes was under way in several states in the South.[11]

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[7] FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860 59-120 (1943).

[8] DEW, REVIEW OF THE DEBATES IN THE VIRGINIA LEGISLATURE OF 1831-1832, THE PRO-SLAVERY ARGUMENT, 422 ff (1853); JENKINS, *op. cit. supra,* n. 5, 246.

[9] WEEKS, HISTORY OF NEGRO SUFFRAGE IN THE SOUTH, 9 POL. SCI. Q. 671-703 (1894); PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 87 ff (1918); SHUGG, NEGRO VOTING IN THE ANTE-BELLUM SOUTH, 21 J. NEG. HIST. 357-364 (1936).

[10] VA. HOUSE J. 84 (1831-1832); VA. LAWS 1831, p. 107; CHANNING, HISTORY OF THE UNITED STATES 136-137 (1921); GREENE and WOODSON, THE NEGRO WAGE EARNER 15 ff (1930).

[11] FRANKLIN, THE ENSLAVEMENT OF FREE-NEGROES IN NORTH CAROLINA, 29 J. NEG. HIST. 401-428 (1944).

This ante-bellum view of the inferiority of the Negro persisted after the Civil War among those who already regarded the newly freed slaves as simply augmenting the group of free Negroes who had been regarded as "the most ignorant . . . vicious, improverished, and degraded population of this country." [12]

B. The Post War Struggle.

The slave system had supported and sustained a plantation economy under which 1,000 families received approximately $50,000,000 a year with the remaining 600,000 families receiving about $60,000,000 per annum. The perfection of that economy meant the ruthless destruction of the small independent white farmer who was either bought out or driven back to the poorer lands—the slaveholders controlled the destiny of both the slave and the poor whites.[13] Slaves were not only farmers and unskilled laborers but were trained by their masters as skilled artisans. Thus, slave labor was in formidable competition with white labor at every level, and the latter was the more expendable for it did not represent property and investment. Only a few white supervisory persons were needed to insure the successful operation of the plantation system.

After the Civil War, the independent white farmer entered into cotton cultivation and took over the lands of the now impracticable large plantations. Within a few years the independent farmer was engaged in 40% of the cotton cultivation, and by 1910 this percentage had risen to 67%.[14] To the poor white Southerner the new Negro,

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[12] See JENKINS, *op. cit. supra*, n. 5, 246.

[13] WESTON, THE PROGRESS OF SLAVERY (1859); HELPER, THE IMPENDING CRISIS OF THE SOUTH (1863); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION, *op. cit. supra*, n. 2; PHILLIPS, AMERICAN NEGRO SLAVERY, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY-PLANTATION AND FRONTIER DOCUMENTS (1910-11).

[14] VANCE, HUMAN FACTORS IN COTTON CULTIVATION (1926); SIMKINS, THE TILLMAN MOVEMENT IN SOUTH CAROLINA (1926).

as a skilled farmer and artisan in a free competitive economy, loomed as an even greater economic menace than he had been under the slave system. They became firm advocates of the Negro's subjugation to insure their own economic well being.[15]

The plantation aristocracy sought to regain their economic and political pre-eminence by rebuilding the pre-war social structure on the philosophy of the Negro's inferiority. This group found that they could build a new economic structure based upon a depressed labor market of poor whites and Negroes. Thus, to the aristocracy, too, the Negro's subjugation was an economic advantage.

The mutual concern of these two groups of white Southerners for the subjugation of the Negro gave them a common basis for unity in irreconcilable resistance to the revolutionary change in the Negro's status which the Civil War Amendments were designed to effect. Their attitude towards the Fourteenth Amendment is best described by a Mississippi editor who said that the southern states were not prepared "to become parties to their own degradation." [16] There were white southerners, however, as there always had been, who sought to build a society which would respect and dignify the rights of the Freedmen. But this group was in the minority and southern sentiment in bitter opposition to Negro equality prevailed. Accordingly, as a temporary expedient, even as an army of occupation has been necessary recently in Germany and Japan to prevent lawlessness by irreconcilables and the recrudescense of totalitarianism, so Union forces were needed during Reconstruction to maintain order and to make possible the development of a more democratic way of life in the states recently in rebellion.

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[15] For discussion of this whole development see JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION (1930).

[16] COULTER, THE SOUTH DURING RECONSTRUCTION 434 (1947).

The Thirteenth, Fourteenth and Fifteenth Amendments and the Reconstruction effort, implemented by those in the South who were coming to accept the new concept of the Negro as a free man on full terms of equality, could have led to a society free of racism. The possibility of the extensive establishment and expansion of mixed schools was real at this stage. It was discussed in every southern state, and in most states serious consideration was given to the proposal to establish them.[17]

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[17] KNIGHT, PUBLIC EDUCATION IN THE SOUTH 320 (1922). See also Part II *infra*, at pages 142-157.

There were interracial colleges, academies, and tributary grammar schools in the South established and maintained largely by philanthropic societies and individuals from the North. Although they were predominantly Negro institutions, in the Reconstruction period and later, institutions such as Fisk University in Nashville, Tennessee, and Talladega College in Alabama usually had some white students. In the last quarter of the nineteenth century most of the teachers in these institutions were white. For accounts of co-racial education at Juppa Institute and Nat School in Alabama, Piedmont College in Georgia, Saluda Institute in North Carolina and in other southern schools, see BROWNLEE, NEW DAY ASCENDING 98-110 (1946).

The effect of these institutions in keeping alive the possibility of Negroes and whites living and learning together on the basis of complete equality was pointed out by one of the South's most distinguished men of letters, George W. Cable. "In these institutions," he said:

> ". . . there is a complete ignoring of those race distinctions in the enjoyment of common public rights so religiously enforced on every side beyond their borders; and yet none of those unnamable disasters have come to or from them which the advocates of these onerous public distinctions and separations predict and dread. On scores of Southern hilltops these schools stand out almost totally without companions or competitors in their peculiar field, so many refutations, visible and complete, of the idea that any interest requires the colored American citizen to be limited in any of the civil rights that would be his without question if the same man were white."

CABLE, THE NEGRO QUESTION 19 (1890).

C. The Compromise of 1877 and the Abandonment of Reconstruction.

The return to power of the southern irreconcilables was finally made possible by rapproachement between northern and southern economic interests culminating in the compromise of 1877. In the North, control of the Republican Party passed to those who believed that the protection and expansion of their economic power could best be served by political conciliation of the southern irreconcilables, rather than by unswerving insistence upon human equality and the rights guaranteed by the post war Amendments. In the 1870's those forces that held fast to the notion of the Negro's preordained inferiority returned to power in state after state, and it is significant that one of the first measures adopted was to require segregated schools on a permanent basis in disregard of the Fourteenth Amendment.[18]

In 1877, out of the exigencies of a close and contested election, came a bargain between the Republican Party and the southern leaders of the Democratic Party which assured President Hayes' election, led to the withdrawal of federal troops from the non-redeemed states and left the South free to solve the Negro problem without apparent

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[18] Georgia, where the reconstruction government was especially short-lived, passed a law in 1870 making it mandatory for district school officials to "make all necessary arrangements for the instruction of the white and colored youth . . . in separate schools. They shall provide the same facilities for each . . . but the children of the white and colored races shall not be taught together in any sub-district of the state." Ga. Laws 1870, p. 56. As soon as they were redeemed, the other southern states enacted similar legislation providing for segregated schools and gradually the states incorporated the provision into their constitutions. See, for example, Ark. Laws 1873, p. 423; THE JOURNAL OF THE TEXAS CONSTITUTIONAL CONVENTION 1875, pp. 608-616; Miss. Laws 1878, p. 103; STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 170-176 (1908). When South Carolina and Lousiana conservatives secured control of their governments in 1877, they immediately repealed the laws providing for mixed schools and established separate institutions for white and colored youth.

fear of federal intervention. This agreement preserved the pragmatic and material ends of Reconstruction at the expense of the enforcement of not only the Fourteenth Amendment but the Fifteenth Amendment as well.[19] For it brought in its wake peonage and disfranchisement as well as segregation and other denials of equal protection. Although there is grave danger in oversimplification of the complexities of history, on reflection it seems clear that more profoundly than constitutional amendments and wordy statutes, the Compromise of 1877 shaped the future of four million freedmen and their progeny for generations to come. For the road to freedom and equality, which had seemed sure and open in 1868, was now to be securely blocked and barred by a maze of restrictions and limitations proclaimed as essential to a way of life.

D. Consequences of the 1877 Compromise.

Once the South was left to its own devices, the militant irreconcilables quickly seized or consolidated power. Laws and practices designed to achieve rigid segregation and the disfranchisement of the Negro came on in increasing numbers and harshness.

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[19] The explanation for this reversal of national policy in 1877 and the abandonment of an experiment that had enlisted national support and deeply aroused the emotions and hopes has been sought in many quarters. The most commonly accepted and often repeated story is that authorized spokesmen of Hayes met representatives of the Southern Democrats at the Wormley House in Washington in late February, 1877, and promised the withdrawal of troops and abandonment of the Negro in return for the support of southern Congressmen for Hayes against the Democratic candidate Samuel J. Tilden in the contested Presidential election. Recent investigation has demonstrated that the so-called "Wormley House Bargain", though offered by southern participants as the explanation, is not the full relevation of the complex and elaborate maneuvering which finally led to the agreement. See WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) for an elaborate and detailed explanation of the compromise agreement.

The policy of the southern states was to destroy the political power of the Negro so that he could never seriously challenge the order that was being established. By the poll tax, the Grandfather Clause, the white primary, gerrymandering, the complicated election procedures, and by unabated intimidation and threats of violence, the Negro was stripped of effective political participation.[20]

The final blow to the political respectability of the Negro came with disfranchisement in the final decade of the Nineteenth Century and the early years of the present century when the discriminatory provisions were written into the state constitutions.[21] That problem the Court dealt with during the next forty years from *Guinn* v. *United States,* 238 U. S. 347 to *Terry* v. *Adams,* 345 U. S. 461.

A movement to repeal the Fourteenth and Fifteenth Amendments shows the extremity to which the irreconcilables were willing to go to make certain that the Negro remained in an inferior position. At the Mississippi Constitutional Convention of 1890, a special committee studied the matter and concluded that "the white people only are capable of conducting and maintaining the government" and that the Negro race, "even if its people were educated, being wholly unequal to such responsibility," should be excluded from the franchise. It, therefore, resolved that the "true and only efficient remedy for the great and important difficulties" that would ensue from Negro participation lay

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[20] In 1890, Judge J. Chrisman of Mississippi could say that there had not been a full vote and a fair count in his state since 1875, that they had preserved the ascendancy of the whites by revolutionary methods. In plain words, he continued, "We have been stuffing the ballot boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for election was about to rot down." Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 58 (1951).

[21] KEY, SOUTHERN POLITICS IN STATE AND NATION 539-550 (1949); WOODWARD, ORIGINS OF THE NEW SOUTH 205, 263 (1951).

in the "repeal of the Fifteenth Amendment . . . whereby such restrictions and limitations may be put upon Negro suffrage as may be necessary and proper for the maintenance of good and stable government . . ." [22]

A delegate to the Virginia Constitutional Convention of 1901-1902 submitted a resolution calling for a repeal of the Fifteenth Amendment because it is wrong, "in that it proceeds on the theory that the two races are equally competent of free government." [23] Senator Edward Carmack of Tennessee gave notice in 1903 that he would bring in a bill to repeal the Amendments.[24] The movement, though unsuccessful, clearly illustrates the temper of the white South.

Having consigned the Negro to a permanently inferior caste status, racist spokesmen, with unabashed boldness, set forth views regarding the Negro's unassimilability and uneducability even more pernicious than those held by the old South. Ben Tillman, the leader of South Carolina, declared that a Negro should not have the same treatment as a white man, "for the simple reason that God Almighty made him colored and did not make him white." He lamented the end of slavery which reversed the process of improving the Negro and "inoculated him with the virus of

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[22] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION, 1890, 303-304. Tillman, Vardaman, and other Southern leaders frequently called for the repeal of the Amendments. Tillman believed "that such a formal declaration of surrender in the struggle to give the Negro political and civil equality would confirm the black man in his inferior position and pave the way for greater harmony between the races." SIMKINS, PITCHFORK BEN TILLMAN 395 (1944). Vardaman called for repeal as a recognition that the Negro "was physically, mentally, morally, racially, and eternally inferior to the white man." See KIRWAN, REVOLT OF THE REDNECKS (1951).

[23] JOURNAL OF THE VIRGINIA CONSTITUTIONAL CONVENTION, 1901-1902, pp. 47-48.

[24] JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2, 136 ff.

equality."[25] These views were expressed many times in the disfranchising conventions toward the end of the century.[26] Nor were the politicians alone in uttering such views about the Negro. Drawing on the theory of evolution as expressed by Darwin and the theory of progress developed by Spencer, persons of scholarly pretension speeded the work of justifying an inferior status for the Negro.[27] Alfred H. Stone, having the reputation of a widely respected scholar in Mississippi, declared that the "Negro was an inferior type of man with predominantly African customs and character traits whom no amount of education or improvement of environmental conditions could ever elevate to as high a scale in the human species as the white man." As late as 1910, E. H. Randle in his

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[25] SIMKINS, PITCHFORK BEN TILLMAN 395, 399 (1944). Tillman's Mississippi counterpart, J. K. Vardaman, was equally vigorous in denouncing the Negro. He described the Negro as an "industrial stumbling block, a political ulcer, a social scab, 'a lazy, lying, lustful animal which no conceivable amount of training can transform into a tolerable citizen.'" Quoted in KIRWAN, *op. cit. supra,* n. 22, at 146.

[26] See, for example, Alabama Constitutional Convention, 1901, Official Proceedings, Vol. I, p. 12, Vol. II, pp. 2710-2711, 2713, 2719, 2782, 2785-2786, 2793; Journal of the South Carolina Convention, 1895, pp. 443-472; Journal of the Mississippi Constitutional Convention, 1890, pp. 10, 303, 701-702; Journal of the Louisiana Constitutional Convention, 1898, pp. 9-10.

[27] See ROWLAND, A MISSISSIPPI VIEW OF RELATIONS IN THE SOUTH, A Paper (1903); HERBERT, et al., WHY THE SOLID SOUTH? OR RECONSTRUCTION AND ITS RESULTS (1890); BRUCE, THE PLANTATION NEGRO AS A FREEMAN: OBSERVATIONS ON HIS CHARACTER, CONDITION AND PROSPECTS IN VIRGINIA (1889); STONE, STUDIES IN THE AMERICAN RACE PROBLEM (1908); CARROLL, THE NEGRO A BEAST (1908); CARROLL, THE TEMPTER OF EVE, OR THE CRIMINALITY OF MAN'S SOCIAL, POLITICAL, AND RELIGIOUS EQUALITY WITH THE NEGRO, AND THE AMALGAMATION TO WHICH THESE CRIMES INEVITABLY LEAD 286 ff (1902); PAGE, THE NEGRO: THE SOUTHERNER'S PROBLEM 126 ff (1904); RANDLE, CHARACTERISTICS OF THE SOUTHERN NEGRO 51 ff (1910).

Characteristics of the Southern Negro declared that "the first important thing to remember in judging the Negro was that his mental capacity was inferior to that of the white man." [28]

Such was the real philosophy behind the late 19th Century segregation laws—an essential part of the whole racist complex. Controlling economic and political interests in the South were convinced that the Negro's subjugation was essential to their survival, and the Court in *Plessy* v. *Ferguson* had ruled that such subjugation through public authority was sanctioned by the Constitution. This is the overriding vice of *Plessy* v. *Ferguson.* For without the sanction of *Plessy* v. *Ferguson,* archaic and provincial notions of racial superiority could not have injured and disfigured an entire region for so long a time. The full force and effect of the protection afforded by the Fourteenth Amendment was effectively blunted by the vigorous efforts of the proponents of the concept that the Negro was inferior. This nullification was effectuated in all aspects of Negro life in the South, particularly in the field of education, by the exercise of state power.

As the invention of the cotton gin stilled the voices of Southern Abolitionists, *Plessy* v. *Ferguson* chilled the development in the South of opinion conducive to the acceptance of Negroes on the basis of equality because those of the white South desiring to afford Negroes the equalitarian status which the Civil War Amendments had hoped to achieve were barred by state law from acting in accordance with their beliefs. In this connection, it is significant that the Populist movement flourished for a

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[28] Quoted in JOHNSON, IDEOLOGY OF WHITE SUPREMACY, op. cit., *supra,* n. 2, p. 151. That the South was not alone in these views is clearly shown by Logan's study of the Northern press between 1877 and 1901. See LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877-1901, cc. 9-10 (unpub. ms., to be pub. early in 1954 by the Dial Press).

short period during the 1890's and threatened to take over political control of the South through a coalition of the poor Negro and poor white farmers.[29] This movement was completely smashed and since *Plessy* v. *Ferguson* no similar phenomenon has taken hold.

Without the "constitutional" sanction which *Plessy* v. *Ferguson* affords, racial segregation could not have become entrenched in the South, and individuals and local communities would have been free to maintain public school systems in conformity with the underlying purposes of the Fourteenth Amendment by providing education without racial distinctions. The doctrine of *Plessy* v. *Ferguson* was essential to the successful maintenance of a racial caste system in the United States. Efforts toward the elimination of race discrimination are jeopardized as long as the separate but equal doctrine endures. But for this doctrine we could more confidently assert that ours is a democratic society based upon a belief in individual equality.

E. Nullification of the Rights Guaranteed by the Fourteenth Amendment and the Reestablishment of the Negro's Pre-Civil War Inferior Status Fully Realized.

Before the end of the century, even without repeal of the Fourteenth and Fifteenth Amendments, those forces committed to a perpetuation of the slave concept of the Negro had realized their goal. They had defied the federal government, threatened the white defenders of equal rights, had used intimidation and violence against the Negro and had effectively smashed a political movement designed to unite the Negro and the poor whites. Provisions requir-

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[29] See CARLETON, THE CONSERVATIVE SOUTH—A POLITICAL MYTH, 22 Va. Q. Rev. 179-192 (1946); LEWINSON, RACE, CLASS AND PARTY (1932); MOON, THE BALANCE OF POWER—THE NEGRO VOTE, c. 4 (1948).

ing segregated schools were written into state constitutions and statutes. Negroes had been driven from participation in political affairs, and a veritable maze of Jim Crow laws had been erected to "keep the Negro in his place" (of inferiority), all with impunity. There was no longer any need to pretend either that Negroes were getting an education equal to the whites or were entitled to it.

In the Constitutional Convention of Virginia, 1901-1902, Senator Carter Glass, in explaining a resolution requiring that state funds be used to maintain primary schools for four months before being used for establishment of higher grades, explained that "white people of the black sections of Virginia should be permitted to tax themselves, and after a certain point had been passed which would safeguard the poorer classes of those communities, divert that fund to the exclusive use of white children. . . ." [30]

Senator Vardaman thought it was folly to make such pretenses. In Mississippi there were too many people to educate and not enough money to go around, he felt. The state, he insisted, should not spend as much on the education of Negroes as it was doing. "There is no use multiplying words about it," he said in 1899, "the negro will not be permitted to rise above the station he now fills." Money spent on his education was, therefore, a "positive unkindness" to him. "It simply renders him unfit for the work which the white man has prescribed and which he will be forced to perform." [31] Vardaman's scholarly compatriot, Dunbar Rowland, seconded these views in 1902, when he said that "thoughtful men in the South were beginning to lose faith in the power of education which had been heretofore given to uplift the negro," and to complain of the

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[30] REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, State of Virginia, Richmond, June 12, 1901-June 26, 1902, p. 1677 (1906).

[31] KIRWAN, *op. cit. supra*, n. 22, at 145-146.

burden thus placed upon the people of the South in their poverty.[32]

The views of Tillman, Vardaman, Stone, Rowland, Glass and others were largely a justification for what had been done by the time they uttered them. The South had succeeded in setting up the machinery by which it was hoped to retain the Negro in an inferior status. Through separate, inferior schools, through an elaborate system of humiliating Jim Crow, and through effective disfranchisement of the Negro, the exclusive enjoyment of first-class citizenship had now become the sole possession of white persons.

And, finally, the Negro was effectively restored to an inferior position through laws and through practices, now dignified as "custom and tradition." Moreover, this relationship—of an inferior Negro and superior white status—established through laws, practice, custom and tradition, was even more rigidly enforced than in the ante-bellum era. As one historian has aptly stated:

> "Whether by state law or local law, or by the more pervasive coercion of sovereign white opinion, 'the Negro's place' was gradually defined—in the courts, schools, and libraries, in parks, theaters, hotels, and residential districts, in hospitals, insane

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[32] JOHNSON, IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2, at 153. That this pattern is not an antiquated doctrine but a modern view may be seen in the current expenditure per pupil in average daily attendance 1949-1950: In Alabama, $130.09 was spent for whites against $92.69 for Negroes; in Arkansas $123.60 for whites and $73.03 for Negroes; in Florida $196.42 for whites, $136.71 for Negroes; in Georgia, $145.15 for whites and $79.73 for Negroes; in Maryland, $217.41 for whites and $198.76 for Negroes; in Mississippi, $122.93 for whites and $32.55 for Negroes; in North Carolina, $148.21 for whites and $122.90 for Negroes; in South Carolina, $154.62 for whites and $79.82 for Negroes; in the District of Columbia, $289.68 for whites and $220.74 for Negroes. BLOSE AND JARACZ, BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES, 1948-50, TABLE 43, "STATISTICS OF STATE SCHOOL SYSTEMS, 1949-50" (1952).

> asylums—everywhere including on sidewalks and in cemeteries. When complete, the new codes of White Supremacy were vastly more complex than the ante-bellum slave codes or the Black Codes of 1865-1866, and, if anything, they were stronger and more rigidly enforced." [33]

This is the historic background against which the validity of the separate but equal doctrine must be tested. History reveals it as a part of an overriding purpose to defeat the aims of the Thirteenth, Fourteenth and Fifteenth Amendments. Segregation was designed to insure inequality—to discriminate on account of race and color—and the separate but equal doctrine accommodated the Constitution to that purpose. Separate but equal is a legal fiction. There never was and never will be any separate equality. Our Constitution cannot be used to sustain ideologies and practices which we as a people abhor.

That the Constitution is color blind is our dedicated belief. We submit that this Court cannot sustain these school segregation laws under any separate but equal concept unless it is willing to accept as truths the racist notions of the perpetuators of segregation and to repeat the tragic error of the Plessy court supporting those who would nullify the Fourteenth Amendment and the basic tenet of our way of life which it incorporates. We respectfully suggest that it is the obligation of this Court to correct that error by holding that these laws and constitutional provisions which seek to condition educational opportunities on the basis of race and color are historic aberrations and are inconsistent with the federal Constitution and cannot stand. The separate but equal doctrine of *Plessy* v. *Ferguson* should now be overruled.

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[33] WOODWARD, ORIGINS OF THE NEW SOUTH 212 (1951).

CONCLUSION TO PART ONE

In short, our answer to Question No. 3 proposed by the Court is that it is within the judicial power, whatever the evidence concerning Questions 2(a) and (b) may disclose, to hold that segregated schools violate the Fourteenth Amendment, and for the reasons hereinabove stated that such power should now be exercised.

WHEREFORE, it is respectfully submitted that constitutional provisions and statutes involved in these cases are invalid and should be struck down.

PART TWO

This portion of the brief is directed to questions one and two propounded by the Court:

> *"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?*
>
> *"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment*
>
> *"(a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or*
>
> *"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"*

I.

The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation.

Research by political scientists and historians, specialists on the period between 1820 and 1900, and other experts in the field, as well as independent research by attorneys in these cases, convinces us that: (1) there is ample evidence that the Congress which submitted and the states which ratified the Fourteenth Amendment contemplated and understood that the Amendment would deprive the states of the power to impose any racial distinctions in determining when,

where, and how its citizens would enjoy the various civil rights afforded by the states; (2) in so far as views of undeveloped public education in the 1860's can be applied to universal compulsory education in the 1950's, the right to public school education was one of the civil rights with respect to which the states were deprived of the power to impose racial distinctions; (3) while the framers of the Fourteenth Amendment clearly intended that Congress should have the power to enforce the provisions of the Amendment, they also clearly intended that the Amendment would be prohibitory on the states without Congressional action.

The historic background of the Fourteenth Amendment and the legislative history of its adoption show clearly that the framers intended that the Amendment would deprive the states of power to make any racial distinction in the enjoyment of civil rights. It is also clear that the statutes involved in these cases impose racial distinctions which the framers of the Amendment and others concerned with its adoption understood to be beyond the power of a state to enforce.

The framers of the Fourteenth Amendment were men who came to the 39th Congress with a well defined background of Abolitionist doctrine dedicated to the equalitarian principles of real and complete equality for all men. Congressional debates during this period must be read with an understanding of this background along with the actual legal and political status of the Negro at the end of the Civil War. This background gives an understanding of the determination of the framers of the Fourteenth Amendment to change the inferior legal and political status of Negroes and to give them the full protection of the Federal Government in the enjoyment of complete and real equality in all civil rights.[34]

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[34] tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 185, 186 (1951).

A. The Era Prior to the Civil War Was Marked By Determined Efforts to Secure Recognition of the Principle of Complete and Real Equality For All Men Within the Existing Constitutional Framework of Our Government.

The men who wrote the Fourteenth Amendment were themselves products of a gigantic antislavery crusade which, in turn, was an expression of the great humanitarian reform movement of the Age of Enlightenment. This philosophy upon which the Abolitionists had taken their stand had been adequately summed up in Jefferson's basic proposition "that all men are created equal" and "are endowed by their Creator with certain unalienable Rights." To this philosophy they adhered with an almost fanatic devotion and an unswerving determination to obliterate any obstructions which stood in the way of its fulfillment. In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have surprised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion.

The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in the light of this revolutionary idealism that the questions propounded by this Court can best be answered.

In the beginning, the basic and immediate concern of the Abolitionists was necessarily slavery itself. The total question of removing all other discriminatory relationships after the abolition of slavery was at first a matter for the future. As a consequence, the philosophy of equality was in a state of continuous development from 1830 through the time of the passage of the Fourteenth Amendment. However, the ultimate objective was always clearly in mind—absolute and complete equality for all Americans.

During the pre-Civil War decades, the antislavery movement here and there began to develop special meaning and significance in the legal concept of "privileges and immunities," the concept of "due process" and the most important concept of all for these cases, "equal protection of the laws." In the immediately succeeding sections, we shall show how the development of these ideas culminated in a firm intention to obliterate all class distinction as a part of the destruction of a caste society in America.

The development of each of these conceptions was often ragged and uneven with much overlapping: what was "equal protection" to one was "due process" or "privilege and immunity" to another. However, regardless of the phrase used, the basic tenet of all was the uniform belief that Negroes were citizens and, as citizens, freedom from discrimination was their right. To them "discrimination" included all forms of racial distinctions.

Equality Under Law

One tool developed to secure full standing for Negroes was the concept of equal protection of the laws. It was one thing, and a very important one, to declare as a political abstraction that "all men are created equal," and quite another to attach concrete rights to this state of equality. The Declaration of Independence did the former. The latter was Charles Sumner's outstanding contribution to American law.

The great abstraction of the Declaration of Independence was the central rallying point for the Abolitionists. When slavery was the evil to be attacked, no more was needed. But as some of the New England states became progressively more committed to abolition, the focus of interest shifted from slavery itself to the status and rights of the free Negro. In the Massachusetts legislature in the 1840's, Henry Wilson, manufacturer, Abolitionist, and later United States Senator and Vice President, led

the fight against discrimination, with "equality" as his rallying cry.[35] One Wilson measure adopted by the Massachusetts Legislature in 1845 gave the right to recover damages to any person "unlawfully excluded" from the Massachusetts public schools.[36]

Boston thereafter established a segregated school for Negro children, the legality of which was challenged in *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198 (1849). Charles Sumner, who later was to play such an important role in the Congress that formulated the Fourteenth Amendment, was counsel for Roberts. His oral argument, which the Abolitionists widely circulated, is one of the landmarks in the crystallization of the equalitarian concept.

This case was technically an action for damages under the Wilson Act. However, Sumner attacked segregation in public schools on the broader ground that segregation violated the Massachusetts Constitution which provided: "All men are created free and equal", and it was from this base that he launched his attack.

> "Of Equality I shall speak, not as a sentiment, but as a principle. . . . * * * Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenital effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles." [37]

"Equality before the law" [38] was the formula he employed. He traced the equalitarian theory from the eighteenth

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[35] For an account of Wilson's struggles against anti-miscegenation laws, against jim-crow transportation and jim-crow education, see NASON, LIFE OF HENRY WILSON 48 *et seq.* (1876).

[36] Massachusetts Act 1845, § 214.

[37] 2 WORKS OF CHARLES SUMNER 330, 335-336 (1875). The entire argument is reprinted at 327 *et seq.*

[38] *Id.* at 327, 330-331.

century French philosophers through the French Revolution into the language of the French Revolutionary Constitution of 1791,[39] the Constitution of February 1793,[40] the Constitution of June 1793 [41] and the Charter of Louis Phillipe.[42] Equality before the law, i.e., equality of rights, was the real meaning of the Massachusetts constitutional provision. Before it "all . . . distinctions disappear":

> "He may be poor, weak, humble, or black—he may be Caucasian, Jewish, Indian or Ethiopian race —he may be of French, German, English or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he French, German, English or Irish; he is a MAN, the equal of all his fellowmen." [43]

Hence, he urged, separate schools are illegal.

The Massachusetts court rejected Sumner's argument and refused to grant relief. Subsequent thereto, in 1853, the Legislature of Massachusetts, after careful consideration of the problem involving hearings and reports, amended the Wilson statute by providing, among other things, that in determining the qualifications of school children in public schools in Massachusetts "no distinction was to be made on account of the race, color or religious opinions of the appellant or scholar." [44]

The Committee on Education of the House of Representatives in its report recommending adoption of this bill carefully considered the arguments for and against the measure and concluded:

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[39] "Men are born and continue free and *equal in their rights.*" *Id.* at 337.

[40] "The law ought to be equal for all." *Id.* at 338.

[41] "All men are equal by nature *and before the law.*" *Id.* at 339.

[42] "Frenchmen are *equal before the law. . . .*" *Ibid.*

[43] *Id.* at 341-342.

[44] General Laws of Mass. c. 256, § 1 (1855).

> "Your committee believe, in the words of another, that 'The only security we can have for a healthy and efficient system of public instruction rests in the deep interest and vigilant care with which the more intelligent watch over the welfare of the schools. This only will secure competent teachers, indefatigable exertion, and a high standard of excellence; and where the colored children are mingled up with the mass of their more favored fellows, they will partake of the advantages of this watchful oversight. Shut out and separated, they are sure to be neglected and to experience all the evils of an isolated and despised class. One of the great merits of our system of public instruction is the fusion of all classes which it produces. From a childhood which shares the same bench and sports there can hardly arise a manhood of aristocratic prejudice or separate castes and classes. Our common-school system suits our institutions, promotes the feeling of brotherhood, and the habit of republican equality. To debar the colored race from these advantages, even if we still secured to them equal educational results, is a sore injustice and wrong, and is taking the surest means of perpetuating a prejudice that should be depreciated and discountenanced by all intelligent and Christian men." [45]

Thus, the argument and theories advanced by Sumner, although rejected by the Supreme Court of Massachusetts, finally became incorporated into the law of the State of Massachusetts. More important, however, is the fact that the argument of Sumner was widely distributed throughout the country during the period immediately preceding the consideration of the Fourteenth Amendment.[46] As a consequence it became a fundamental article of faith among

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[45] Report of Committee on Education to House of Representatives, Commonwealth of Massachusetts, March 17, 1855.

[46] Among those active in distributing the argument was SALMON P. Chase. DIARY AND CORRESPONDENCE OF SALMON P. CHASE, Chase to Sumner, Dec. 14,1849, in 2 Ann. Rep. Am. Hist. Ass'n. 188 (1902).

the Radical Republicans that from a constitutional standpoint racial segregation was incompatible with constitutional guarantees of equal protection.[47]

The analysis of the available materials covering the period from 1830 to 1860, while important to this point, is too voluminous to be included in the argument at this point. We have, therefore, placed this analysis in a supplement at the end of the brief. The analysis of these materials compels the following historical conclusions:

1. To the Abolitionists, equality was an absolute—not a relative—concept which comprehended that no legal recognition be given to racial distinctions of any kind. The notion that any state could require racial segregation was totally incompatible with this doctrine.

2. The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have a specific significance to opponents of slavery in the United States. Proponents of slavery knew and understood what that significance was, even as they disagreed with these theories. Members of the Congress that proposed the Amendment, shared this knowledge.

3. These radical Abolitionists, who had been in the minority prior to the Civil War, gained control of the Republican party in Congress during the course of the war and thus emerged in a dominant position in the Congress which was to write the Fourteenth Amendment. Ten of the members of the Joint Committee of Fifteen were men who had definite antislavery backgrounds and two others had likewise opposed slavery.

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[47] See, for example, Sumner resolution offered Congress on December 4, 1865 which called for "The organization of an educational system for the equal benefit of all without distinction of color or race." Cong. Globe, 39th Cong., 1st Sess. 2 (1865-1866).

4. When the Joint Committee of Fifteen translated into constitutional provisions the equalitarian concepts held and widely bruited about in the struggle against slavery, it used the traditional phrases that had all become freighted with equalitarian meaning in its widest sense: "equal protection", "privileges and immunities" and "due process."

In these respects history buttresses and gives particular content to the recent admonition of this Court that "[w]hatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race and color." *Shelley* v. *Kraemer,* 334 U. S. 1, 23.

Despite the high principles and dedication of the leaders of the Abolitionist movement, their program ran into repeated roadblocks from both individual groups and state machinery. The movement was not only blocked in so far as the abolition of slavery itself was concerned, but was met by an ever increasing tendency on the part of all the southern states and some northern states to gradually cut down on the rights of free Negroes and to bring their status nearer and nearer to that of slaves. This counter-movement culminated in the decision of the Supreme Court in the *Dred Scott* case (*Scott* v. *Sandford,* 19 How. 393) that no person of the "African race, whether free or not" could enjoy, under the Constitution of the United States, any right or protection whatsoever. All Negroes were thereby left, by the principles of that case, to the absolute, unrestrained power of the several states.

B. The Movement For Complete Equality Reached Its Successful Culmination in the Civil War and the Fourteenth Amendment.

The onset of the Civil War marked the turning point of the Abolitionists' drive to achieve absolute equality for all Americans. The first great success came on January 1,

1863, when President Lincoln's Emancipation Proclamation freed all slaves in those areas in insurrection against the United States. Obviously this was far from a complete victory. The doctrines enunciated by Chief Justice Taney in the *Dred Scott* case were still unqualified and remained as a part of the "constitutional law" of the time.

In February, 1865, the Abolitionist-dominated 38th Congress adopted and submitted to the states what was to become the Thirteenth Amendment to the Constitution. However, the Radical Republicans in Congress were intensely aware that the abolition of slavery constituted only a partial attainment of their goal of complete political and legal equality for Negroes. They had already determined as early as the spring and summer of 1862 to strike at the objective of federal statutory and constitutional guarantees for Negro equality. As yet, however, their thinking had not succeeded in distilling clearly a series of specifically defined legal and political objectives which they proposed to write into federal law and Constitution.

It should be observed in passing that their reason for this obviously was not necessarily pure Abolitionist idealism. They were in part motivated by hard practical considerations of Republican Party ascendency, and the fear that a restored South, in which Negroes were not given complete legal and political equality, would fall into the hands of a pre-war conservative white political leadership which would threaten the national political control of the Radical Republicans themselves. Thus their idealistic, social philosophy and their hard practical considerations of party interest dovetailed very nicely.[48]

It was to require the events of 1865-66, most notably the attempt to restore political rule in the South and the attempt to impose an inferior non-citizenship status upon the Negro in the restored southern states, to make clear to

[48] tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 117-119 (1951).

the Radical Republicans their new constitutional objectives and the means they would seek to obtain it.

C. The Principle of Absolute and Complete Equality Began to Be Translated Into Federal Law as Early as 1862.

In 1862 Congress addressed itself to an immediate problem over which it had authority. In debating the bill which was to abolish slavery in the District of Columbia, Representative Bingham said: "The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law".[49] Representative Fessenden concluded: "If I do not mistake, it is quite apparent that when this bill shall be put on its final passage it will proclaim liberty to the slaves within this District. These men—for God created them men, though man has used them as goods and chattels—slaves—these men and women and children will, when the President of the United States signs this bill, be translated . . . [to a] condition in which they are invested with the rights of freemen, upon which none can trespass with impunity; since over the person of the free black as well as the free white man there is thrown the broad shield of the nation's majesty." [50] The bill was enacted into law.[51]

Simultaneously Congress discontinued the application of the Black Codes of Maryland and Virginia to the District of Columbia.[52]

Between the time of the Emancipation Proclamation in 1863 and the formulation of the Fourteenth Amendment, Congress took several forward steps to secure complete equality for the class so recently freed. These steps came in the form of particular solutions to particular problems.

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[49] Cong. Globe, 37th Cong., 2d Sess. 1639 (1862).

[50] *Id.* at 1642.

[51] 12 Stat. 376 (1862).

[52] 12 Stat. 407 (1862).

To this Congress (38th), the most immediate problem was one which fell under their glance daily, the problem of transportation in the District of Columbia. Congressional treatment of this problem is of significance because it reveals the early determination of the Radical Republicans to prohibit racial segregation.

In 1863, Congress amended the charter of the Alexandria and Washington Railroad to eliminate the practice of putting white and Negro passengers in separate parts of the street cars.[53] When, in 1864, the Washington and Georgetown street car company attempted to put colored passengers in cars separate from those of the white passengers, Senator Sumner denounced the practice in the Senate and set forth on his crusade to prohibit all racial distinctions by first eliminating street car segregation in the District.[54] In 1865, he carried to passage a law applicable to all District carriers that "no person shall be excluded from any car on account of color."[55]

The debate on the street car bill covered the entire issue of segregation in transportation. Those who supported prohibition of segregation did so on the ground that any such separation was a denial of equality itself. Senator Wilson denounced the "Jim Crow car," declaring it to be "in defiance of decency."[56] Senator Sumner persuaded his brethen to accept the Massachusetts view, saying that in Massachusetts, "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the Commonwealth."[57] Thus, when Congress in 1866 framed the Fourteenth Amendment, it did so against a background of Congressional determination that segregation in transportation was unequal, unjust, and was "in defiance of decency."

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[53] 12 Stat. 805 (1863).

[54] Cong. Globe, 38th Cong., 1st Sess. 553, 817 (1864).

[55] 13 Stat. 536, 537 (1865).

[56] Cong. Globe, 38th Cong., 1st Sess. 3132, 3133 (1864).

[57] *Id.* at 1158.

D. From the Beginning the Thirty-Ninth Congress Was Determined to Eliminate Race Distinctions From American Law.

The 39th Congress which was to propose the Fourteenth Amendment convened in December 1865 with the realization that, although slavery had been abolished, the overall objective, the complete legal and political equality for all men had not been realized. This was dramatically emphasized by the infamous Black Codes being enacted throughout the southern states. These Black Codes had the single purpose of providing additional legislative sanction to maintain the inferior status for all Negroes which had been judicially decreed in the opinion in the case of *Scott* v. *Sandford,* 19 How. 393.

The Black Codes, while they grudgingly admitted that Negroes were no longer slaves, nonetheless used the states' power to impose and maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. These codes thus followed the legal pattern of the ante-bellum slave codes. Like their slavery forerunners, these codes compelled Negroes to work for arbitrarily limited pay; restricted their mobility; forbade them, among other things, to carry firearms; forbade their testimony in a court against any white man; and highly significant here, contained innumerable provisions for segregation on carriers and in public places. In at least three states these codes prohibited Negroes from attending the public schools provided for white children.[58]

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[58] See the summary in Senator Wilson's speech before Congress, Cong. Globe, 39th Cong., 1st Sess. 39-40, 589 (1866); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906); MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29-44 (1880).

It was this inferior caste position which the Radical Republicans in Congress were determined to destroy. They were equally determined that by federal statutory or constitutional means, or both, Congress would not only invalidate the existing Black Codes but would proscribe any and all future attempts to enforce governmentally-imposed caste distinctions.

Congress was well aware of the fact that to take this step involved a veritable revolution in federal-state relations. A number of Senators and Representatives in the 39th Congress, by speech and resolution, made it eminently clear that they aimed at nothing less than the total destruction of all hierarchy, oligarchy and class rule in the southern states. One of the more notable resolutions of this kind was that of Senator Charles Sumner, introduced on December 4, 1865, at the opening of the session. This resolution asserted that no state formerly declared to be in rebellion was to be allowed to resume its relation to the Union until "the complete reestablishment of loyalty . . ." and:

> "The complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens, so that there shall be no denial of rights on account of color or race; but justice shall be impartial, and all shall be equal before the law."

Another requirement of Sumner's resolution called for:

> "The organization of an educational system for the equal benefit of all without distinction of color or race."[59]

Sumner thus recognized the close relationship between the destruction of the southern ruling class and the elimination of segregation in the educational system.

Representative Jehu Baker of Illinois introduced a similar resolution in the House of Representatives, which read in part as follows:

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[59] Cong. Globe, 39th Cong., 1st Sess. 2 (1865-1866).

"Whereas class rule and aristocratic principles of government have burdened well nigh all Europe with enormous public debts and standing armies, which press as a grievous incubus on the people, absorbing their substance, impeding their culture, and impairing their happiness; and whereas the class rule and aristocratic element of slaveholding which found a place in our Republic has proved itself, in like manne, hurtful to our people . . . Therefore,

"*Resolved*, (as the sense of this House,) That once for all we should have done with class rule and aristocracy as a privileged power before the law in this nation, no matter where or in what form they may appear; and that, in restoring the normal relations of the States lately in rebellion, it is the high and sacred duty of the Representatives of the people to proceed upon the true, as distinguished from the false, democratic principle, and to realize and secure the largest attainable liberty to the whole people of the Republic, irrespective of class or race."[60]

There were numerous other resolutions and speeches expressing similar sentiments. All of the resolutions were referred to the Joint Committee on Reconstruction and are a part of the background of that committee's work in the framing of the Fourteenth Amendment.

These expressions of principle were started toward statutory fruition by Senator Trumbull's Bill to enlarge the powers of the Freedmen's Bureau. The debates which followed the introduction of his Senate Bill No. 60 are of particular interest because they make it clear that a large number of the Radical Republicans regarded the destruction of segregation in the school districts of the southern states as a highly desirable legislative objective. What followed amounted to a forthright assault on the idea that there could be racial segregation in the public schools.

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[60] Cong. Globe, 39th Cong. 1st Sess. 69 (1865-1866).

Representative Hubbard of Connecticut expressed the broad pattern of thinking of which this bill was a part:

> "The words, caste, race, color, ever unknown to the Constitution, . . . are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill.
>
> "The era is dawning when it will be a reproach to talk in scorn about the distinctions of race or color. Our country is, and must be, cosmopolitan. . . .
>
> "It is in vain that we talk about race, caste, or color. . . ." [61]

Likewise, Representative Rousseau of Kentucky stated:

> ". . . Here are four school-houses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates." [62]

Representative Dawson of Pennsylvania recognized that the supporters of the bill:

> ". . . hold that the white and black race are equal. . . . Their children are to attend the same schools with white children, and to sit side by side with them. . . ." [63]

Of more importance was S.61 "A Bill to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Vindication." This bill, though introduced through Senator Trumbull in his capacity as Chairman of the Judiciary Committee, was in fact a measure sponsored by the entire Radical Republican majority.

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[61] *Id.* at 630.

[62] *Id.* at App. 71.

[63] *Id.* at 541.

The bill forbade any "discrimination in civil rights or immunities" among "the people of the United States on account of race, color, or previous condition of slavery". It provided that all persons should have "full and equal benefits of all laws" for the security of their persons and their property.

In a lengthy speech, Senator Trumbull defended the wisdom and constitutionality of this bill in detail. The Thirteenth Amendment, he argued, made the bill both constitutional and necessary.

> "Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited."[64]

Senator Trumbull's argument precipitated a lengthy debate on the constitutional issues. Opponents of the measure, conceding that Congress had the power under the Thirteenth Amendment to assure freedom of Negroes, denied that Congress had the power to endow Negroes with citizenship and civil rights. To sustain their position they pointed to the fact that Negroes who were freed prior to the Emancipation Proclamation were not treated as citizens and under the authority of the *Dred Scott* case could not be citizens.[65]

In reply, Trumbull advanced the additional constitutional argument that, once slavery was abolished, the naturalization clause of the Constitution provided Congress with the power to endow Negroes with the citizenship the *Dred Scott* case had held they could not otherwise enjoy. Trumbull thus adopted the position of Chief Justice Taney in

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[64] *Id.* at 474.

[65] See statements of Senators Van Winkle of West Virginia and Saulsbury of Delaware. *Id.* at 475 ff.

the *Dred Scott* case that the power to confer citizenship was vested in the federal, not the state government.

Another major area of controversy with respect to the bill was as to its scope. Time and again the Democrats and the more conservative Republicans in the Senate asserted that the bill would invalidate every state law which provided for racial segregation, or provided a different rule for persons of different races.[66] For example, there was the charge of Senator Cowan, a Republican of Pennsylvania, who said:

> "Now, as I understand the meaning . . . of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous."[67]

Senator Howard in reply gave the Conservatives no comfort:

> "I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights . . . there is to be hereafter

[66] *Id.* at 500 ff.

[67] *Id.* at 500.

> no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else. . . . There is no invasion of the legitimate rights of the States." [68]

But, perhaps the best answer of all to these assertions of the sweeping character of the bill was given by Senator Morrill of Vermont, a member of the Joint Committee of Fifteen:

> "The Senator from Kentucky tells us that the proposition [federal guarantee of civil rights] is revolutionary, . . . I admit that this species of legislation is absolutely revoluntionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grant results of four years of war?" [69]

It is highly significant that Senator Morrill was not only a member of the Joint Committee of Fifteen, even then engaged in drafting the Fourteenth Amendment, but that he later was to insist that the Fourteenth Amendment prohibited separate but equal provisions in state school legislation.

After two full days of debate, the Senate passed the Trumbull bill by a vote of 33 to 12.

The only rational inference to be drawn from the legislative history of the Trumbull bill in the Senate is that the great majority of that body was determined to bar the states from using their power to impose or maintain racial distinctions. The same majority was of the opinion that the federal government had constitutional authority so to delimit such action by the state.

In the House, the Conservatives pointed out forcefully that the text of the bill presented would destroy all

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[68] *Id.* at 504.

[69] *Id.* at 570.

limitations on federal power over state legislation and would likewise destroy all state legislative and judicial provisions making distinctions against Negroes. Representative Rogers observed:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the soveriegn domain of a State . . . then, by parity of reasoning, it has a right to enter the domain of that State and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise. . . ."[70]

In a somewhat disingenous attempt to deal with the argument of the Conservatives, Representative Wilson of Iowa, chairman of the House Judiciary Committee, argued vaguely that the bill would not have the effect of destroying all legislation discriminating on the basis of race.[71] Nevertheless Wilson broadly defined the term civil rights as used in the bill as being "the natural rights of man." Moreover, he observed that "immunities" secured "to citizens of the United States equality in the exemptions of the law."[72]

At this point, Representative Bingham of Ohio, who had become converted to the Conservatives' constitutional power argument, made a notable address to the House. While admitting that perhaps Congress was at that time without constitutional authority to enact so sweeping a bill, he said it was nevertheless true that the bill as it stood was as sweeping as was charged by the Conservatives.

Representative Bingham then made it preeminently clear that he entirely approved of the sweeping objectives of the

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[70] *Id.* at 1121.

[71] *Id.* at 1117.

[72] *Ibid.*

bill as it came from the Senate. His willingness to accept any modification of the bill was *solely* on the grounds of an overwhelming present constitutional objection which he himself was even then in the process of curing with a proposal for a constitutional amendment. He said:

> "If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I might say here, without the least fear of contradiction, that there is scarcely a State in this Union which does not, by its Constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights."[73]

Bingham then insisted that he believed that all discriminatory legislation should be wiped out by amending the Constitution.

> "The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."[74]

Bingham's prestige as a leader of the Radical Republican majority obliged Wilson to accept the Ohioan's interpretation. Consequently, the bill was returned to the Judiciary Committee and amended to eliminate the sweeping phrase "there shall be no discrimination in civil rights and immunities." Wilson no doubt comforted himself with the fact that even as amended the language of the bill was

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[73] *Id.* at 1291.

[74] *Id.* at 1294.

still revolutionary. At any rate, the Conservatives were still convinced that the bill invalidated state racial segregation laws. With considerable force, they argued that the phrase "the inhabitants of every state" . . . shall have the rights to full and equal benefits of all laws and proceedings for the "security of persons and property . . ." was properly to be broadly interpreted. In fact, Senator Davis of Kentucky had this to say:

> ". . . [T]his measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' . . .
>
> But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment. . . ." [75]

Significantly, there was no attempt to reply to this interpretation of the amended bill.

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[75] *Id.* at App. 183.

The bill in its amended form was adopted by Congress and vetoed by President Johnson.

Representative Lawrence, who spoke in favor of overriding President Johnson's veto said:

> "This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of 'some class,' or 'some race,' or 'of the least favored class,' or 'of the most favored class,' or of a particular complexion, for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice."[76]

He also said:

> ". . . distinctions created by nature of sex, age, insanity, etc., are recognized as modifying conditions and privileges, but mere race or color, as among citizens never can [be]."[77]

Numerous newspapers also thought the bill destroyed all segregation in schools, theatres, churches, public vehicles and the like.[78] Flack said of the bill:

> "Many [Congressmen] believed that the negro would be entitled to sit on juries, to attend the same schools, etc., since, if the States undertook to legislate on those matters, it might be claimed that he was denied the equal rights and privileges accorded to white men. It does not appear that all of these contentions were specifically contradicted.
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[76] *Id.* at 1836.

[77] *Id.* at 1835.

[78] New York Herald, March 29 and April 10, 1866: Commercial March 30, 1866; National Intelligencer, April 16, 1866 and May 16, 1866. There were a number of suits against local segregation laws banning Negroes from theatres, omnibuses, etc., McPherson's Scrap Book, The Civil Rights Bill, pp. 110 ff. None of these suits appear to have involved school segregation laws.

> It would seem reasonable to suppose that if the bill should prove to be constitutional that these rights could not be legally denied them." [79]
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> ". . . many of the leading papers of the country, including some of the principal Republican papers, regarded the Civil Rights Bill as a limitation of the powers of the States, and as a step towards centralization, in that it interfered with the regulation of local affairs which had hitherto been regulated by state and local authorities or by custom. This opinion was held in the North as well as in the South. There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc." [80]
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> "What the papers gave as their opinion must necessarily have been the opinion of large numbers of people. There is much evidence to substantiate this conclusion, for almost immediately after the passage of the bill over the President's veto, efforts were made by the negroes to secure these rights." [81]

The following generalizations are pertinent to the relationship of the Civil Rights Act (S. 61 as amended) to the problem of segregation in schools and the Fourteenth Amendment:

> 1. As originally drafted, the Act contained a phrase "there shall be no discrimination in civil rights and immunities among the inhabitants of any state . . ." This was so broad in scope that most Senators and Representatives believed that it would have the effect of destroying entirely all state legis-

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[79] FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 40 (1908).

[80] *Id.* at 45.

[81] *Ibid.*

tion which distinguished or classified in any manner on the basis of race. School segregation laws, statutes establishing unequal penalties in criminal codes, laws banning Negroes from juries, all alike would have become invalid as against the federal statute.

2. A great majority of the Republicans—the men who formulated the Fourteenth Amendment—had no objection to a bill which went this far. Men like Rogers, Kerr and Cowan objected to the bill on the ground that it would end all caste legislation, including segregated schools, and this was the view of the Senate. None of the bill's supporters in the House, except Wilson, denied that the bill had that effect.

3. The Bingham amendment was finally adopted in the House which struck out the "no discrimination" clause, simply because a majority of the members of the House believed that so sweeping a measure could not be justified under the Constitution as it stood. They accepted Bingham's argument that the proper remedy for removing racial distinctions and classifications in the states was a new amendment to the Constitution.

4. The logic of the Bingham constitutional objections aside, the persuasiveness of his technical objection to the Trumbull bill was immeasurably enhanced by the fact that several days before his motion to amend the Civil Rights Bill, Bingham had in fact proposed to the House, on behalf of the Joint Committee, a constitutional amendment by the terms of which his constitutional objections to the Trumbull bill were obviated. That measure, H. R. 63, with some significant changes intended to underscore the prohibition on state governmental action with the

addition of the citizenship clause became the Fourteenth Amendment.[82]

5. The law as finally enacted enumerated certain rights which Trumbull and other Radicals had felt were inseparably connected with the status of freedom. However, there is no evidence that even after the modification of the bill, the enumeration in the bill was considered to exclude rights not mentioned. Kerr, Rogers, Cowan, Grimes and other conservatives still insisted that the bill, even in its final form, banned segregation laws. The phrase "the inhabitants of every race . . . shall have the right . . . to full and equal benefit of all laws and proceedings for the security of persons and property" still stood in the bill and was susceptible of broad interpretation.

6. Finally, it may be observed that a majority of both Houses of Congress were ready to go beyond the provisions of the Civil Rights Act. Congressmen as diverse in their views as John A. Bingham and Henry J. Raymond, a moderate Republican and editor of the New York Times, united in proposing a constitutional amendment which would remove doubts as to the ability of Congress to destroy all state legislation discriminating and segregating on the basis of race. The forthcoming amendment, at all odds, was to set at rest all doubts as to the power of Congress to abolish all state laws making any racial distinctions or classifications.

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[82] "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 (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 61 (Kendrick ed. 1914).

The Framers of the Fourteenth Amendment

While Congress was engaged in the passage of the Civil Rights Act, a powerful congressional committee was even then wrestling with the problem of drafting a constitutional amendment which they hoped would definitely destroy all class and caste legislation in the United States. This committee was the now famous Joint Committee of Fifteen, which the two houses of Congress had established by Joint Resolution in December, 1865, to "inquire into the conditions of the states which formed the so-called Confederate States of America and report whether any or all of them were entitled to representation in Congress." It is extremely important for the purpose of this brief to observe that the Joint Committee of Fifteen was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition, the equalitarianism which has been set forth earlier in this brief.

Section 1 of the Fourteenth Amendment, and particularly the equal protection clause, is pecularily the product of this group, plus Senators Sumner, Wilson and Trumbull.[83]

Co-chairmen of the Commitee were Representative Thaddeus Stevens of Pennsylvania and Senator William P. Fessenden of Maine.

Stevens was virtually dictator of the House. It was his dedicated belief that the Negro must be immediately elevated to a position of unconditional, legal, economic, political and social equality; and to this end he was determined to destroy every legal and political barrier that stood in

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[83] Kelly and Harbison, The American Constitution, Its Origin and Development 460-463 (1948); Boudin, Truth and Fiction About the Fourteenth Amendment, 16 N. Y. U. L. Q. Rev. 19 (1938); Frank and Munro, The Original Understanding of "Equal Protection of the Laws", 50 Col. L. Rev. 131, 141 (1950).

the way of his goal.[84] Obviously, any constitutional amendment affecting the Negro would very heavily reflect his point of view.

Stevens believed that the law could not permit any distinctions between men because of their race. It was his understanding of the first section of the Fourteenth Amendment that: ". . . where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality . . ." [85] He believed that it was up to Congress to repudiate ". . . the whole doctrine of the legal superiority of families or races," [85a] and that under the Amendment, ". . . no distinction would be tolerated in this purified Republic but what arose from merit and conduct." [86]

Senator Fessenden undoubtedly held moderate views on the Reconstruction and, these views probably accounted for his selection as Co-chairman of the Joint Committee. Although Fessenden hoped that the Republican Party would work successfully with President Johnson, he broke with Johnson on the Civil Rights Act, which he supported with conviction. He was a staunch champion of the Fourteenth Amendment. Fessenden believed that all distinctions in civil rights based upon race must be swept away, and he

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[84] See for example, Stevens' speech attacking the "doctrine of the legal superiority of families or races" and denouncing the idea that "this is a white man's government." Cong. Globe, 39th Cong., 1st Sess. 75 (1865). "Sir," he said on this occasion, "this doctrine of a white man's Government is as atrocious as the infamous sentiment that damned the late Chief Justice to everlasting fame; and, I fear, to everlasting fire." See also similar observations on Stevens in BOWERS, THE TRAGIC ERA (1929) and WOODBURN, THE LIFE OF THADDEUS STEVENS (1913).

[85] Cong. Globe, 39th Cong., 1st Sess. 1063 (1866).

[85a] *Id.* at 74.

[86] *Id.* at 3148.

was in favor of excluding the southern states from any representation in Congress until this end was assured.[87]

His son reports that the essence of his views was "all civil and political distinctions on account of race or color [would] be inoperative and void. . . ." [88]

Senator James W. Grimes, Republican of Iowa, was a Moderate and a close friend of Fessenden.[89] While he was governor of Iowa, prior to his election to the Senate the state constitution was revised to provide schools free and open to all children.[90] He insisted upon free schools open to all,[91] and Lewellen, who analyzed Grimes' political ideas, concluded that—

> "Special legislation, whether for individual or class, was opposed by Grimes as contrary 'to the true theory of a Republican government' and as the 'source of great corruption.' Although he sympathized with the newly freed Negroes after the Civil War, he opposed any attempt to make them wards of the Federal government. They had been made citizens and had been given the right to vote; there was no reason in the world why a law should be passed 'applicable to colored people' and not to white people. While his ideas on the Negro question were colored by his radical opinions on the slavery question his opposition to race legislation would probably have been practically as firm upon any other subject." [92]

Senator Ira Harris of New York, one of the least vocal members of the Committee of Fifteen, was a close friend

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[87] KENDRICK, *op. cit. supra* n. 82, at 172-177; 6 DICTIONARY OF AMERICAN BIOGRAPHY 349-350 (1931).

[88] 2 FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 36 (1931).

[89] KENDRICK, *op. cit. supra* n. 82, at 190-191.

[90] 7 DICTIONARY OF AMERICAN BIOGRAPHY 632 (1931).

[91] *Ibid.*; SALTER, LIFE OF JAMES W. GRIMES, c. 3 (1876).

[92] LEWELLEN, POLITICAL IDEAS OF JAMES W. GRIMES 42 IOWA HIST. & POL. 339, 347 (1944).

of Charles Sumner,[93] and "acted with the radicals in all matters pertaining to reconstruction." [94] His explicit views on segregation are unascertained.[95] He was, however, so closely allied to the insiders on the Committee who considered race and color an indefensible basis for making legal distinctions,[96] that it is safe to conclude that he espoused, or at least acquiesced in, this viewpoint.

Senator George H. Williams, an Oregon Republican and former Douglas Democrat, claimed authorship of the First Reconstruction Act of 1867, originally called the Military Reconstruction Bill, which he introduced in the Senate on February 4, 1867.[97] In commenting upon this bill he said:

> "I will say that in preparing this bill, I had no desire to oppress or injure the people of the South, but my sole purpose was to provide a system by which all classes would be protected in life, liberty, and property . . ." [98]

His views on segregation are also unascertained.[99] It should be noted, however, that there is no record of his ever lending his voice or his votes to any law providing segregation based upon race or color.

Senator Jacob H. Howard of Michigan was clearly in the vanguard of that group which worked to secure full

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[93] 8 DICTIONARY OF AMERICAN BIOGRAPHY 310 (1932).

[94] KENDRICK, *op. cit. supra* n. 82, at 195.

[95] FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION OF THE LAWS, 50 COL. L. REV. 131, 142 (1950).

[96] *Ibid.*

[97] KENDRICK, *op. cit. supra* n. 82, at 191; Williams, *Six Years in the United States Senate*, Daily Oregonian, Dec. 3, 10, 1905.

[98] CHRISTENSEN, THE GRAND OLD MAN OF OREGON: THE LIFE OF GEORGE H. WILLIAMS 26 (1939).

[99] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

equality for Negroes.[100] He was clear and definite in his interpretation of the Civil Rights Act of 1866 and the Fourteenth Amendment. He said after the passage of the former that "in respect of all civil rights, there is to be hereafter no distinction between the white race and the black race."[101] In explaining the intention of the Joint Committee during discussion of the joint resolution to propose what was to become the Fourteenth Amendment, he said:

> "He desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as [Senator Doolittle of Wisconsin] who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters."[102]

In another speech, while acting for Senator Fessenden as floor leader for the Amendment, Howard interpreted Section 1 as follows:

> "The last two clauses of first section . . . disable a state from depriving . . . any person . . . of life, liberty or property without due process of law, or from denying to him the equal protection of the laws of the state. This abolishes all class legislation and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States . . .[103]

The evidence conclusively establishes that Howard's interpretation of the equal protection clause precluded any

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[100] KENDRICK, *op. cit. supra* n. 82, at 192.

[101] FRANK AND MUNRO, *op. cit. supra* n. 83, at 140.

[102] Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).

[103] *Id.* at 2766.

use whatever of color as a basis for legal distinctions.[104]

Senator Reverdy Johnson, Democrat of Maryland, was attorney for the defense in *Dred Scott* v. *Sandford.*[105] George I. Curtis, one of Scott's attorneys, credited Johnson with being the major influence in shaping the decision.[106] Where segregation was concerned, Johnson was not entirely consistent or predictable.

In 1864 he supported the motion of Senator Charles Sumner that the Washington Railroad end the exclusion of persons of color.[107] During the debate upon Sumner's motion, Johnson said:

> "It may be convenient, because it meets with the public wish or with the public taste of both classes, the white and the black, that there should be cars in which the white men and ladies are to travel, designated for that purpose, and cars in which the black men and black women are to travel, designated for that purpose. But that is a matter to be decided as between these two classes. There is no more right to exclude a black man from a car designated for the transportation of white persons than there is a right to refuse to transport in a car designated for black persons white men; and I do not suppose that anybody will contend . . . that there exists any power in the company to exclude white men from a car because the company have appropriated that car for the general transportation of black passengers.[108]

Two years later, Johnson said:

> ". . . as slavery has been abolished in the several States, those who were before slaves are now citizens of the United States, standing . . . upon the same condi-

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[104] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[105] 19 How. 393.

[106] 10 DICTIONARY OF AMERICAN BIOGRAPHY 113 (1933).

[107] WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 507 (1877).

[108] Cong. Globe, 38th Cong., 1st Sess. 1156 (1864).

> tion, therefore, with the white citizens. If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason [is] equally applicable to the white man as to the black man. . . .'' [109]

Thus it appears that he understood that the granting of citizenship rights to Negroes meant that racial distinctions could no longer be imposed by law.

Representative John A. Bingham of Ohio, a member of the committee who has been described as the "Madison of the first section of the Fourteenth Amendment'' [110] and undoubtedly its author, was a strong and fervent Abolitionist, classified with those whose views of equal protection "precluded any use whatsoever of color as a basis of legal distinctions.'' [111]

While the Fourteenth Amendment was pending, Representative Bingham took the view that state constitutions which barred segregated schools were "in accordance with the spirit and letter of the Constitution of the United States . . . [if] the utterance of Jefferson ever meant anything . . . it meant precisely that when he declared for equal and exact justice. . . .'' [112]

Representative George Boutwell of Massachusetts, was a hard, practical politician rather than an idealist. He was how-

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[109] Cong. Globe, 39th Cong., 1st Sess. 372-374 (1865-1866).

[110] Dissent of Mr. Justice Black in Adamson v. California, 332 U. S. 46, 74.

[111] FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION OF THE LAWS, 50 COL. L. REV. at 151. See GRAHAM, THE "CONSPIRACY THEORY" OF THE FOURTEENTH AMENDMENT, 47 YALE L. J. 371, 400-401 (1938); GRAHAM, THE EARLY ANTISLAVERY BACKGROUNDS OF THE FOURTEENTH AMENDMENT, 1950 WIS. L. REV. 479 at 492; Cong. Globe, 39th Cong., 1st Sess. 1291, 1293, 2461-2462 (1866). For other sketches of Bingham see 2 DICTIONARY OF AMERICAN BIOGRAPHY 278 (1929) and KENDRICK, *op. cit. supra* n. 82 at 183.

[112] Cong. Globe, 40th Cong., 1st Sess. 2462 (1868).

ever, no less extreme in his demands for Negro civil rights and Negro suffrage than men like Stevens and Sumner. Indicative of his views is his vote on May 22, 1874 against the Sargent amendment to the Civil Rights Act of 1875, which would have permitted separate but equal schools.[113] During Reconstruction Alabama was "flooded with the radical speeches of Morton and Boutwell in favor of mixed schools." [114] He was among those whose interpretation of "equal protection" would not admit color as a basis for legal distinctions.[115]

Representative Roscoe Conkling, a New York Republican, was thought to have taken his views on Reconstruction from Stevens.[116] He was called by some a protege of Stevens; at any rate, they worked as partners on much reconstruction legislation.[117] In 1868, when the readmission of Arkansas was being discussed, he voted against the Henderson Amendment to the bill which would have permitted the state to establish segregated schools.[118] In 1872 he favored the supplementary civil rights bill and voted against the Thurman amendment which would have struck out a clause permitting colored persons to enter "any place of public amusement or entertainment." [119] He was in the Senate majority which on May 22, 1874, voted down the Sargent amendment to the Civil Rights Bill, an amendment which would have permitted separate but equal schools.[120] Conkling must be classified as one of those who agreed to no legal classifications or distinctions based upon color.[121]

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[113] 2 Cong. Rec. 4167 (1874).

[114] BOWERS, THE TRAGIC ERA 427 (1929).

[115] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[116] KENDRICK, *op. cit. supra* n. 82, at 186.

[117] CHIDSEY, THE GENTLEMAN FROM NEW YORK 34-35 (1935).

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

[119] CONKLING, LIFE AND LETTERS OF ROSCOE CONKLING 432 (1869).

[120] 2 Cong. Rec. 4167 (1874).

[121] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

Representative Henry T. Blow, a Missouri Republican, first supported the views of Thaddeus Stevens in the Joint Committee and then in the second session gave his support to Bingham.[122] In either case, he acted with those who favored a broad and sweeping denial of the right of the states to make legal classifications on the basis of race or color. Blow came to Congress with a strong antislavery background and took the position that color discrimination could not be defended, as a matter of course.[123]

Representative Justin S. Morrill of Vermont is characterized as "an extreme radical", one "regularly on the side of radicalism". It is said of him that "the only part taken by him in Reconstruction was to attend the meetings of the Committee and cast his vote." [124] However, he was among those voting against the "white" clause in the Nebraska constitution when the bill to admit that state to the union was under consideration.[125] He voted against the Henderson amendment to permit segregated schools in the bill to readmit Arkansas.[126] He voted against the Sargent Amendment to allow separate but equal schools, during the debates on the bill that became the Civil Rights Act of 1875.[127] Morrill thus belongs in the group of those who did not consider color a reasonable ground for legal distinctions.[128]

Representative Elihu Washburne of Illinois was a staunch member of the House Radical bloc, and a pronounced enemy of the more moderate Reconstruction policies of President Johnson. He supported both the Civil

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[122] KENDRICK, *op. cit. supra* n. 82, at 194.

[123] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[124] KENDRICK, *op. cit. supra* n. 82, at 140, 193.

[125] Cong. Globe, 39th Cong., 1st Sess. 4275-4276 (1866).

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

[127] 2 Cong. Rec. 4167 (1874).

[128] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

Rights Act and the Fourteenth Amendment and his remarks make it clear that he favored a revolution in the southern social order.[129]

The two Democratic members of the Joint Committee from the House were both enemies of the Civil Rights Act and the Fourteenth Amendment. Representative Henry Grider of Kentucky was without influence in the drafting of the Fourteenth Amendment by the Joint Committee.[130] However, remarks of Representative Andrew Jackson Rogers of New Jersey, in opposition to these measures, are significant indication of contemporary understanding of their reach and thrust. Thus, in speaking of the Civil Rights Bill, Rogers said:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes . . . , then . . . it has a right to . . . , inflict upon the people . . . the right of the negro to [vote]. . . ." [131]

Similarly, in speaking of the proposed Section 1 of the Fourteenth Amendment on February 26, 1866, he said:

> ". . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have

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[129] 19 DICTIONARY OF AMERICAN BIOGRAPHY 504 (1936); see also KENDRICK, *op. cit. supra* n. 82, at 194.

[130] KENDRICK, *op. cit. supra* n. 82, at 196. Grider is not even listed in the DICTIONARY OF AMERICAN BIOGRAPHY. He died before the second session of the 39th Congress. KENDRICK, *op. cit. supra* n. 82, at 197.

[131] Cong. Globe., 39th Cong., 1st Sess. 1121 (1866).

> equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens. . . ." [132]

Again, in denouncing the Amendment, he declared:

> "This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ."
>
> ". . . I hold [the amendment] will prevent any State from refusing to allow anything to anybody." [133]

E. The Fourteenth Amendment Was Intended to Write into the Organic Law of the United States the Principle of Absolute and Complete Equality in Broad Constitutional Language.

While the Civil Rights Act of 1866 was moving through the two Houses of Congress, the Joint Committee of Fifteen was engaged in the task of drafting a constitutional amendment as a part of a program for the "readmission" of the southern states to the Union. When the Committee began its meetings in January 1866, several of its members introduced proposals for constitutional amendments guaranteeing civil rights to the freedmen. After a series of drafting experiments, Representative Bingham on February 3 proposed the following:

> "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 (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." [134]

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[132] *Id.* at App. 134 (1866).

[133] *Id.* at 2538.

[134] This proposal with some changes was destined to become eventually the second portion of Section 1 of the Fourteenth Amendment. KENDRICK, *op. cit. supra* n. 82, at 61.

The Joint Committee found this proposal satisfactory and accordingly on February 13th introduced it in the House as H. R. 63.[135]

By now the dedicated purpose of the Radical Republicans based in part upon the ante-war equalitarian principles as opposed to caste and class legislation had to be crystallized in a Fourteenth Amendment. Necessarily, the drafters of this amendment and those who participated in the debates on the amendment recognized that constitutional amendments are properly worded in the broadest and most comprehensive language possible.

It must be borne in mind that Representative Bingham, and those who supported his position on the amendment to the Civil Rights Bill of 1866, had already demonstrated that the constitutional amendment under consideration would be at least as comprehensive in its scope and effect as the original sweeping language of the Trumbull Civil Rights Bill *before* it was amended in the House, and that it would be far broader than the scope of the bill as finally enacted into law. On this point, Bingham repeatedly made his intentions clear, both in his discussion on the power limitations on the Civil Rights Bill itself and in his defense of his early drafts of the proposed constitutional amendment.

Representative Rogers immediately attacked the proposed constitutional amendment (H. R. 63) as "more dangerous to the liberties of the people and the foundations of the government" than any proposal for amending the Constitution heretofore advanced. This amendment, he said, would destroy all state legislation distinguishing Negroes on the basis of race. Laws against racial intermarriage, laws applying special punishments to Negroes for certain crimes, and laws imposing segregation, including school segregation laws, alike would become unconstitutional. He said:

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[135] Cong. Globe, 39th Cong., 1st Sess. 813 (1865-1866).

"Who gave the Senate the constitutional power to pass that bill guarantying equal rights to all, if it is necessary to amend the organic law in the manner proposed by this joint resolution? . . . It provides that all persons in the several States shall have equal protection in the right of life, liberty, and property. Now, it is claimed by gentlemen upon the other side of the House that Negroes are citizens of the United States. Suppose that in the State of New Jersey Negroes are citizens, as they are claimed to be by the other side of the House, and they change their residence to the State of South Carolina, if this amendment be passed Congress can pass under it a law compelling South Carolina to grant to Negroes every right accorded to white people there; and as white men there have the right to marry white women, Negroes, under this amendment, would be entitled to the same right; and thus miscegenation and mixture of the races could be authorized in any State, as all citizens under this amendment are entitled to the same privileges and immunities, and the same protection in life, liberty, and property.

* * *

"In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States." [136]

Representative Bingham, who was contemporaneously amending the original Trumbull Civil Rights Bill because its broad anti-discrimination provisions lacked constitu-

[136] Cong. Globe, 39th Cong., 1st Sess., App. 134 (1865-1866).

tional foundation, naturally did not dispute Representative Rogers' appraisal of the wide scope of H. R. 63. On the contrary, Representative Bingham two days later indicated his concurrence in that appraisal in the course of a colloquy with Representative Hale.

Representative Hale inquired of Representative Bingham whether his proposed constitutional amendment did not "confer upon Congress a general power of legislation for the purpose of securing to all persons in the several states protection of life, liberty and property, subject only to the qualification that the protection shall be equal." And Representative Bingham replied, "I believe it does . . ."

In order to nail down the precise source of the proposed grant of power, Representative Hale then asked Representative Bingham to "point me to that clause or part . . . which contains the doctrine he here announces?" To which the answer was, "The words 'equal protection', contain it, and nothing else." [137]

The House at the end of February was preoccupied with debating Reconstruction generally as well as the Civil Rights Bill, and it showed itself in no hurry to take up Bingham's proposal, especially since it was obvious that a more comprehensive measure would soon be forthcoming from the Joint Committee. Following the debate on February 28, the House postponed further consideration of the proposed amendment until mid-April.[138] In fact, "H. R. 63" was not to be heard from in that form again. Yet its protective scope presently passed into the more extensive proposal which the Joint Committee brought forward at the end of April and which became, after some changes, the amendment which Congress finally submitted to the states.

During most of March and April, the Joint Committee paid little attention to the question of civil rights.

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[137] *Id.* at 1094.

[138] *Id.* at 1095

It was concerned, for a time, with the question of the admission of Tennessee; then, for a time, it appears to have been inactive. Not until late April did it resume sessions looking forward to the drafting of a comprehensive constitutional amendment on Reconstruction. On April 21, Stevens offered to the committee a draft of a proposed constitutional amendment, covering civil rights, representation, Negro suffrage and the repudiation of the "rebel" debt.

This proposal became the frame upon which the Fourteenth Amendment was constructed. Most significant from our point of view was section 1:

> "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." [139]

Section 2 provided that on and after July 4, 1876, no discrimination should be made between persons in the rights of suffrage on account of race, color, or previous condition of servitude. Section 3 provided that until that time, no class of persons against whom a state imposed suffrage discrimination because of race, color or previous condition of servitude should be included in the state's basis of representation. Section 4 invalidated the "rebel" debt. Section 5, which passed substantially intact into the Fourteenth Amendment, provided that Congress was to have the power to enforce the provisions of the amendment by appropriate legislation.[140]

Section 1 was to pass through several critical changes in the next few days. Almost at once, Senator Bingham moved to have the following provision added to section 1:

> "... nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." [141]

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[139] KENDRICK, *op. cit. supra* n. 82, at 83.

[140] *Ibid.*

[141] *Id.* at 85.

It will be noticed that Bingham's suggestion had within it the substance of the equal protection clause of the Fourteenth Amendment. After some discussion, the committee voted this suggestion down, seven to five.

Other changes followed. After some further discussion, Bingham moved that the following be added as a new section of the amendment:

> "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." [142]

This was substantially Bingham's earlier amendment, submitted to Congress in February as H. R. 63 with the addition of the equal protection clause. One significant difference lay in the fact that Bingham's new section did not confer power upon Congress to legislate; instead, it made privileges and immunities, due process and equal protection constitutional guarantees against state interference.

F. The Republican Majority in the 39th Congress Was Determined to Prevent Future Congresses from Diminishing Federal Protection of These Rights.

There were two rather obvious reasons for Senator Bingham's last two amendments. First, a number of committee members had earlier expressed some concern over the phraseology of H. R. 63 because it allowed Congress to refuse to enforce the guarantees if it saw fit. The Radical Republicans were openly fearful lest later and more conservative Congresses destroy their work.[143] But direct

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[142] *Id.* at 87.

[143] See speeches of Representatives Garfield, Broomall, Eldridge, and Stevens and Senator Howard, Cong. Globe, 39th Cong., 1st Sess. 2459, 2462, 2498, 2506, 2896 (1865-1866).

constitutional guarantees would be beyond the power of Congress to impair or destroy. Second, Bingham was acting with the knowledge that section 5 of the proposed amendment already granted Congress full power to legislate to enforce the guarantees of the amendment. In other words, the Radical Republicans had no thought of stripping Congress of the power to enforce the amendment by adequate legislation. They put the guarantees themselves beyond the reach of a hostile Congress.[144]

The Committee at once adopted Representative Bingham's suggested addition by a vote of ten to two.[145] Four days later, however, on April 25, the Committee on Williams' motion, struck out Bingham's latest suggested revision, only Stevens, Bingham, Morrill, Rogers and Blow voting to retain it.[146] On April 28, in the final stages of committee discussion, Bingham moved to strike out section 1, reading "no discrimination shall be made . . ." and insert his proposal of April 21 in its place. Although the Committee had voted only three days earlier to kill Bingham's proposal entirely, it now passed his new motion.[147] Thus, Bingham's proposal ultimately became section 1 of the amendment which the Committee now submitted to Congress. As such, and with the addition of the citizenship clause adopted from the Civil Rights Act of 1866, it was to pass into the Fourteenth Amendment as finally accepted by Congress.

On April 30, Representative Stevens introduced the text of the Committee's proposed amendment in the House of Representatives. As presented, the amendment differed in two particulars from the Fourteenth Amendment as finally adopted: the first section as yet did not contain the citizen-

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[144] See for example Stevens's explanations on the reasons for reenforcing the Civil Rights Act by constitutional guarantees. *Id.* at 2459.

[145] KENDRICK, *op. cit. supra* n. 82, at 87.

[146] *Id.* at 98.

[147] *Id.* at 106.

ship clause; and the third section carried a clause for the complete disfranchisement of Confederate supporters until 1870. An accompanying resolution proposed to make successful ratification of the amendment, together with ratification by the several southern states, a condition precedent to the readmission of the southern states to representation in Congress.[148]

On May 8, Stevens opened debate in the House on the proposed amendment. In a sharp speech he emphasized the legislative power of Congress under the proposed amendment:

> "I can hardly believe that any person can be found who will not admit that every one of these provisions [in the first section] is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."[149]

The amendment, he added, was made necessary by the "oppressive codes" which had become law in the southern states. "Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen."[150]

Finally, he stated that the purpose of section 1 was to place the Civil Rights Act beyond the reach of a hostile Congress:

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

[149] *Ibid.* (italics in original).

[150] *Ibid.*

> "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 . . . This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get." [151]

There was general agreement among subsequent speakers that one of the purpose of section 1 of the amendment was to reinforce the Civil Rights Act. Enemies of the proposed amendment charged that Radical Republicans, having forced through what was an unconstitutional statute, were now attempting to clear up the constitutional issue by writing the statute into the supreme law.[152]

The Radical Republicans refused to admit that they were attempting to cover up the passage of an unconstitutional statute. Instead, they insisted that one of the purposes of the present proposed amendment was to place the guarantees of the Civil Rights Act beyond attack by future Congresses unfriendly to the rights of the freedman "The Civil Rights Bill is now part of the law of this land," said Representative James A. Garfield of Ohio in defending the amendment. "But every gentleman knows it will cease to

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[151] *Ibid.*

[152] Representative William Finck of Ohio asserted, for example, that "all I have to say about this section is, that if it is necessary to adopt it . . . then the civil rights bill, which the President vetoed, was passed without authority and was clearly unconstitutional." *Id.* at 2461. Representative Benjamin Boyer of Pennsylvania, another enemy of the amendment, after observing that "the first section embodies the principles of the civil rights bill," twitted the Republicans for seeking to rectify their own constitutional error and attacked the present amendment as "objectionable, also, in its phraseology, being open to ambiguity and admitting the conflicting constructions." *Id.* at 2467. Representative Charles Eldridge of Wisconsin asked ironically, "What necessity is there, then, for this amendment if that bill was constitutional at the time of its passage?" *Id.* at 2506.

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[151] *Ibid.*

[152] Representative William Finck of Ohio asserted, for example, that "all I have to say about this section is, that if it is necessary to adopt it . . . then the civil rights bill, which the President vetoed, was passed without authority and was clearly unconstitutional." *Id.* at 2461. Representative Benjamin Boyer of Pennsylvania, another enemy of the amendment, after observing that "the first section embodies the principles of the civil rights bill," twitted the Republicans for seeking to rectify their own constitutional error and attacked the present amendment as "objectionable, also, in its phraseology, being open to ambiguity and admitting the conflicting constructions." *Id.* at 2467. Representative Charles Eldridge of Wisconsin asked ironically, "What necessity is there, then, for this amendment if that bill was constitutional at the time of its passage?" *Id.* at 2506.

be a part of the law whenever the sad moment arrives when that gentleman's party comes into power . . . For this reason, and not because I believe the civil rights bill to be unconstitutional, I am glad to see that first section here."[153] Representative John Broomall of Ohio, making the same point, said, "If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Broomall pointed out, also, that no less a friend of the Negro than Representative John A. Bingham, had entertained grave doubts as to the constitutionality of the measure, and thought a constitutional amendment necessary. He disagreed, Broomall said, with Bingham's doubts, but he was not so sure of himself that he felt justified "in refusing to place the power to enact the law unmistakably in the Constitution."[154]

Probably other moderate Republicans agreed with Representative Henry J. Raymond of New York who had voted against the Civil Rights bill because he "regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution had any power to enact such a law. . . ." But he nonetheless had heartily favored the principles and objectives of the bill, and because he still favored "securing an equality of rights to all citizens" he would vote "very cheerfully" for the present amendment.[155]

There was little discussion during the debate in the House of the scope of the civil rights which would be protected by the proposed amendment, apparently because both sides realized that debate on the original Civil Rights Bill had exhausted the issue. The indefatigable Rogers, fighting to the last against any attempt to guarantee rights for the Negro, repeatedly reminded Congress that the amendment would sweep the entire range of civil rights

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[153] *Id.* at 2462.

[154] *Id.* at 2498.

[155] *Id.* at 2502.

under the protection of the Federal Government and so work a revolution in the constitutional system.[156]

Although it was not necessary to answer Rogers, Bingham reminded Congress:

> "The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." [157]

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[156] *Id.* at 2537.

[157] *Id.* at 2542.

G. Congress Understood That While the Fourteenth Amendment Would Give Authority to Congress to Enforce Its Provisions, the Amendment in and of Itself Would Invalidate All Class Legislation by the States.

On May 10, the House passed the amendment without modification by a vote of 128 to 37. The measure then went to the Senate.[158]

On the same day, Senator Howard opened the debate in the Senate. Speaking for the Joint Committee because of Senator Fessenden's illness, Howard gave a broad interpretation of the first section of the proposed amendment. He emphasized the scope of legislative power which Congress would possess in the enforcement of the Amendment.

> "How will it be done under the present amendment? As I have remarked, they are not [at present] 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 be given to Congress to that end. This is done by the fifth section of this amendment which declares that 'the Congress shall have power to enforce by appropriate legislation the provisions of this article.' 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." [159]

Senator Howard's interpretation of the legislative power of Congress under the proposed amendment makes it obvious that the Joint Committee, in separating the guarantees of civil rights from the congressional power to legislate thereon, had not at all intended to weaken the legislative capacity of Congress to enforce the rights conferred by the amendment. The guarantees, however, no longer depended upon congressional fiat alone for their effectiveness as they

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[158] *Id.* at 2545.

[159] *Id.* at 2766.

had in Bingham's proposed civil rights amendment of January (H. R. 63). But in Howard's view and that of the Committee, this meant merely that future Congresses could not destroy the rights conferred.

Senator Howard then passed to an equally expansive interpretation of the due process and equal protection clauses of the amendment:

> "The last two clauses of the first section of the amendment disabled a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law or from denying to him the equal protection of the laws of the State. *This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.* It 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." [160] (Italics added.)

The only class of rights, Howard added, which were not conferred by the first section of the amendment was "the right of suffrage." Howard concluded this analysis by asserting that the entire first section, taken in conjunction with the legislative power of Congress conferred in section five, was of epoch-making importance:

> "I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable everyone of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it

[160] *Id.* at 2766.

> gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.'' [161]

Thus, Senator Howard understood that due process and equal protection would sweep away entirely ''all class legislation'' in the states. By implication, he subscribed to a ''substantive interpretation'' of due process of law, thus making due process a limitation upon state governments to subvert civil liberties.

No Senator thereafter challenged these sweeping claims for the efficacy of the civil rights portion of Section 1. Howard's allies subscribed enthusiastically to his interpretation. Senator Luke Poland of Vermont, a staunch Radical Republican, regarded the amendment as necessary to set to rest all questions of congressional competence in enacting the civil rights bill:

> ''Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States. . . .'' [162]

Certainly the Conservatives in the Senate agreed altogether with Senator Howard and the other Senate Republicans about the sweeping impact which the prospective amendment would have upon state caste legislation. Senator Thomas Hendricks of Indiana, in condemning the legislative power to enforce the amendment which Congress would

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[161] *Id.* at 2766.

[162] *Id.* at 2961.

acquire from the operation of section 5, said that these words had

> "... such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous." [163]

The prospective amendment moved forward rapidly in the Senate, with comparatively little debate. The Radical Republicans were confident of their objectives. The conservative Republicans and Democrats despaired of arresting the tide of events. One significant change occurred on May 30 when Howard brought forward the citizenship clause of the Civil Rights Act and successfully moved it as an amendment to section 1. Few Republicans doubted that Congress already had the power to legislate upon the question of citizenship. However, the new provision cleared up a serious hiatus in the original Constitution by settling in unequivocal fashion the definition of national and state citizenship. Needless to say, the new provision, like its predecessor in the Civil Rights Act, specifically endowed Negroes with citizenship and reversed the dictum of the *Dred Scott* case that no Negro could be a citizen of the United States.

The Radical Republicans were well aware that by endowing the Negro with citizenship, they strengthened his claim to the entire scope of civil rights. Bingham had mentioned as much in debate in the House, while Representative Raymond of New York had added that once the Negro became a citizen, it would not be possible in a republican government to deny him any right or to impose upon him any restriction, even including that of suffrage. The force of this stratagem did not escape the Conservatives in the Senate.

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[163] *Id.* at 2940.

Senator Garrett Davis of Kentucky had this to say of the citizenship provision of the amendment:

> "The real and only object of the first provision of this section, which the Senate has added to it, is to make Negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle." [164]

The Senate passed the amendment in June, 33 to 11. Congress formally proposed the amendment on June 13 and it was submitted to the states.

Congress Intended to Destroy All Class Distinctions In Law

What, then, may one conclude concerning the intent of Congress with regard to segregation in the framing of the amendment?

Both Senator Howard and Representative Stevens made it definitely clear that the scope of the rights guaranteed by the amendment was much greater than that embraced in the Civil Rights Act.

It is evident that the members of the Joint Committee intended to place all civil rights within the protection of the Federal Government and to deny the states any power to interfere with those rights on the basis of color. The scope of the concept of liberties entertained by the Committee was very broad. The breadth of this concept was recognized by this Court in all of its decisions up to *Plessy* v. *Ferguson.*

In adopting the Civil Rights Act of 1866, Congress had enumerated the rights protected. This was done because Bingham and others doubted that Congress had the power to take all civil liberties under federal protection. Un-

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[164] *Id.* at App. 240.

restricted by this consideration in drafting a constitutional provision, Congress used broad comprehensive language to define the standards necessary to guarantee complete federal protection. This was promptly recognized by this Court in one of the earliest decisions construing the Amendment when it was held: "The 14th Amendment makes no effort to enumerate the rights it designs to protect. It speaks in general terms, and those are as comprehensive as possible." *Strauder* v. *West Virginia*, 100 U. S. 303, 310.

Did Congress specifically intend to ban state laws imposing segregation by race? And more specifically, did it intend to prohibit segregation in school systems, even where a state provided a separate but equal system for Negroes? To begin with it must be recognized that the "separate but equal" doctrine was yet to be born. The whole tenor of the dominant argument in Congress was at odds with any governmentally enforced racial segregation as a constitutionally permissible state practice.

Senator Howard, among others, asserted categorically that the effect of the due process and equal protection clauses of the Fourteenth Amendment would be to sweep away entirely all caste legislation in the United States. Certainly a number of Conservatives, notably Representative Rogers of New Jersey, a member of the Joint Committee and Senator Davis of Kentucky, were convinced that the effect of the amendment would be to prohibit entirely all laws classifying or segregating on the basis of race. They believed, and stated, that school laws providing separate systems for whites and Negroes of the kind which existed in Pennsylvania, Ohio and in several of the Johnson-Reconstructed southern states would be made illegal by the amendment.

It is notable that while there were some assurances extended by Radical Republicans to the Moderates and Conservatives as to the scope of the Civil Rights Act of 1866 in this regard, there were no such assurances in the debates on the Fourteenth Amendment.

The Republican majority realized full well that it could not envisage all possible future applications of the amendment to protect civil rights. By separating section 1 of the amendment, which provides an absolute federal constitutional guarantee for those rights, from section 5, which endows Congress with legislative capacity to protect such rights, the framers of the amendment assured continued protection of these rights, by making it possible to win enforcement of them in the courts and eliminated the power of Congress alone to diminish them.

H. The Treatment of Public Education or Segregation in Public Schools During the 39th Congress Must Be Considered in the Light of the Status of Public Education at That Time.

Although today, compulsory free public education is universally regarded as a basic, appropriate governmental function, there was no such unanimity existing at the time the Fourteenth Amendment was adopted. Arrayed against those who then visualized education as vital to effective government, there were many who still regarded education as a purely private function.

While it has already been shown that the conception of equal protection of the laws and due process of law, developed by the Abolitionists before the Civil War, was so broad that it would necessarily cover such educational segregation as is now before this Court, compulsory public education at that time was the exception rather than the rule. The conception of universal compulsory free education was not established throughout the states in 1866. The struggle for such education went on through most of the 19th century and, even where accepted in principle in some of the states, it sometimes was not fully put into practice.

Prior to the first quarter of the nineteenth century childhood education was considered an individual private responsibility.[165] The period 1830-1860 was one of marked

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[165] CUBBERLY, A BRIEF HISTORY OF EDUCATION, cc. XXV-XXVI (1920).

educational advancement. It has commonly been termed as the era of the Common School Revival, a movement to extend and improve facilities for general education. This movement flourished in New England under the leadership of Horace Mann, Henry Barnard and others. There was a definite tendency throughout the country to shift from private to public support of education and this trend extended to normal schools and facilities for secondary and higher education. Many states, urged on by educational leaders, publicists and statesmen, began making legislative provisions for public education.

On the other hand, these gains have been commonly exaggerated and in some respects misinterpreted. The laws were by no means always carried into effect and the recommendations of the reformers were, in most instances, accepted with great hesitancy.[166] Another authority after appraising public education during the period just prior to the Civil War made the following generalizations:

> "Practically all the states were making substantial progress in the development of systems of public education. (2) At the close of the period no single state can be said to have been providing any large percentage of its children and youth with schools well-supported and well-taught. (3) The facilities for secondary education were by no means as extensive as has commonly been reported. (4) Regional differences in educational development have been exaggerated; and (5) where sectional differences in school support and attendance did exist they appear to have been due more to differentials in urban and rural development than to differences in social attitudes and philosophies." [167]

In general, it should be noted that in New England and in New York the main problem during this period was to

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[166] EDWARDS AND RICHEY, THE SCHOOL IN THE SOCIAL ORDER 421 (1947).

[167] *Id.* at 423.

improve the educational systems which had already been established and to secure additional support for them. In the Middle Atlantic states the major problem was to establish systems of public schools and to provide effective public education. In the West, the prevailing political and social philosophy required that at least some degree of education be provided to as large an element of the population as possible.

Public education was much slower in getting under way in the South. In most of the southern states, despite some promising beginnings, an educational system was not created until after the close of the Civil War. One historian concluded:

> ". . . although the 'common school awakening' which took place in the Northern States after Horace Mann began his work in Massachusetts (1837) was felt in some of the Southern States as well, and although some very commendable beginnings had been made in a few of these States before 1860, the establishment of state educational systems in the South was in reality the work of the period following the close of the Civil War. The coming of this conflict, evident for a decade before the storm broke, tended to postpone further educational development." [168]

Public education in the South made progress only after it became acceptable as being compatible with its ideal of a white aristocracy.[169]

Among the factors responsible for this condition were the aristocratic attitude which held that it was not neces-

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[168] CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 251 (1919).

[169] EDWARDS AND RICHEY, *op. cit. supra* n. 166, at 434.

sary to educate the masses, the reluctance of the people to tax themselves for educational purposes, the marked individualism of the people, born of isolation, and the imperfect state of social and political institutions. Most southerners saw little or no relation between education and life. Consequently, the view prevailed that those who could afford education could indulge themselves in securing it and those who could not afford it lost little, if anything. This southern attitude was aptly summed up fifteen years after the close of the war by the statement of Virginia's Governor F. W. M. Holliday that public schools were "a luxury . . . to be paid for like any other luxury, by the people who wish their benefits." [170] Education in the South was not so much a process of individual and community improvement as it was an experience that carried with it a presumption of social equality for those who shared it, a view hardly compatible with any notion of universal education which included persons of diverse social and ethnic backgrounds.

Between 1840 and 1860, public education began to advance in the South but its benefits were denied Negroes. It is significant that racist and other types of intolerant legislation increased markedly during this period. While education could be extended to all whites who, for political purposes, belonged to one big happy family, there was nothing in such a conception that suggested that Negroes should be included.[171] The editor of the authoritative antebellum organ of southern opinion, *DeBow's Review,* summed up the matter of education for Negroes during slavery as follows: "Under the institution of slavery we used to teach them everything nearly except to read." [172]

The framers of the Fourteenth Amendment were familiar with public education, therefore, only as a developing con-

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[170] Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 61 (1951).

[171] DEBOW, THE INTEREST IN SLAVERY OF THE SOUTHERN NON-SLAVEHOLDER 3-12 (1860).

[172] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., Pt. IV, 135 (1866).

cept. We have already demonstrated that they were determined to eliminate all governmentally imposed racial distinctions—sophisticated as well as simple minded—and expressed their views in the broadest and most conclusive terms. The intentions they expressed were definitely broad enough to proscribe state imposed racial distinctions in public education as they knew it, and the language which they used in the Fourteenth Amendment was broad enough to forever bar racial distinctions in whatever public educational system the states might later develop.

Furthermore, the framers intended that Congress would have the power under section 5 to provide additional sanctions, civil and criminal, against persons who attempted to enforce states statutes made invalid by section 1 of the Amendment. As stated above, Representative Bingham purposely revised an earlier draft of the Amendment so that the prohibitions of section 1 would be self-executing against state statutes repugnant thereto and would be beyond the threat of hostile Congressional action seeking to repeal civil rights legislation. In other words, the judicial power to enforce the prohibitory effect of section 1 was not made dependent upon Congressional action.

Thus, the exercise of this Court's judicial power does not await precise Congressional legislation. This Court has repeatedly declared invalid state statutes which conflicted with section 1 of the Fourteenth Amendment, even though Congress had not acted.[173] For example, there

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[173] Of course, Title 8 provides a remedy in law or equity against any person acting under color of State law who deprives anyone within the jurisdiction of the United States of rights secured by the Federal Constitution or laws. It provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 8 U. S. C. § 43.

is no federal statute to the effect that a state which permits released time for religious instructions is acting in a way prohibited by the Fourteenth Amendment. This Court, nevertheless, held that such state action conflicted with section 1 of the Fourteenth Amendment and directed the trial court to enjoin the continuance of the proscribed state action. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203.

Similarly, this Court has acted to redress violations of constitutional rights, even in the absence of specific Congressional statute, in a long series of cases involving the rights of freedom of expression and freedom of worship under the Fourteenth Amendment. See *e.g., De Jonge* v. *Oregon*, 299 U. S. 353. And this Court has often vindicated the constitutional rights of members of minority groups in the area of public education in the absence of any Congressional statute. *Sweatt* v. *Painter, supra.*

Indeed, this rule has been applied in all areas in which the prohibitory effect of section 1 has been employed by the Court. *E.g., Miller* v. *Schoene*, 276 U. S. 272; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400. To now hold Congressional action a condition precedent to judicial action would be to stultify the provisions in the Federal Constitution protecting the rights of minorities. In effect, this Court would be holding that action by a state against an unpopular minority which the Constitution prohibits cannot be judicially restrained unless the unpopular minority convinces a large majority (the whole country as represented in Congress) that a forum in which to ask relief should be provided for the precise protection they seek.

I. During the Congressional Debates on Proposed Legislation Which Culminated in the Civil Rights Act of 1875 Veterans of the Thirty-Ninth Congress Adhered to Their Conviction That the Fourteenth Amendment Had Proscribed Segregation in Public Schools.

At various times during the 1870's, Congress considered bills for implementing the Fourteenth Amendment as well as the Civil Rights Act of 1866. Debate on these measures was on occasion extremely significant, since it gave members of Congress an opportunity to express themselves as to the meaning and scope of the Amendment. These observations were the more significant in that perhaps two-fifths of the members of both Houses in the early seventies were veterans of the Thirty-ninth Congress which had formulated the Amendment. Moreover, the impact of the Amendment upon segregated schools had by this time moved into the public consciousness so that Congressmen now had an opportunity to say specifically what they thought about the validity under the Amendment of state statutes imposing segregation upon public school systems.

The second session of the Forty-second Congress, which convened in December, 1871, soon found itself involved in a fairly extended discussion of the effect of the Fourteenth Amendment upon racial segregation, particularly in school systems. Early in the session the Senate took under consideration an amnesty bill to restore the political rights of ex-Confederate officials in accordance with the provisions of section 3 of the Amendment. On December 20, Senator Sumner of Massachusetts, now a veteran champion of the rights of the Negro, moved the following as an amendment to the measure under consideration:

> "Section—That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers;

> by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law. . . and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude." [174]

Here was a provision, which if adopted would commit Congress to the proposition that under the Fourteenth Amendment it could do away entirely with state school statutes providing for segregated school systems. Sumner attacked school segregation at length. The public school, he asserted, "must be open to all or its designation is a misnomer and a mockery. It is not a school for whites or a school for blacks, but a school for all; in other words a common school for all." Segregation he called an "odius discrimination" and an "ill-disguised violation of the principle of Equality." [175]

In the debate that followed, it was apparent that a large majority of the Republicans in the Senate were convinced that Congress quite appropriately might enact such legislation in accordance with section 5 of the Fourteenth Amendment.

Senator Carpenter of Wisconsin, one of the best constitutional lawyers in the Upper House, was doubtful of the constitutionality of Sumner's measure insofar as it applied to churches. But he had no doubt on the authority of Congress to guarantee the right of all persons, regardless of race or color, to attend public schools, to use transportation facilities, and the like, and he offered a resolution of his own to this end.[176] Even the conservative Kentuckian Garrett Davis admitted that there was no question of congressional competence under the Amendment to guarantee these

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[174] Cong. Globe, 42nd Cong., 2nd Sess. 244 (1871).

[175] *Id.* at 383-384.

[176] *Id.* at 760.

rights as against state action, though he challenged the validity of any statute protecting rights against private discrimination.[177] And Senator Stevenson of Kentucky, another strong enemy of mixed schools, confined his attack to discussion of the evil involved in an attempt to "coerce social equality between the races in public schools, in hotels, in theatres. . . ."; he spoke not at all of constitutional objections.[178]

The real objection to Sumner's measure, however, was not the constitutionality of the measure itself, but the incongruity of its attachment as a rider to an amnesty bill, which required a two-thirds majority of both Houses of Congress. Nonetheless, the Senate, after extended debate, adopted Sumner's amendment, including the provision banning segregated schools, by a vote of 28-28, the ballot of the Vice President breaking the tie.[179] The amnesty measure itself later failed to obtain the necessary two-thirds majority of the Senate.

The impressive Senate support in favor of a bill which would have banned segregation in state school systems alarmed Conservatives in both Houses, who now began to advance, very deliberately, the idea that "separate but equal" facilities would be constitutional under the limitations of the equal protection clause of the Fourteenth Amendment. In the House, a few days after the defeat of the amnesty bill, Representative Frank Hereford of West Virginia offered the following resolution as an expression of conservative sentiment:

> "*Be it resolved,* That it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the States, and equally unconstitutional and tyrannical for Con-

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[177] *Id.* at 764.

[178] *Id.* at 913.

[179] *Id.* at 919. The Senate vote on the amnesty bill was 33 to 19 in favor of the measure. *Id.* at 929.

> gress to pass any law interfering with churches, public carriers, or inn-keepers, such subjects of legislation belonging of right to the States respectively."

There was no debate on the Hereford resolution, which was put to an immediate vote and defeated, 85 to 61, 94 not voting.[180]

Later in the session, there was still further debate in the Senate concerning segregated schools. With a second amnesty bill up for consideration, Sumner on May 8 again moved an amendment providing:

> "That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by inn-keepers; by common carriers . . . or . . . by trustees, commissioners, superintendents, teachers, and other officers of common schools and other public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law. . . ." [181]

This proposal led to sharp debate and decided differences of opinion among the Republican majority. Senator Trumbull of Illinois, who was the author of the Civil Rights Act of 1866 and who had become decidedly more conservative in his political outlook since the early Reconstruction era, now insisted that the right to attend public schools was in any event not a civil right, so that Congress could not legislate on the subject under the Fourteenth Amendment. But Senator George Edmunds of Vermont, already known as a distinguished constitutional lawyer and who had entered the Senate in 1866 in time to participate in the debates on the Fourteenth Amendment, dissented sharply, insisting that the right to attend tax-supported public schools was a civil right and therefore subject to regulation by Con-

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[180] *Id.* at 1582.

[181] *Id.* at 3181.

gress.[182] Senator Morton taking the same view, insisted that "if the right to participate in these schools is to be governed by color, I say that it is a fraud upon those who pay the taxes." And he added that where there are public schools supported by common taxation upon everybody, white and black, then there is a civil rights that there shall be equal participation in those schools.

Observing that the Ohio Supreme Court had but lately held constitutional a state statute providing for segregation in public schools, he argued that Congress was entirely competent under the Fourteenth Amendment to prohibit segregated schools.

Senator Arthur Boreman of West Virginia also took it as a matter of course that Congress had the power under the amendment to prohibit separate but equal facilities in school systems; he thought that Congress ought not to force the issue at present:

> "The time will come when . . . these distinctions will pass away in all the States, when school laws will be passed without this question appearing upon the face of those laws; but it is not so now, and for the present I am willing to allow the laws of the State to remain as they are where they provide schools for both classes."[183]

At the close of the debate, the proponents of segregated school systems tried unsuccessfully to modify the Sumner measure to eliminate the requirement for mixed school systems. Senator Orris Ferry of Connecticut first moved to strike out entirely the provisions of the Sumner amendment which related to public school systems. This motion the Senate defeated 26 to 25.[184] Senator Francis P. Blair of Missouri then offered another amendment to allow "local

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[182] *Id.* at 3190.

[183] *Id.* at 3195.

[184] *Id.* at 3256, 3258.

option'' elections within the states on the question of mixed versus segregated schools. Sumner, Edmunds and Howe all strongly condemned this proposal, which the border and southern Senators as strongly commended. The Blair amendment in turn met defeat, 23 to 30.[185] Finally, an amendment to strike out the first five sections of the Sumner measure, thereby completely destroying its effect, was defeated 29 to 29, with the Vice President casting a deciding negative vote.[186] The Senate then formally adopted the Sumner amendment to the amnesty bill, 28 to 28, with the Vice President voting in the affirmative.[187]

The conclusion seems inescapable that as of 1872 a substantial majority of the Republican Senators and perhaps half of the Senate at large believed that the prohibitions of the Fourteenth Amendment extended to segregated schools.

The authority of the judiciary to act in this field was specifically recognized and not disputed.[188] A significant number of the Senators in question, among them Edmunds, Howe, Sumner, Conkling, and Morrill, had been in Congress during the debates on the adoption of the Amendment, while Conkling and Morrill had been members of the Joint Committee. And Vice President Henry Wilson, who several times cast a deciding vote in favor of prohibiting segregated schools not only had been in Congress during the debates on the Amendment but had also authored one of the early civil rights bills of the Thirty-ninth Congress.

The first session of the Forty-third Congress, which opened in December, 1873, saw extended discussion of the issue of segregated schools in both Houses. On December

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[185] *Id.* at 3262.

[186] *Id.* at 3264-3265.

[187] *Id.* at 3268. The amnesty bill itself subsequently received a favorable vote of 32 to 22, thereby failing to receive the necessary two-thirds majority. *Id.* at 3270.

[188] *Id.* at 3192.

18, Representative Benjamin F. Butler of Massachusetts, chairman of the House Judiciary Committee and long one of the most outspoken leaders of the Radical faction of the Republican party, introduced the following measure from his committee:

> ". . . 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 not less than $100 nor more than $5000 for each offense. . . ." [189]

This measure inspired a somewhat bitter two-day debate early in January, 1874, during which the power of Congress to prohibit segregated schools received more attention than any other single issue involved. The most extended defense of the constitutionality of Butler's measure was made by Representative William Lawrence of Ohio, who began with the flat assertion that "Congress has the constitutional power to pass this bill." Denying that civil rights were any longer in the exclusive care of the states, he asserted that since the passage of the Fourteenth Amendment, "if a state permits any inequality in rights to be created or meted out by citizens or corporations enjoying its protection, it denied the equal protection of laws." He then launched into an extended historical analysis of the debates in the Thirty-ninth Congress before and during the passage of the Amendment. He recalled Bingham's

[189] 2 CONG. REC. 318 (1873-1874).

statement in opposition to the original extreme language of the Civil Rights bill, in which the Ohioan had said that the proper remedy for state violation of civil rights was to be achieved not by an "arbitrary assumption of power," but "by amending the Constitution of the United States expressly prohibiting the States from any such abuse of power in the future." He quoted Stevens' and Howard's speeches introducing the Amendment in Congress to show the broad purpose which they had represented to be the objectives of the Joint Committee. In some irony, he quoted various conservatives in the House, among them Finck, Boyer and Shanklin, who had asserted again and again that the Amendment would place all civil rights within the protective custody of the federal government.[190] Lawrence's speech was the more impressive in that he was a veteran of the Thirty-ninth Congress who had actively supported both the Civil Rights Act and the passage of the Fourteenth Amendment. Moreover, he was held in great respect in Congress as an able jurist and constitutional lawyer.[191]

The most extended argument in opposition to Lawrence was advanced by Representative Roger Q. Mills of Texas, who presented the contention that civil rights, in spite of the Fourteenth Amendment, were still entrusted entirely to the care of the states. Congress, he thought, had no right to touch the public school system of the several states. "The States," he said, "have . . . [an] unquestioned right . . . to establish universities, colleges, academies, and common schools, and govern them according to their own pleasure." He relied upon the narrow interpretation of the "privileges or immunities" clause of the Fourteenth Amendment recently advanced by the Supreme Court in the *Slaughter House Cases* as a new argument in support of

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[190] *Id.* at 412 ff.

[191] 11 DICTIONARY, *op. cit. supra* n. 129, at 52. He was later the author of the statute creating the Department of Justice.

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his contention. And he finished with the warning, not entirely unheard in the twentieth century, that if Congress passed any such measure as the Butler bill, "the Legislatures of every State where the white people have control will repeal the common-school laws."[192] At the end of debate, Butler's bill was recommitted on the motion of its sponsor, and was not heard of again during the session.

More significant events were occurring in the Senate. On December 2, Sumner had once more presented his now well-known civil rights measure, this time as an independent Senate bill instead of a proposed amendment to an amnesty resolution.[193] This bill finally came up for debate in late April and May, although Sumner himself had died in March. Conkling of New York, Boutwell of Massachusetts, Howe of Wisconsin, Edmunds of Vermont, and Frelinghuysen of New Jersey all gave it very effective support in debate.[194]

In a strong speech, Senator Frelinghuysen pointed out that a variety of conflicting state decisions had introduced some confusion into the question of whether or not state statutes setting up segregated school systems were constitutional under the Amendment. The present measure, he thought, would destroy "injurious agitation" on that subject. There could be no question of the constitutional power of Congress to enact the bill; the "privileges or immunities" and "the equal protection" clauses, in particular, were especially germane to congressional power. And he pointed out that if the present bill became law, it would still be possible to pursue an informal voluntary segregation by the consent of both parents and school boards, where for a time that seemed advisable. But he added that segregated school systems established by law

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[192] 2 Cong. Rec. 383 ff. (1873-1874).

[193] *Id.* at 2.

[194] Boutwell and Conkling, it will be recalled, had both served as members of the Joint Committee.

were in complete violation of the whole spirit of the Amendment; separate schools for colored people were inevitably inferior to those for whites. "Sir", he said in conclusion, "if we did not intend to make the colored race full citizens . . . we should have left them slaves." [195]

Senator Edmunds used both constitutional and pragmatic arguments in support of the bill. "What the Constitution authorizes us to do is to enforce equality," he said, "and . . . not half-equality, for there is no such thing as half-equality. It is entire equality or none at all." And segregated schools imposed inequality on Negroes. He quoted figures from Georgia school statistics, to demonstrate that although forty-three percent of the children in that state were colored, there were nonetheless only 356 schools for colored children as against 1379 for whites. In the light of this kind of evidence, he thought, the duty of Congress was clear.[196]

Senator Boutwell declared that "opening the public schools of this country to every class and condition of people without distinction of race and color, is security . . . that . . . the rising . . . generations will advance to manhood with the fixed purpose of maintaining these principles [of the Republic]." Like Edmunds, he argued that segregation made either adequate or equal facilities impossible; there was not enough money in the South to support two school systems.[197]

Senator Howe asserted that ". . . I am of the opinion that the authority of Congress to issue these commands, to enact this bill into law, is as clear, as indisputable as its authority to lay taxes or do any other one thing referred to in the Constitution." Like Frelinghuysen he thought that voluntary segregation might exist in some places for a time without violating the amendment. "Open two school houses

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[195] *Id.* at 3451-3455.

[196] *Id.* at 4173.

[197] *Id.* at 4116.

wherever you please;" he said, and "furnish in them equal accommodations and equal instruction, and the whites will for a time go by themselves, and the colored children will go by themselves for the same reason, because each will feel more at home by themselves than at present either can feel with the other. . . ." But legally segregated schools, he thought would not in fact be equal, and it was the duty of Congress to prohibit them.[198]

Senator Pease of Mississippi shortly before the bill was passed speaking in favor of the bill said in unequivocal terms:

> "The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. . . . There has been a great revolution in public sentiment in the South during the last three or four years, and I believe that to-day a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education . . . I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a State south of Mason and Dixon's line that will abolish its school system. . . .
>
> * * * I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.
>
> ". . . because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination." [199]

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[198] *Id.* at 4151.

[199] *Id.* at 4153-4154.

The opponents of the Sumner bill meantime had become aware of the epoch-making significance of the Supreme Court's decision in the *Slaughter House Cases*, and they leaned very heavily upon Justice Miller's opinion during the debate. Thurman of Ohio analysed the *Slaughter House Cases* at length to prove his former contention that the main body of civil rights was still in the custody of the states and that the present bill was unconstitutional."[200] Senator Henry Cooper of Tennessee, after citing Justice Miller's opinion to make the same constitutional point, asked the Republican majority, ". . . what good are you to accomplish thus by forcing the mixture of the races in schools?"[201] And Senator Saulsbury of Delaware, who, in 1866 had insisted that if Congress enacted the Fourteenth Amendment it would work an entire revolution in state-federal relations, now argued flatly that the Sumner bill was unconstitutional under Justice Miller's interpretation of the limited scope of the "privileges or immunities" clause of the Amendment.[202]

However, the Senate majority remained firm in its intention to pass the bill with the ban on segregated schools. At the close of debate, Senator Aaron Sargent of California presented an amendment that "nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds." This amendment the Senate promptly defeated, 21 to 26.[203] Senator McCreery then moved an amendment providing that "nothing herein contained shall be so construed as to apply to schools already

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[200] *Id.* at 4089.

[201] *Id.* at 4154.

[202] *Id.* at 4159.

[203] *Id.* at 4167.

established." This, too, met defeat, mustering but eleven "ayes" in its support.[204] Immediately after this, the Senate, on May 22, passed the Sumner bill, by a vote of 29 to 16, and sent it to the House.[205]

Again the conclusion with respect to congressional intent as regards segregated schools seems fairly clear: a majority of the Senate in the Forty-third Congress, under control of leaders, a number of whom had supported the passage of the Fourteenth Amendment eight years earlier, thought Congress had the constitutional power to ban segregated schools and that it would be good national policy to do so.[206]

Congress adjourned before the House could take action on the Sumner bill, so that the measure carried over to the second session of the Congress, beginning in December, 1874. And now occurred a curious anticlimax with respect to the prohibition of segregated schools; Congress speedily enacted what virtually amounted to the Sumner bill of 1874 into law, but with the provision banning segregated schools eliminated from the bill.

The critical action occurred in the House of Representatives, where Butler on December 16 introduced what amounted to a somewhat modified draft of the measure passed by the Senate the previous spring. The constitutional debates produced little that was new. It was apparent that Congress by virtue of Section 5 had the constitutional power to take all civil liberties under its protection. Representative Robert Hale of New York, a veteran of the Thirty-ninth Congress, twitted Finck of Ohio for his fallible memory in forgetting so conveniently that in 1866,

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[204] *Id.* at 4171.

[205] *Id.* at 4176.

[206] Flack long ago reached a similar conclusion, that the great majority in Congress who voted for Sumner's bill "fully believed they had the power to pass it." "Of all the evidence," he said, "only a very minor part of it against this conclusion." Flack, *op. cit. supra* n. 79, at 271.

he had solemnly warned that the impending amendment would place all civil rights under federal protection.[207]

Whatever may be said about the quantum or quality of Congressional debates on one side or the other no one can deny that the 39th Congress opened with a determination on the part of the Radical Republican majority to deprive the states of all power to maintain racial distinctions in governmental functions. No one can gainsay that this determination permeated the 39th Congress and continued through the passage adoption of the Fourteenth Amendment. The debates and all of the related materials show conclusively that the Fourteenth Amendment effectively gave constitutional sanction to the principle that states are thereby deprived of all power to enforce racial distinctions in governmental functions including public schools.

II

There is convincing evidence that the State Legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it prohibited State legislation which would require racial segregation in public schools.

The Fourteenth Amendment was submitted to the states for consideration on June 16, 1866. 14 Stat. 358. It was deliberated by thirty-seven states and ratified by thirty-three.[208] We urge that the evidence with respect to the

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[207] 3 Cong. Rec. 979, 980 (1875).

[208] The ratifying states included twenty free or non-slaveholding states (Connecticut, New Hampshire, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, Kansas, Maine, Nevada, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska and Iowa), two former slave-holding but loyal states (West Virginia and Missouri), and the eleven former slaveholding states which had seceded (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia). Delaware, Kentucky and Maryland, three former slave-holding but non-seceding states, expressly rejected the Amendment. California, probably because the control of its legislature differed in each house, was unable to take any definitive action.

states' understanding indicates that three-fourths of the states understood and contemplated the Amendment to forbid legislation compelling the assignment of white and Negro youth to separate schools.

The evidence which compels this conclusion is adduced from governors' messages, reports of the legislative committees on federal relations and entries in the journals of the legislatures. At that time, the legislatures, almost without exception, kept no verbatim record of debates and speeches; and the journals merely noted motions and votes. There are, however, newspaper summaries of some speeches and proceedings. But much of the evidence from these sources is inadequate.

More significant is the modifications which the states made in their schools laws. For if it was understood in the legislatures, which considered the proposed Amendment, that ratification would perforce forbid compulsory segregated schools, it seems certain that the legislatures would have apprehended its effect upon the state's constitutional or statutory provisions for public schools. If, for example, a state required or authorized segregated schools under existing law, presumably the legislature would not knowingly adopt the Amendment without giving some thought to its implications. After adoption, it would be expected that measures would be taken to conform the school laws to the new constitutional mandate. If, however, a state's school laws and practices already conformed to the understanding that the Fourteenth Amendment forbade segregated schools, it is probable that its legislature would not have objected to the Amendment on this question and would afterwards either retain or reinforce its school laws. On the other hand, if there was an authorization or requirement of segregation in a state's school laws, and, after ratification, the legislature took no action to end this disparity, undoubtedly it would appear that this state did not understand the Amendment to have the effect which Appellants urge. Yet, if a state under these same conditions had

rejected the Amendment, it would suggest that the Amendment's impact upon the school segregation law was a controlling factor. We submit, the new constitutional and statutory provisions enacted with respect to public schools during the critical period, i.e., from 1866, the year the Amendment was submitted, until several years following adoption, constitute strong evidence on the question of the understanding of the Amendment in the state legislatures.

Then, too, we note that the Fourteenth Amendment was designed particularly as a limitation upon the late Confederate States. *Slaughter House Cases*, 16 Wall. 36. Each of them, except Tennessee, was required to endorse the Amendment and the price of readmission also required each to demonstrate that it "modified its constitution and laws in conformity therewith." 14 Stat. 428 (Act of March 2, 1867). In this connection, Representative Boutwell significantly declared: [209]

> "We are engaged in the great work of reconstructing this Government, and I suppose if we are committed to anything, it is this: that in the ten States not now represented there shall hereafter be no distinction on account of race or color."

These new constitutions, and the proposals and debates of the conventions which framed them, then are of utmost significance. Certainly, they had to measure up to the requirements of the Fourteenth Amendment and, therefore, their educational provisions apparently reflect the understanding of the draftsmen as to the Amendment's effect upon compulsory public school segregation. Similarly, since the constitutions of these states, were subject to the scrutiny of Congress, an additional insight into the understanding of Congress is provided. For it would hardly be possible to maintain that Congress contemplated

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[209] Cong. Globe, 39th Cong., 2nd Sess. 472 (1867).

the Fourteenth Amendment as a prohibition on compulsory segregated schools if it had approved a constitution having a provision inconsistent with this proposition.

We now turn to the legislative history of the Fourteenth Amendment in the states. The proceedings in the several states shall be taken up in turn. Because of the geographic origin of certain of the instant cases and the significance of the contemporary understanding and contemplation of the effect of the Amendment upon Southern institutions, we will first treat the evidence from the states whose readmission to the Union was conditioned upon their conformity with the Amendment.

A. The Eleven States Seeking Readmission Understood that the Fourteenth Amendment Stripped Them of Power to Maintain Segregated Schools.

Subsequent to the proclamation of the Thirteenth Amendment the South sought to define the relations between the new freedmen and white men in a manner which retained most of the taint of the former master-slave relationship. The ante-bellum constitutions remained inviolate although prohibitions against slavery were added. Laws were passed which restricted Negroes in their freedom of movement, employment, and opportunities for learning. *Slaughter House Cases,* 16 Wall. 36, 71-72; *Strauder* v. *West Virginia,* 100 U. S. 303, 306-307. In Arkansas [210] and Florida,[211] the so-called Black Codes required separate schools for the children of the two races.

After March 2, 1867, the date of the First Reconstruction Act, 14 Stat. 428, the South was obliged to redefine the status of the freedmen in conformity with their understanding of the Fourteenth Amendment. New constitutions were adopted which without exception were free of

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[210] Ark. Acts 1866-67 p. 100.

[211] Cong. Globe, 39th Cong., 1st Sess. 217 (1866).

any requirement or specific authorization of segregated schools. It is also significant that in almost all of these constitutional conventions and legislatures, the issue of segregated schools was specifically raised and rejected. And no law compelling segregated schools was enacted in any state until after it had been readmitted.

Arkansas

The first of these states to be readmitted was Arkansas. 15 Stat. 72 (Act of June 22, 1868). The constitution which it submitted to Congress had not one reference to race; the education article merely obligated the general assembly to "establish and maintain a system of free schools for all persons" of school age.[212] It is reported that this article was adopted to nullify the segregated school law passed by the legislature earlier in 1867.[213] Its adoption had been generally opposed in the Convention on the ground that it would "establish schools in which there would be 'indiscriminate social intercourse between whites and blacks.' "[214] The electorate was warned that this constitution would "force children into mixed schools."[215] But the new constitution was adopted and proclaimed law on April 1, 1868.[216]

The general assembly convened on April 3, and ratified the Fourteenth Amendment on April 6, 1868.[217] It then proceeded to repeal the former school statute and a new school law was proposed whereby taxes were to be assessed to support a system of common schools for the education of all children. This law was interpreted as establishing "a system of schools where the two races are blended together."[218] And it was attacked because it granted white

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[212] Ark. Const. 1868, Art. IX, § 1.

[213] Staples, Reconstruction in Arkansas 28 (1923).

[214] *Id.* at 247.

[215] Daily Arkansas Gazette, March 19, 1868; *Id.*, March 15, 1868.

[216] *Id.*, April 2, 1868.

[217] Ark. Sen. J., 17th Sess. 19-21 (1869).

[218] *Ibid.*

parents "no option to their children . . . but to send them to the negro schools . . . unless, as is now rarely the case, they are able to give their children education in other schools." [219]

These provisions for public schools were included in the legislative record which Arkansas submitted to the scrutiny of Congress. Whereupon, Arkansas was re-admitted on June 22, 1868. 15 Stat. 72. One month later, but after readmission, the legislature amended the public school statute and directed the Board of Education to "make the necessary provisions for establishing separate schools for white and colored children and youths. . . ." [220]

North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida.

The North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida modifications in their constitutions and laws were approved by Congress in the Omnibus Act of June 25, 1868 and Congress authorized readmittance effective on the date each ratified the Amendment. 15 Stat. 73. The constitution which Florida offered for congressional review imposed a specific duty on the state to provide "for the education of all children residing within its borders without distinction or preference." [221] The legislature ratified the Amendment on June 9, 1868 and when it next convened passed a law to maintain "a uniform system of instruction, free to all youth of six to twenty-one years." [222] It is agreed that this law was not designed to foster segregated schools and by its operation "mixed schools were authorized or required." [223]

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[219] Daily Arkansas Gazette, April 10, 1868.

[220] Act of July 23, 1868 as amended by Ark. Acts 1873, p. 423. See Ark. Dig. Stats., c. 120 § 5513 (1874).

[221] Fla. Const. 1868, Art. VIII § 1.

[222] Fla. Laws 1869, Act of Jan. 30, 1869.

[223] Knight, Public Education in the South 306 (1922); Eaton, "Special Report to the United States Commissioner of Education", Rep. U. S. Commr. Educ. to Secy. Int. 127 (1871).

Several years later the Florida Legislature passed a sweeping law which forbade any racial distinction in the full and equal enjoyment of public schools, conveyances, accommodations and amusements.[224] The first compulsory school segregation provision did not appear until over twenty years after readmission.[225]

In the North Carolina Constitution of 1868, the education article called for the general assembly to maintain "a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and sixteen."[226] Furthermore, the general assembly was "empowered to enact that every child of sufficient mental and physical ability, shall attend the public schools" unless otherwise educated.[227] It is reported that the Constitutional Convention refused by a vote of 86 to 11 to adopt a section which provided that "The General Assembly shall provide separate and distinct schools for the black children of the state, from those provided for white children."[228] The adopted article also survived amendments which would have permitted separate schools "for any class of the population" providing each class shared equally in the school fund.[229] Some proponents of the education article said that it did not force racial commingling but they frankly admitted that it did not prevent it and contended that separate schools, if established, should only develop out of the mutual agreement of parents rather than through legislation.[230] Avail-

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[224] Fla. Laws 1873, c. 1947.

[225] FLA. CONST. 1885, Art. XII § 2.

[226] N. C. CONST. 1868, Art. IX § 2.

[227] *Id.*, § 17.

[228] Motion of Mr. Durham reported in KNIGHT, INFLUENCE OF RECONSTRUCTION ON EDUCATION 22 (1913).

[229] Motions of Messrs. Graham and Tourgee reported in *Id.* at 22.

[230] NOBLE, A HISTORY OF PUBLIC SCHOOLS IN NORTH CAROLINA 340-41 (1930).

able contemporary comment upon the education article of the 1868 constitution uniformly agreed that it either authorized or required mixed schools.[231]

The 1868 Constitution, with this education article, was submitted to Congress and treated as being in conformity with the Amendment. North Carolina's readmission was thus assured contingent upon its ratification of the Fourteenth Amendment.

The state legislature convened on July 1, 1868 and ratified the Amendment on July 4th.[232] Three days later the lower house adopted a resolution providing for the establishment of separate schools, but it failed to win support in the upper house which successfully carried a resolution instructing the Board of Education to prepare a code for the maintenance of the system of free public schools contemplated in the constitution.[233] Significantly, this measure made no reference to race. It was enrolled on July 28, 1868.[234]

At the next regular session after readmission, the legislature passed a school law which required separate schools.[235] However doubtful the validity of this law was to some as late as 1870,[236] the state constitution as amended in 1872, settled the issue by specifically requiring racial separation in education.[237]

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[231] Wilmington Morning Star, March 27, 1868; *id.*, March 28, 1868, p. 2; Charlotte Western Democrat, March 24, 1868; *id.*, April 17, 1868, p. 2; Greensboro Times, April 2, 1868, p. 3; *id.*, April 16, 1868, p. 1; Fayetteville News, April 14, 1868, p. 2; *id.*, June 2, 1868, p. 1.

[232] N. C. Laws 1867, ch. CLXXXIV, Sec. 50.

[233] NOBLE, *op. cit. supra* n. 230, at 297, 299.

[234] See List of Public Acts and Resolutions Passed by the General Assembly of North Carolina, Spec. Sess. of July, 1868.

[235] N. C. Laws 1868-69, c. CLXXXIV, § 50.

[236] NOBLE, *op. cit. supra* n. 230, at 325.

[237] Art. IX, § 2.

South Carolina and Louisiana both ratified the Amendment on July 9, 1868 and were readmitted as of that date pursuant to the Omnibus Act. 15 Stat. 73. The educational articles in their 1868 constitutions were of the same cloth. The Louisiana article flatly said: "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana."[238] South Carolina's constitution provided that: "All the public schools, colleges and universities of this State, supported in whole or in part by the public school fund, shall be free and open to all the children and youths of the State, without regard to race or color."[239] In addition to this, the South Carolina Constitution required the legislature to pass a compulsory school law after it organized facilities for the education of all children.[240] The 1868 constitutions of both states also declared that all citizens, without regard to race or color, were entitled to equal civil and political rights.[241]

The proponents of the education articles in the Louisiana and South Carolina conventions defended the provisions prohibiting segregation by force of law in public schools as an incident of equal justice or equal benefits in return for equal burdens; and they overwhelmingly considered compulsory segregation to be a hostile distinction based on race and previous condition.[242] The chairman of the Education Committee of the South Carolina Convention, defending the proposed education article, explained:[243]

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[238] LA. CONST. 1868, Title VII, Art. 135.

[239] S. C. CONST. 1868, Art. XX § 10.

[240] *Id.*, § 4.

[241] *Id.*, Art. I, § 7; LA. CONST. 1868, Title I, Art 2.

[242] Proceedings of the South Carolina Constitutional Convention of 1868, Held at Charleston, S. C., Beginning January 14th and Ending March 17th, 1868, pp. 654-900 (1868); Official Journal of the Proceedings for Framing a Constitution for Louisiana, 1867-1868, *passim* (1868).

[243] Proceedings, *op. cit. supra* n. 242, at 899.

> "The whole measure of Reconstruction is antagonistic to the wishes of the people of the State, and this section is a legitimate portion of that scheme. It secures to every man in this State full political and civil equality, and I hope members will not commit so suicidal an act as to oppose the adoption of this section."

Continuing, he explained:[244]

> *"We only compel parents to send their children to some school, not that they shall send them with the colored children; we simply give those colored children who desire to go to white schools, the privilege to do so."* (Emphasis supplied.)

After the Louisiana and South Carolina constitutions were approved by Congress, the South Carolina Legislature, in a special session, ratified the Amendment and temporarily organized the school system in conformity with the education article, despite Governor Scott's plea for a law which would require racial separation in schools as a preventive against "educational miscegenation."[245] At the next regular session, the school system was permanently organized, and a law was passed forbidding officials of the state university to "make any distinction in the admission of students or management of the university on account of race, color or creed."[246]

The Louisiana legislature acted with similar celerity and consistency. It assembled on June 29, 1868, ratified the Amendment on July 9, 1868 and enacted laws conforming to the constitutional mandate against segregated schools.[247] At its next session, it supplemented the school

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[244] *Id.* at 690.

[245] S. C. House J., Spec. Sess., p. 51 *et seq.* (1868). See Charleston Daily News, July 10, 1868.

[246] S. C. Acts 1868-69, pp. 203-204.

[247] DABNEY, UNIVERSAL EDUCATION IN THE SOUTH 370 (1936).

laws by imposing penal and civil sanctions against any teacher refusing to accept a pupil of either race.[248] Subsequent laws forbade racial distinctions at a state institution for the instruction of the blind, prohibited racial separation on common carriers, and provided that there should be no racial discrimination in admission, management and discipline at an agricultural and mechanical college.[249]

More than a quarter-century elapsed before South Carolina and Louisiana in 1895 and 1898, respectively, changed these laws to require racial segregation in public education.[250]

The Alabama Constitutional Convention assembled on November 4, 1867, but the education article was not adopted until December 5th, the final day of the session. What emerged was borrowed directly from the Iowa Constitution of 1857, in most particulars, plus the language of a statute passed by the 1865-66 Iowa legislature to specifically bar segregation in schools.[251] This anti-segregation article survived two attempts to introduce provisos specifically requiring the establishment of separate schools.[252]

Congress found that Alabama had conformed its constitution with the Amendment and considered the state qualified for readmission as soon as it ratified the Fourteenth Amendment. On July 13th, 1868, the General Assembly fulfilled the final requirement. Thereafter, on August 11th, the State Board of Education, acting under the legislative powers conferred upon it in the constitution,

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[248] FAY, "THE HISTORY OF EDUCATION IN LOUISIANA", 1 U. S. Bu. Educ. Cir. No. 1, p. 101 (1898).

[249] La. Acts 1869, p. 37; La. Laws 1871, pp. 208-10; La. Laws 1875, pp. 50-52.

[250] S. C. CONST. 1895, Art. XI § 7; LA. CONST. 1898, Art. 248.

[251] Compare ALA. CONST. 1867, Art. XI with IOWA CONST. 1857, Art. IX and Iowa Laws 1865-66, p. 158.

[252] Official Journal of the Constitutional Convention of the State of Alabama 1867-68, pp. 237, 242 (1869).

passed a regulation which made it unlawful "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 . . ."[253] But the significant point again is that this was done only after readmission.

Georgia, like most of the South, had no public school system prior to Reconstruction. In fact, no reference to public schools appears in either the ante-bellum Georgia Constitution or the Constitution of 1865 which was substantially a reenactment of the former.[254]

The Constitutional Convention of 1867-68, however, rewrote the basic state document and the committee on education reported a proposal to establish a thorough system of public education "without partiality or distinction."[255] During the drafting and consideration of the proposed education article, several efforts to include provisions requiring segregated schools were defeated.[256] The Convention adopted an article which directed the General Assembly to "provide a thorough system of general education to be forever free to all children of the State . . .".[257]

After this constitution was approved by Congress, the legislature ratified the Fourteenth Amendment on July 21, 1868 and Georgia apparently qualified for readmission. But the General Assembly forcibly expelled its Negro complement at this session on the ground that their color

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[253] Ala. Laws 1868, App., Acts Ala. Bd. of Educ. It would appear that had this law been tested, application of the rule applicable to borrowed statutes would have invalidated it inasmuch as a similar statute in Iowa had been struck down on the basis of a less stringent constitutional provision. Clark v. Board of School Directors, 24 Iowa 266 (1868).

[254] 2 Thorpe, Federal and State Constitutions 765 *et seq.* (1909).

[255] Journal of the Constitutional Convention of Georgia, 1867-68, p. 151 (1868).

[256] *Id.*, at 69, 151, 479, 558. See ORR, HISTORY OF EDUCATION IN GEORGIA 187 (1950).

[257] GA. CONST. 1868, Art. VI.

made them ineligible to hold office. This action prompted Congress to refuse to seat the Georgia congressional delegation.[258] The General Assembly then reconvened on January 10, 1870, re-seated its Negro members, ratified the Fourteenth Amendment again, and expunged the word "white" from all state laws.[259] The conduct of this legislature satisfied Congress and Georgia was readmitted to the Union on July 15, 1870. 16 Stat. 363.

Three months later, on October 13, 1870, the state legislature passed a public school act which in section 32 established a system of segregated schools.[260] The state constitution was amended in 1877 and validated this legislation by an express requirement for racial separation in public schools.[261]

Texas.

In Texas a Constitutional Convention met in June 1868 to frame the constitution under which it was subsequently readmitted. Drafted to secure the approval of Congress,[262] it required the legislature to maintain "a system of public free schools, for the gratuitous instruction of all the inhabitants of this State of school age."[263] This constitution was accepted at the elections in 1869, and the legislature, without discussion, ratified the three Civil War Amendments on February 18, 1870.[264] Texas was readmitted on March 30, 1870, 16 Stat. 80, and the legislature drafted a public school law which provided that local boards of

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[258] Orr, *op. cit. supra* n. 256, at 195-196.

[259] Ga. Sen. J. Pt. II, p. 289 (1870); Ga. House J. pp. 307, 1065 (1870).

[260] Ga. Laws 1870, p. 57.

[261] Ga. Const. 1877, Art. VIII § 1.

[262] Tex. Const. 1871, Art. I § 1.

[263] *Id.* Art. IX §§ 1-4.

[264] Daily State Journal, February 20, 1870.

education, "when in their opinion the harmony and success of the schools require it, . . . *may* make any separation of the students or schools necessary to secure success in operation . . . ".[265] Contemporary opinion was that this grant of discretion to school boards was a restrained effort to achieve racial separation without offending Congress and that the Fourteenth Amendment forbade the requirement of separate schools although it did not compel mixed schools.[266] It was not until 1876, when Texas adopted a new constitution, that racial separation in schools was expressly required by law.[267]

Virginia.

Virginia submitted to Congress a constitution which contained no reference to race or racial separation in public schools.[268] In the Constitutional Convention, the issue of segregation was introduced when the report of the committee on education was being considered. First, an amendment was proposed to provide "that in no case shall white and colored children be taught in the same school." [269] This amendment was defeated.[270] Subsequently, a proposal to add an independent section providing for the establishment of segregated schools met a like fate.[271] A provision was also submitted to require that public schools be open to all classes without distinction and that the legislature be denied the power to make any law which would admit of any

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[265] 6 Tex. Laws 1866-71, p. 288. (Emphasis added.)

[266] Flake's Daily Bulletin, March 3, 1870; *Id.* March 13, 1870.

[267] Tex. Const. 1876, Art. VII § 7; 8 Tex. Laws 1873-79 CXX § 54.

[268] Va. Const. 1868, Art. VIII § 3.

[269] Journal of the Virginia Constitutional Convention, 1867-68, p. 299 (1868).

[270] *Id.* at 300; Richmond Enquirer, March 31, 1868.

[271] Journal, *op cit. supra* n. 269, at 301.

invidious distinctions.[272] This proposal and a substitute to the same effect were also defeated.[273] Opponents of the proposals to prohibit segregated schools explained the failure of passage, not on the grounds of fundamental objection, but because it was feared that the adoption of such an article in the constitution would doom its chance of ratification.[274] Thus, an article merely directing the general assembly to provide for a uniform system of public free schools was adopted "rather than risk having the Congress or Union Leagues force an obnoxious law on them."[275]

After the election of 1869, at which the constitution was adopted, the General Assembly convened and ratified the Fourteenth Amendment on October 8, 1869. This session passed no school laws and the establishment of the public school system was deferred until after readmission. Full statehood status was regained on January 26, 1870. 16 Stat. 62. Six months later, on June 11th, the General Assembly established a "uniform system of schools" in which separate schools were required.[276] A specific constitutional mandate for segregated[277] schools, however, did not appear until 1902.

Mississippi.

Mississippi followed the general pattern of the former seceded states. The Constitutional Convention of 1868, adopted an education article which made no mention of race or racial separation.[278] At least two unsuccessful

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[272] *Id.*, at 333.

[273] *Id.*, at 335-40.

[274] Address of the Conservative Members of the Late State Convention to the Voters of Virginia (1868).

[275] Dabney, Universal Education in the South 143-44 (1936).

[276] Va. Acts 1869-70, c. 259 § 47, p. 402.

[277] Va. Const. 1902, Art. IX § 140.

[278] Miss. Const. 1868, Art. VIII.

attempts were also made in the Convention to require segregated schools.[279]

While the convention journal does not specifically indicate that the Fourteenth Amendment was raised as an objection to segregated schools, the convention had passed a resolution which declared that:

> ". . . the paramount political object . . . is the restoration or reconstruction of our government upon a truly loyal and national basis, or a basis which will secure liberty and equality before the law, to all men, regardless of race, color or previous conditions." [280]

The convention also framed a Bill of Rights which required all public conveyances to accord all persons the same rights,[281] and it refused to adopt an article forbidding intermarriage.[282]

The next legislature convened in January, 1870, ratified the Fourteenth and Fifteenth Amendments, repealed all laws relative to Negroes in the Code of 1857, as amended by the Black Code of 1865, and indicated that it intended to remove all laws "which in any manner recognize any natural difference or distinction between citizens and inhabitants of the state." [283]

The Constitution and actions of the legislature proved acceptable to Congress, and Mississippi was restored to the Union on February 23, 1870. 16 Stat. 77. It was not until 1878 that Mississippi passed a law requiring segregated

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[279] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1868, pp. 316-18, 479-80 (1868).

[280] *Id.* at 123.

[281] *Id.* at 47; MISS. CONST. 1868, Art I, § 24.

[282] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1868, pp. 199, 212 (1868).

[283] GARNER, RECONSTRUCTION IN MISSISSIPPI 285 (1901).

schools;[284] and it was still later when the Constitution was altered to reiterate this requirement.[285]

Tennessee.

Tennessee, although a member state in the late Confederacy, was not subjected to the requirements of the First Reconstruction Act, inasmuch as it had promptly ratified the Fourteenth Amendment and had been readmitted prior to the passage of that Act. Nevertheless, this state likewise reentered the Union with compulsory racial segregation absent from its constitution and statutory provisions on public schools. Readmission was under the Constitution of 1834, inasmuch as the Constitutional Convention of 1865 merely amended it to abrogate slavery and authorize the general assembly to determine the qualifications of the exercise of the elective franchise.[286] The education article in this constitution merely required the legislature to encourage and support common schools "for the benefit of all the people" in the state.[287] The first law providing for tax supported schools, on its face, also made no racial distinction.[288] The next law, however, prohibited compulsory integrated schools.[289] Contemporary federal

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[284] Miss. Laws 1878, p. 103.

[285] Miss. Const. 1890, Art. IX, § 2.

[286] Tenn. Const. 1834 as amended by §§ 1 and 9 of "Schedule" ratified February 22, 1865. In conformity with the Schedule's directive the legislature enacted that Negroes could exercise and pursue all types of employment and business under the laws applicable to white persons, Tenn. Acts. 1865-66, c. 15; that Negroes were competent witnesses, *Id.*, c. 18; and that persons of color henceforth had the same rights in courts, contracts and property as white persons except that Negroes could not serve on juries and that this act "shall not be construed as to require the education of white and colored children in the same school." *Id.*, c. 40, § 4.

[287] Tenn. Const. 1834, Art. XI § 10.

[288] Tenn. Acts. 1853-54, c. 81.

[289] Tenn. Acts 1865-66, c. 40, § 4.

authorities noted that ante-bellum practice apparently had restricted the benefits of the school system to white children; but approved these provisions because, in sum, they provided a sufficient guarantee for the support and enjoyment of common schools for the equal benefit of all the people without distinction on the basis of race or color.[290]

The Governor convened the legislature in special session on July 4, 1866 to consider the Fourteenth Amendment. In urging its adoption, he summarized Section 1, and said that its practical effect was to protect the civil rights of Negroes and to "prevent unjust and oppressive discrimination" in the exercise of these citizenship rights.[291] A joint resolution to ratify was introduced in the upper house; and a resolution to amend it with a proviso that the proposed Amendment should not be construed to confer upon a person of color rights to vote, to hold office, to sit on juries or to intermarry with whites or to "prevent any state from enacting and enforcing such laws" was voted down.[292] Then the Senate approved the joint resolution and the House concurred.[293]

After ratification, a group in the lower house formally protested its confirmation of the Amendment on the ground that it invaded state rights "and obliterates all distinctions in regard to races, except Indians not taxed."[294] A similar protest was filed in the upper house.[295] Such of the debates as were reported in the press indicate that the legislators understood the Amendment to force absolute equality[296] and that under the inhibitions of Section 1 "distinctions in

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[290] Rep. U. S. Commr. Educ. 1867-68, 101 (18).

[291] Tenn. House J., Called Sess. 3, 26-27 (1866); Tenn. Sen. J., Called Sess. 8 (1866).

[292] Tenn. Sen. J., Called Sess. 26 (1866).

[293] *Id.* at p. 24; Tenn. House J., Called Sess. 24 (1866).

[294] Tenn. House J., Called Sess. 38 (1866).

[295] Tenn. Sen. J., Called Sess. 41-42 (1866).

[296] Nashville Dispatch, July 12, 1866.

schools cannot be made, and the same privileges the one has cannot be denied the other. . . ." [297]

Tennessee was readmitted July 24, 1866. 15 Stat. 708-711. After readmission, a school law was passed on March 5, 1867 whereby boards of education were "authorized and required to establish . . . special schools for colored children, when the whole number by enumeration exceeds twenty-five." [298] It also provided for the discontinuance of these separate schools when the enrollment fell below fifteen. The law, however, did not forbid non-segregated schools. But it was repealed in 1869 and replaced with a requirement that racial separation in schools be observed without exception.[299] Finally, the constitution was amended in 1870 to secure the same result.[300]

In summary, therefore, as to these eleven states the evidence clearly reveals that the Fourteenth Amendment was understood as prohibiting color distinctions in public schools.

B. The Majority of the Twenty-two Union States Ratifying the 14th Amendment Understood that it Forbade Compulsory Segregation in Public Schools.

Other than the states already treated, twenty-six Union States considered the Amendment. Twenty-two of them ratified it. The evidence adduced here is of a somewhat less uniform character than that from the states which formed the late Confederacy for the simple reason that the legislatures in the North were unfettered by any congressional surveillance, and they did not experience the imperative necessity of re-examining their constitutions and laws at the time the proposed Fourteenth Amendment was con-

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[297] *Id.*, July 25, 1866.

[298] Tenn. Laws 1867, c. 27, § 17.

[299] Tenn. Laws 1870, c. 33, § 4.

[300] TENN. CONST. 1870, Art. XI, § 12.

sidered by them. Thus, it is to be expected that some of these legislatures deferred attuning their school laws with the keynote of the Amendment until several years after it had become the law of the land. In other states, the legislatures adjusted their school laws almost simultaneously with their ratification of the Amendment. Still others, because existing laws and practices conformed with their basic understanding with respect to the impact of the Amendment, were not required to act. In the end, nevertheless, we submit that the overwhelming majority of the Union States ratified or did not ratify the Fourteenth Amendment with an understanding or contemplation that it commanded them to refrain from compelling segregated schools and obliged them to conform their school laws to assure consistency with such an understanding.

West Virginia and Missouri.

West Virginia, a state created during the Civil War when forty western counties refused to follow Virginia down the road to secession, and Missouri, a former slaveholding state comprised the small minority of states which ratified the Fourteenth Amendment and perpetuated laws requiring segregated schools without any subsequent enactment consistent with a discernment that such laws and the Amendment were incompatible.

Both states required separate schools for the two races prior to the submission of the Amendment.[301] These laws were continued after the Amendment was proclaimed as ratified;[302] and both states subsequently strengthened the requirement of separate schools in the 1870's by amending their constitutions to specifically proscribe racial integration in public schools.[303]

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[301] W. Va. Laws 1865, p. 54; Mo. Laws 1864, p. 126.

[302] W. Va. Laws 1867, c. 98; W. Va. Laws 1871, p. 206; Mo. Laws 1868, p. 170; Mo. Laws 1869, p. 86.

[303] W. Va. Const. 1872, Art. XII, § 8; Mo. Const. 1875, Art. IX.

THE NEW ENGLAND STATES.

Segregated schools also existed in some of the strongly abolitionist New England states prior to their consideration and ratification of the Amendment. But their reaction to the prohibitions of Section 1 was directly contrary to the course taken in West Virginia and Missouri.

In Connecticut, prior to the adoption of the Amendment, racial segregation was not required by state law but segregated schools were required in some cities and communities, e.g., in Hartford pursuant to an ordinance enacted in 1867 and in New Haven by administrative regulation.[304] On August 1, 1868, four days after the Amendment was proclaimed, however, the legislature expressly forbade separate schools.[305] Interestingly, during the course of debate on this bill, amendments which would have required segregation or permitted separate "equal" schools were introduced and rejected.[306]

Similarly, racial separation in schools was never required by the constitution or laws of Rhode Island, but segregated schools existed at least in Providence, Newport and Bristol.[307] Here, too, the same legislature which

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[304] MORSE, THE DEVELOPMENT OF FREE SCHOOLS IN THE UNITED STATES AS ILLUSTRATED BY CONNECTICUT AND MICHIGAN 127, 144, 192 (1918); WARNER, NEW HAVEN NEGROES 34, 71-72 (1940).

[305] Conn. Acts 1866-68, p. 206. See Conn. House J. 410 (1866); Conn. Sen. J. 374 (1866).

[306] Conn. Sen. J. 247-48 (1868); Conn. House J. 595 (1868). See New Haven Evening Register, June 17, 1868.

[307] BARTLETT, FROM SLAVE TO CITIZEN, c. 6 *passim*. (unpub. ms., pub. expected in Dec. 1953). See Ammons v. School Dist. No. 5, 7 R. I. 596 (1864).

ratified the Amendment enacted a law prohibiting racial segregation in public schools.[308]

In Maine, there was no racial separation in public schools prior to the adoption of the Amendment.[309] However, the leading supporter of ratification extolled in the broadest terms its equality provisions and indicated that the proponents expected it to compel in the other states the same equality in civil and political rights as existed in Maine, itself.[310]

Massachusetts too, had already made unlawful any racial segregation in schools prior to the submission of the Amendment.[311] Thus, since Massachusetts had already considered state required racial segregation completely inconsistent with a system of laws and government which treats all persons alike irrespective of color,[312] there was

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[308] R. I. Laws 1866, c. 609.

The Committee on Education recommended passage of this act, saying: "The great events of the time are, also, all in favor of the elevation of the colored man. They are all tending to merge the distinctions of race and of class in the common brotherhood of humanity. They have already declared the Negro and the white man to be equal before the law; and the privileges here asked for by these petitioners, are simply a necessary result of this recognized equality." It went on to say, "We have no right to withhold it from him in any case", and asked, "With what consistency can we demand that these colored people shall be equal before the law in other states or the territories, while we, ourselves, deprive them of one of their most important civil rights?" Report of Committee on Education, Pub. Doc. No. 4 (1896).

[309] See CHADBOURNE, A HISTORY OF EDUCATION IN MAINE (1936).

[310] Speech of Senator Crosby in the Maine Senate, January 16, 1867, reported in Kennebec Journal, January 22, 1867, p. 1.

[311] Mass. Acts & Res. 1854-1855, p. 650; Mass. Acts & Res. 1864-1865, pp. 674-75.

[312] This was precisely the fundamental proposition underlying the enactment of the Act of 1855 prohibiting racial segregation in public schools. Report of the Committee on Education, Mass. House Doc. No. 167, March 17, 1855.

no subsequent legislative action interpretative of the impact of the Amendment on segregation.

The deliberations of the legislature on the proposed Amendment opened with its reference to the body by the governor. He recommended ratification and his speech indicates that he understood Section 1 of the Amendment to be a reinforcement of the Civil Rights Act of 1866 and observed: "Whatever reasons existed at the time for the enactment of that bill, apply to the incorporation of its provisions into the state law." [313] Surprisingly, strong opposition to ratification developed. A majority of the joint committee recommended rejection on the ground that the proposed Amendment neither specifically guaranteed Negro suffrage nor added anything to what was already in the constitution "possibly excepting the last clause" of Section 1. Of this, is concluded: [314]

> "The denial by any state to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights. . . . [But] such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments."

The minority reported that: [315]

> "Without entering into any argument upon the merits of the amendment, they would express the opinion that its ratification is extremely important in the present condition of national affairs."

When these reports were presented in the lower house of the legislature, a motion was passed to substitute the

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[313] Mass. Acts and Res. 1867, pp. 789, 820; Boston Daily Advertiser, January 5, 1867, Sat. Supp.

[314] Mass. House Doc. 149, pp. 23-24 (1867).

[315] *Id.*, at 25.

minority report.[316] Suffrage had claimed much of the strident debate on the motion. But a speech of one of the last members to speak for the motion was reported as follows:[317]

> "To the first article of this amendment, there had been no objection brought by those who favored rejection. . . . The speaker felt that this was a most important article; by it the question of equal rights was taken from the supreme courts of the States and given to the Supreme Court of the United States for decision; the adoption of the article was the greatest movement that the country had made toward centralization, and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not like it, sacrifice some of their rights for the purpose of aiding the blacks."

The upper house considered the motion several days later, re-echoed the theme of the speeches previously made in the lower house, and voted for ratification.[318]

The New Hampshire legislature took up the proposed Amendment in June of 1866. The governor's message urged ratification but its brief comment was not revealing.[319] The majority report of the house committee with respect to the Amendment merely offered a resolution to modify.[320] But the minority reported a number of reasons

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[316] Boston Daily Advertiser, March 13, 1867, p. 2; *Ibid.*, March 14, 1867, p. 1.

[317] *Id.*, March 14, 1867, p. 1 (Speech of Richard Henry Dana, Jr.).

[318] Mass. Acts and Res. 1867, p. 787; Mass. Leg. Doc. Sen. Doc. No. 25 (1867); Boston Daily Advertiser, March 21, 1867, p. 1.

[319] N. H. House J. 137 (1866).

[320] *Ibid.*, p. 174.

for rejection which, *inter alia*, criticized section 1 on the grounds of ambiguity and furthermore:[321]

> "Because said amendment is a dangerous infringement upon the rights and independence of all the states, north as well as south, assuming as it does, control their legislation in matters purely local in their character, and impose disabilities upon them for regulating, in their own way [such matters]."

The same set of objections was presented by a minority of the special committee of the upper house.[322] Both chambers voted for ratification, however, within a month after the Amendment was offered to the state.[323]

Laws governing public schools in New Hampshire appear to have never been qualified on the basis of race or color at any time after its organic law obligated the legislature to stimulate public education.[324] Similarly, Vermont seems to have no history of segregated schools. Neither did its laws sanction such a policy.[325] When the legislature convened in 1866, the Governor's opening message discussed the proposed Fourteenth Amendment at some length. He urged that it be ratified to secure "equal rights and impartial liberty", otherwise a small number of whites in the South and the entire colored race would be left unprotected. In concluding, he said Vermont welcomed "such a reorganization of the rebellious communities, as would have given the people, white and black, the equal civil and political rights secured to the people of the State, by our Bill of Rights and Constitution, and under which peace,

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[321] *Id.* at 176.

[322] N. H. Sen. J. 70 (1866).

[323] *Id.* at 94, N. H. House J. 231-33 (1866).

[324] N. H. CONST. 1792, § LXXXIII.

[325] VT. CONST. 1777, c. II, § XXXIX; VT. CONST. 1786, c. II, § XXXVIII; VT. CONST. 1793, c. II, § 41. See Report of the Indiana Department of Public Instruction 23-28 (1867-68).

order, civilization, *education,* contentment, Christianity and liberty have shed their benign and blessed influence alike upon every home and household in our beloved Commonwealth." [326] Thereupon, both houses routinely voted for ratification.[327]

The Middle Atlantic States.

Three Mid-Atlantic States, New York, New Jersey and Pennsylvania ratified the Amendment. The Pennsylvania evidence is in some detail because it was one of the few states to preserve the full discussions and debates of its legislature. Furthermore, its statutes, previous to the adoption of the Amendment, authorized segregation in schools; [328] and public carriers had regulations which excluded or segregated Negroes. See *West Chester & Phila. R. Co.* v. *Miles,* 5 Smith (55 Pa.) 209 (1867).

On January 2, 1867, the Governor transmitted the Fourteenth Amendment to the Legislature. He called for its adoption primarily upon political grounds but strenuously urged that every citizen of the United States had certain rights that no state had a right to abridge and the proposed Amendment asserted "these vital principles in an authoritative manner, and this is done in the first clause of the proposed amendments [sic]." [329]

The resolution recommending ratification was introduced in the Pennsylvania Senate by its floor leader. He urged that one of the reasons why it had to be adopted was because Mississippi had enacted a law requiring segregation on railroads and the Amendment was necessary to

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[326] Vt. Sen. J. 28 (1866); Vt. House J. 33 (1866). (Emphasis added.)

[327] Vt. House J. 139 (1866); Vt. Sen. J. 75 (1866).

[328] Act of May 8, 1854, Pa. L. 617 § 24.

[329] Pa. Sen. J. 16 (1867).

overcome all state legislation of this character.[330] In summary of his concept of the purpose of section 1, he said:

> "The South must be fenced in by a system of positive, strong, just legislation. The lack of this has wrought her present ruin; her future renovation can come only through pure and equitable law; law restraining the vicious and protecting the innocent, making all castes and colors equal before its solemn bar, that, sir, is the *sine qua non*. . . ."

The pith of the speeches of both the proponents and opponents of ratification are as follows:

Senator Bingham, a leading supporter of the resolution, noted that "it has been only a question of time how soon all legal distinctions will be wiped out."[331]

Another announced, "I shall vote for it with satisfaction for my own conscience and gratitude to Congress for squarely meeting the universal demand of the loyal states to destroy all legal caste within our borders."[332]

The leading opponent of ratification interpreted the Amendment as follows:[333]

> "By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons . . . which has found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal rights to all. *In all matters of civil legislation and administration there shall be perfect equality in the advantages and securities guaranteed by each state to everyone here declared a citizen, without distinction of race or color*, every one being equally entitled to demand from the

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[330] 2 Pa. Leg. Rec., app., p. III (1867).

[331] *Id.* at XVI.

[332] *Id.* at XXII (speech of Senator Taylor).

[333] *Id.* at XLI (speech of Mr. Jenks).

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[330] 2 Pa. Leg. Rec., app., p. III (1867).

[331] *Id.* at XVI.

[332] *Id.* at XXII (speech of Senator Taylor).

[333] *Id.* at XLI (speech of Mr. Jenks).

> state and state authorities full security in the enjoyment of such advantages and securities." (Emphasis supplied).

The legislature ratified the Amendment on January 17, 1867.[334]

About two weeks later, on February 5th, a bill was introduced making it unlawful for public conveyances to exclude or segregate Negroes.[335] In introducing this bill, its sponsor announced that the doctrine of equality before the law required the passage of this bill. Both he and another supporter of the bill pointed out that these practices were pursuant to carrier regulations and policies and had to be eradicated by legislative action. It was also pointed out that the bill did not effect social equality because that is regulated solely by the personal tastes of each individual.[336] The bill was overwhelmingly enacted into law the following month.[337]

The school law authorizing separate schools was not specifically repealed until 1881 when the legislature made it unlawful for any school official to make any distinction on account of race or color in students attending or seeking to attend any public school.[338]

It appears, however, that when the state constitution was amended in 1873, the 1854 school law was viewed as having been brought into conformity with the adoption of a provision for a school system "wherein all children of this Commonwealth above the age of six years shall be educated. . . ." [339] The Secretary of State, official reporter

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[334] Pa. Laws 1867, 1334.

[335] 2 Pa. Leg. Rec., app. p. LXXXIV (1867).

[336] Id. at pp. LXXXIV *et seq.* (Remarks of Senators Lowery and Brown.)

[337] Act of March 22, 1867, Pa. Laws 1867, pp. 38-39.

[338] Act of June 8, 1881, Pa. L. 76, § 1, Pa. Laws 1881, p. 76.

[339] PA. CONST. 1873, Art. X, § 1.

of the Convention, states particular attention was paid to "that part which confers authority on the subject of education." And he noted that the new article was formulated to conform with the policy of protest against all racial discrimination and, specifically, to remove the "equivocal and indivious provision."[340] These purposes are further borne out when the sponsor of the 1881 bill stated:[341]

> "In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time."

New Jersey, as early as 1844, enacted general legislation for the establishment and support of a public school system "for the equal benefit of all persons. . . ."[342] In 1850, special legislation was enacted which enabled Morris Township to establish a separate colored school district if the local town meeting voted to do so.[343] The state superintendent of schools construed this act and concluded that it in combination with the earlier law of 1844 permitted any local school system to maintain separate schools provided both schools offered the same advantages and no child was excluded.[344]

The New Jersey Legislature convened in a special session and hastily ratified the Amendment on September 11, 1866.[345] The dispatch with which this was done was made

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[340] JORDAN, OFFICIAL CONVENTION MANUAL 44 (1874).

[341] Pa. Sen. J. (entry dated May 26, 1881).

[342] N. J. CONST. 1844, Art. IV § 7(6); N. J. REV. STATS., c. 3 (1847).

[343] N. J. Laws 1850, pp. 63-64.

[344] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF SCHOOLS 41-42, (1868).

[345] N. J. Sen. J., Extra Sess., 1866, p. 14; MINUTES OF THE ASSEMBLY, Extra Sess., 1866, p. 8.

a focal issue in the following elections. The Republicans broadly defended the Amendment as "forbidding class legislation, or the subjecting of one class of people to burdens that are not equally laid upon all."[346] The Democrats more specifically contended that their candidates opposed the Amendment because they were "against Negro suffrage and the attempt to mix negroes with workingmen's children in public schools."[347] When the Republicans captured the governorship and elected a radical congressional delegation, the Democrats captured the state legislature and immediately proceeded to rescind New Jersey's ratification.[348]

When the Republicans recaptured control of the legislature in 1870 the school law was amended to require "a thorough and effective system of public schools for the instruction of all children. . . ."[349] And this was later reinforced by an enactment which made it unlawful to exclude any child from any public school on account of color.[350] As a result of this law, separate schools soon disappeared except in a few counties where Negro citizens generally accepted them. When Negroes chose not to accept these segregated schools the school authorities were required to admit them to the white schools pursuant to the prohibition of the 1881 school law.[351]

New York, like the other Middle-Atlantic states, had ante-bellum constitutions which merely authorized the legis-

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[346] Newark Daily Advertiser, October 25, 1866; Trenton State Gazette, November 3, 1866.

[347] Trenton Daily True American, November 3, 1866.

[348] N. J. Sen. J. 198, 249, 356 (1868); Minutes of the Assembly; 309, 743 (1868). See KNAPP, NEW JERSEY POLITICS DURING THE PERIOD OF CIVIL WAR AND RECONSTRUCTION 167 (1924).

[349] N. J. Laws 1874, p. 135.

[350] N. J. Laws 1881, p. 186.

[351] See Pierce v. Union Dist. School Trustees, 17 Vroom (46 N. J. L.) 76 (1884).

lature to establish a common school fund.[352] There was never any general legislation on the subject of racial separation in schools sharing in the common school fund. The legislature, however, granted charters to Brooklyn, Canandaigua, Buffalo and Albany which permitted these cities to maintain segregated schools as early as 1850.[353] The Common School Act of 1864 was in the same vein. It only permitted school boards in certain political subdivisions to establish and maintain segregated schools "when the inhabitants of any school district shall so determine, by resolution at any annual meeting called for that purpose, establish a separate school or separate schools for the instruction of such colored children. . . ." [354] Communities exercising the option under this law comprised the exception rather than the rule.[355]

Shortly after New York ratified the Amendment,[356] a constitutional convention was held and it adopted a new constitution which provided for free instruction of all persons of school age.[357] The convention approved a committee report which contained a ringing declaration that Negroes

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[352] N. Y. CONST. 1821, Art. VII; N. Y. CONST. 1846, Art. IX.

[353] N. Y. Laws 1850, c. 143; N. Y. Laws 1852, c. 291. See Dallas v. Fosdick, 50 How. Prac. 249 (1869); People v. Easton, 13 Abb. Prac. N. S. 159 (1872).

[354] N. Y. Laws 1864, c. 555.

[355] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION 131, 159, 163, 166, 170, 233, 323 (1866).

[356] N. Y. Sen. J. 33 (1867); N. Y. Ass. J. 77 (1867). The Governor's message upon transmission of the Amendment leaves little doubt that he considered it as a "moderate proposition" containing "just the conditions for safety and justice indispensible to a permanent settlement." N. Y. Sen. J. 6 (1867); N. Y. Ass. J. 13 (1867).

[357] N. Y. CONST. 1868, Art IX. See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1867-68 (1868).

should have full equality in the enjoyment of all civil and political rights and privileges.[358]

Subsequently, in 1873, the legislature passed an "Act to Provide for the Protection of Citizens in Their Civil and Public Rights."[359] The Act made it unlawful for any person to exclude any other person on the ground of race or color from the equal enjoyment of any place of public accommodation, place of public amusement, public conveyance, "*common schools and public instruction* [sic] of learning. . . ." (emphasis supplied). It also annulled the use of the word "white" or any other discriminatory term in all existing laws, statutes, ordinances and regulations.[360] The New York Court of Appeals did not give vitality to this act in the case of *People ex rel. King* v. *Gallagher,* 92 N. Y. 438 (1883). But cf. *Railway Mail Association* v. *Corsi,* 326 U. S. 88.

The Western Reserve States.

The five states in the Western Reserve all ratified the Fourteenth Amendment. Each of them had rather well established public school systems prior to the Civil War. In Ohio, the first public school legislation expressly denied

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[358] "First. Strike out all discriminations based on color. Slavery, the vital source and only plausible ground of such invidious discrimination, being dead, not only in this State, but throughout the Union, as it is soon to be, we trust, throughout this hemisphere, we can imagine no tolerable excuse for perpetuating the existing proscription. Whites and blacks are required to render like obedience to our laws, and are punished in like measure for their violation. Whites and blacks are indiscriminately drafted and held to service to fill our State's quotas in a war whereby the Republic was saved from disruption. We trust that we are henceforth to deal with men according to their conduct, without regard to their color. If so, the fact should be embodied in the Const." Documents of the Convention of the State of New York, 1867-68, Doc. No. 15 (1868).

[359] N. Y. Laws 1873, c. 186 § 1.

[360] *Id.,* § 3.

Negroes the benefit of free schools.[361] Twenty years later, in 1847, this act was amended to permit the maintenance of separate schools for colored children if the residents of a school district objected to their admission into the white schools.[362] At its next session, the legislature repealed the provision in an earlier law that had prohibited the application of taxes paid by white residents toward the support of colored schools.[363] And in 1853 the school law was revised to require the allocation of public school funds in proportion to the number of children of school age regardless of color.[364]

Separate schools, however, were still maintained except in Cleveland, Oberlin and other northern cities despite the general feeling that this act had relaxed the stringent restrictions of the antecedent laws. Furthermore, the State Supreme Court held this law not to entitle colored children, as of right, to admission into white schools. *Van Camp* v. *Board of Education,* 9 Ohio St. 406 (1859).

After ratification of the Amendment,[365] the legislature did not immediately modify the schools laws. In fact, it did nothing until after the Ohio Supreme Court upheld compulsory segregated schools in *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198 (1872). Then the legislature enacted a statute which permitted rather than required seg-

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[361] Ohio Laws 1828-29, p. 73.

[362] Ohio Laws 1847-48, pp. 81-83.

[363] Ohio Laws 1848-49, pp. 17-18.

[364] Ohio Laws 1852, p. 441.

[365] Ohio Sen. J. 9 (1867); Ohio House J. 13 (1867). The Amendment was ratified within two days of its submission to the legislature by the Governor. He observed that the Amendment had four provisions; the first of which was "the grant of power to the National Government to protect the citizens of the whole country . . . should any state attempt to oppress classes or individuals, or deprive them of equal protection of the laws . . ." Ohio Exec. Doc., Part I, 282 (1867).

regated schools.[366] Later, it denied local school authorities the power to exercise their discretion in the premises.[367] By this act, all public schools were opened to all children without distinction on account of race or color. *State* v. *Board of Education*, 2 Ohio Cir. Ct. Rep. 557 (1887).

Indiana's pre-Fourteenth Amendment school law provided for the support of public schools but exempted "all Negroes and mulattoes" from the assessment.[368] This law was interpreted as excluding colored children from public schools wherever the parents of white children objected. *Lewis* v. *Henley*, 2 Ind. 332 (1850).

On January 11, 1867, Governor Morton submitted the Fourteenth Amendment to the legislature. His message urged ratification but suggested that schools should be provided for Negroes and that they be educated in separate schools to relieve any friction which could arise if they were required to be admitted to white schools.[369] A resolution to ratify the Amendment was introduced on the same day and referred to a joint committee. Five days later the resolution was reported out favorably with a recommendation of prompt ratification.[370] A minority report was made which objected to the Amendment primarily because it conferred civil and political equality upon Negroes, including the same rights that were then enjoyed by the white race.[371]

The resolution was adopted on the same day in the Senate.[372] No speeches were made in support of the resolution in this chamber but two senators spoke at length against it.[373] In the House, the main contention of the opponents was that the Amendment would impose Negro equality,[374]

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[366] Ohio Laws 1878, p. 513.

[367] Ohio Laws 1887, p. 34.

[368] Ind. Rev. Stats. 314 (1843).

[369] Ind. Doc. J., Part I, p. 21 (1867).

[370] Ind. House J. 101 (1867).

[371] *Id.* at 102.

[372] Ind. Sen. J. 79 (1867).

[373] Brevier, Legislative Reports 44-45 (1867).

[374] *Id.* at 79.

seat Negroes on juries, grant them suffrage and admit them into the white schools.[375] The proponents only denied that the Amendment conferred suffrage.[376] And the lower chamber adopted the resolution on January 23, 1867.[377]

Two years after ratification of the Fourteenth Amendment, the legislature revised its law to require the organization of separate schools.[378] The act also authorized the maintenance of non-segregated schools in areas where there were insufficient Negro children residing within a reasonable distance to justify a separate school. In 1874, the compulsory segregation section of this law was declared valid in the case of *Cory* v. *Carter*, 48 Ind. 327 (1874).

The legislature, however, revised the school laws at its next session to permit (*not require*) segregated schools.[379] The revised law, furthermore, required that colored children be admitted to the regular schools if a separate school was not maintained. This provision was applied in sustaining mixed schools in *State* v. *Grubbs*, 85 Ind. 213 (1883).

Illinois statutes never specifically required separate schools. But the ante-bellum school statute provided that school districts with Negro populations should allow these residents a portion of the school fund equal to the amount of taxes collected from them.[380] As construed by the state superintendent of schools, this law was applied to require segregated schools.[381]

The Illinois legislature received the governor's message endorsing ratification of the Fourteenth Amendment on

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[375] *Id.* at 80, 88-89, 90.

[376] *Id.* at 90.

[377] Ind. House J. 184 (1867).

[378] Ind. Laws 1869, p. 41.

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

[380] Ill. Stats. 1858, p. 460.

[381] SIXTH BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ILLINOIS, 1865-66, pp. 27-29; 2 REPORTS MADE TO THE GENERAL ASSEMBLY AT ITS TWENTY-FIFTH SESSION, pp. 35-37.

January 7, 1867. Both chambers then ratified it on the same day with virtually no discussion or debate.[382] About one year later, in December 1869, Illinois called a constitutional convention. It adopted the present organic law which provides for a free public school system for the education of "all children".[383] This provision stems from a resolution in which the convention directed the Education Committee to submit an article which would call for the establishment of a public school system for the education of every "susceptible child—without regard to color or previous condition".[384] Furthermore, the convention rejected two resolutions which would have directed the establishment of a compulsory segregated school system.[385]

Of all the states of the Western Reserve, Michigan was most deeply affected by the tide of abolitionism which swept this section during the pre-war years. By its Constitution of 1850 the word "white" was eliminated from the section establishing voting qualifications [386] and slavery was declared intolerable.[387] Neither this constitution nor the general law of the state recognized any racial distinctions in the enjoyment of public education. But as early as 1842 and as late as 1866, special statutes were passed granting school boards in certain of the larger cities discretionary power to regulate the apportionment of school funds and distribution of pupils among the several schools under their

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382 Ill. House J. 40, 154 (1867); Ill. Sen. J. 40, 76 (1867).

383 ILL. CONST. 1870, Art. VIII, § 1.

384 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, Convened at Springfield, December 13, 1869, p. 234.

385 *Id.* at 429-431, 860-861.

386 Compare MICH. CONST. 1850, Art. VII, § 1 with MICH. CONST. 1835, Art. II, § 1.

387 Art. XVIII, § 11.

jurisdiction. Pursuant to this authority some school boards, e.g., in Detroit and Jackson, established separate schools.[388]

The Amendment was submitted to the legislature on January 6, 1867. On January 12th, a resolution was adopted in the Senate instructing the Committee on Public Instruction to report out a bill "to prevent the exclusion of children from the primary or graded or other public schools of this state on account of race or color." And four days later the general school law was amended to provide that "all residents of any district shall have an equal right to attend any school therein. . . ." [389] The Fourteenth Amendment was subsequently ratified on February 16, 1867.[390]

The legislative record of Michigan during the next several years is replete with more blows against segregation and other distinctions based on race or color. In 1869, insurance companies were prohibited from making any distinction between white and Negro insureds.[391] The ban against interracial marriages was removed in 1883.[392] Then in 1885, the civil rights law was enacted prohibiting racial separation on public conveyances, in places of public accommodation, recreation, and amusement.[393]

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[388] See People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400 (1869) for reference to these special statutes and notice of separate schools in these two cities. Since the decision in this case, there have been no segregated schools maintained by state authorities.

[389] 1 Mich. Laws 42 (1867); Mich. Acts 1867, Act 34 § 28.

[390] The journals of the Michigan legislature indicate that both houses promptly ratified the Amendment without reference to a committee. Mich. Sen. J. 125, 162 (1867); Mich. House J. 181 (1867).

[391] Mich. Acts 1869, Act 77 § 32. See Mich. Comp. Laws § 7220 (1897).

[392] Mich. Acts 1883, Act 23, p. 16.

[393] Mich. Acts 1885, Act 130 § 1. See Mich. Comp. Laws § 11759 (1897).

Wisconsin, since 1848, provided for a public school system free to all children.[394] Moreover, during the crucial years, its Negro population was insignificant—less than two-tenths of one percent,[395] Thus, it seems obvious why segregation in schools or elsewhere never merited the attention of the legislature at the time of its ratification of the Amendment or thereafter.[396]

The Wisconsin legislature met on January 3, 1867 and was addressed by the Governor. His speech suggests that in his thinking the Fourteenth Amendment which he asked them to ratify was designed to apply solely to the South and required that "they must assent to the proposed amendment with all of its guarantees, securing to all men equality before the law. . . ." [397] A joint resolution was introduced to ratify the Amendment and referred to a committee of three, two of whom reported a recommendation to adopt. The report filed by the minority member condemned the Amendment at some length. "The apparent object," to him, was to allow Congress to enfranchise Negroes, legislate generally on civil rights, "give to the federal government the supervision of all the social and domestic relations of the citizen of the state and to subordinate state governments to federal power." [398]

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[394] WIS. CONST. 1848, Art. X, § 3; WIS. REV. STATS. Title VII (1849).

[395] LEGAL STATUS OF THE COLORED POPULATION IN RESPECT TO SCHOOLS AND EDUCATION, SPECIAL REPORT OF THE COMMISSIONER OF EDUCATION, 400 (1871).

[396] Wis. Sen. J. 119, 149 (1867); Wis. Ass. J. 224-226, 393 (1867). The entire series of Journals covering the War and Reconstruction years shows but a single reference to color in connection with education. This was a proposal to amend an 1863 bill so as to limit certain educational privileges to children of "white parentage". The amendment failed and the matter was never revived. Wis. Ass. J. 618 (1863).

[397] Wis. Sen. J. 32 (1867); Wis. House J. 33 (1867).

[398] *Id.* at 96, 98 *et seq.* (Report filed by Sen. Garrett T. Thorne).

It appears that this understanding of the Amendment was not disputed. Rather, one supporter of the Amendment is reported as stating: "If the states refuse to legislate as to give all men equal civil rights and equal protection before the laws, then, sir, there should be supervisory power to make them do that, and a consolidation of that kind will be a benefit instead of an injury.[399] And, another answered:[400]

> "We therefore need such a provision in the Constitution so that if the South discriminates against the blacks the United States courts can protect them. I know it is objected that this is an enlargement of the power of the United States Supreme Court. But it is a power given on the side of liberty—power to protect and not power to oppress. For the appeal will come up to this court from the aggrieved individual against the aggressing state. . . ."

The Western States.

Of the states west of the Mississippi which ratified the Amendment, Nebraska is quite significant because it was admitted to the Union during the life of the 39th Congress and conditions were imposed upon its admission which demonstrate that the Congress which prepared the Amendment intended to eradicate all distinctions based upon race. Nebraska won statehood without having ratified the Amendment. But the enabling Act provided that "this act shall take effect with the fundamental and perpetual condition that there shall be no abridgement or denial of the exercise of the elective franchise, *or any other right,* to any person by reason of race or color. . . ." Act of February 9, 1867, ch. 9, sec. 3, 14 Stat. 377 (emphasis supplied). The Act, furthermore, required Nebraska to publicly proclaim

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[399] Wisconsin State Journal, Feb. 7, 1867 (Reporting speech of Assemblyman C. B. Thomas).

[400] Daily Wisconsin Union, Feb. 7, 1867 (Reporting speech of Assemblyman H. C. Hobart).

this fundamental condition "as a part of the organization of this state."

While the enabling Act was still being considered by Congress, the territorial legislature forthwith passed a "Bill to remove all distinctions on account of race or color in our public schools" [401] since the existing school law restricting the enumeration of pupils to white youths [402] had heretofore been administratively construed to exclude colored children from the public schools. This bill failed to enter the statute books for lack of gubernatorial endorsement.[403]

The same session of the legislature by an appropriate resolution recognized the enabling Act's "fundamental condition" on February 20, 1867 and on March 1st Nebraska was proclaimed the 37th state. Two months later, a special session of the legislature was called to ratify the Amendment and to enact legislation to "render Nebraska second to no other state in the facilities offered to all her children, irrespective of sex or condition. . . ." [404] The Amendment was ratified in June 1867,[405] and the school law was amended to require the enumeration of "all the children" in the school census.[406] The new school law did not in specific language prohibit segregation, but colored children entered the public schools on a non-segregated basis at the next school term in September, 1867.[407]

Another school law was enacted in 1869 which provided an increase in the taxes for the support of public schools

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[401] Neb. House J., 12th Terr. Sess. 99, 105 (1867). See Omaha Weekly Republican, January 25, 1867, p. 2; *Id.*, February 8, 1867.

[402] Neb. Comp. Laws 1855-65, pp. 92, 234, 560, 642 (1886).

[403] MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF NEBRASKA. COLLECTED IN PUBLICATIONS OF THE NEBRASKA STATE HISTORICAL SOCIETY, 249 (1942).

[404] *Id.* at 274.

[405] Neb. House J. 148 (1867); Neb. Sen. J. 174 (1867).

[406] 2 Neb. Comp. Laws 1866-77, p. 351 (1887).

[407] See Nebraska City News, August 26, 1867, p. 3; *Id.*, September 4, 1867, p. 3.

"affording the advantages of a free education to all youth;" [408] and thereafter no school law has contained any language describing the system of public schools operated by the state.

Prior to its ratification of the Amendment, Kansas, a loyal border state, had adopted a policy of permissive segregation whereby boards of education were authorized, but not required, to establish separate schools.[409] The legislature ratified the Amendment on January 16, 1867,[410] and changed the school law on February 26th by an act which made it illegal for "any" school board to refuse to admit "any" child.[411] In 1868, it reenacted the earlier permissive school segregation law.[412] Subsequently, an 1876 revision of the school laws omitted any authorization for segregation in cities of the first class and specifically forbade segregated schools in cities of the second class.[413] The same session also passed a civil rights act which is still the law and proscribes any distinction on account of race or color in "any state university, college, or other school of public instruction" or in any licensed place of public accommodation or amusement, or on any means of public carriage.[414] In 1879, the legislature reenacted the law permitting racial

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[408] 2 Neb. Comp. Laws 1866-77, pp. 451, 453 (1887).

[409] Kan. Laws 1862, c. 46, Art. 4 §§ 3, 18; Kan. Laws 1864, c. 67, § 4; Kan. Laws 1865, c. 46, § 1.

[410] The Amendment was ratified without reference to a committee within three days after it was submitted to the legislature. Kan. Sen. J. 43, 76, 128 (1867); Kan. House J. 62, 79 (1867).

[411] Kan. Laws 1867, c. 125, § 1; KAN. GEN. STATS., c. 92, § 1 (1868). The punitive feature of this statute directed county superintendents to withhold school funds from any offending schools.

[412] Kan. Gen. Stats., c. 18, Art. V § 75, c. 19, Art. V § 57 (1868).

[413] Kan. Laws 1876, 238.

[414] Kan. Laws 1874, c. 49, § 1. See KAN. REV. STATS. § 21-2424 (1935).

separation in schools but limited it to cities of the first class.[415]

Minnesota ratified the Fourteenth Amendment on January 16, 1867.[416] Its legislature was not obliged to contemplate whether the Amendment nullified segregated schools because such practices had been made a penal offense in 1864.[417] However, in submitting the Amendment to the legislature, the governor urged that its adoption was necessary because of the failure of the former seceding states "to reorganize their civil government on the basis of equal . . . rights, without distinction of color. . . ."[418] In 1873, the legislature rephrased the school law so as to specifically prohibit segregated schools.[419]

In Nevada, the school law in existence prior to its consideration of the Amendment excluded Negroes from public schools and prescribed a penalty against any school which opened its doors to such persons.[420] However, the statute provided that school authorities might, if they deemed it advisable, establish a separate school for colored children and maintain it out of the general school fund. While the legislature took no affirmative action after it ratified the Amendment on January 22, 1867,[421] it similarly remained

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[415] Kan. Laws 1879, c. 81, § 1. This is the current law in Kansas. KAN. REV. STATS. § 27-1724 (1935).

[416] The governor laid the proposed Amendment before the legislature with the observation that it would secure equal civil rights to all citizens and both houses voted at once to ratify the Amendment without further reference. Minn. Exec. Doc. 26 (1866); Minn. House J. 26 (1866); Minn. Sen. J. 22, 23 (1866).

[417] Minn. Laws 1864, c. 4, § 1, amending Minn. Laws 1862, c. 1, § 33.

[418] Minn. Exec. Docs. 25 (1866).

[419] Minn. Stats., ch. 15 § 74 (1873).

[420] Nev. Laws 1864-65, p. 426.

[421] The governor presented the Amendment to the legislature with an admonition that they were expected to ratify it and the ratification was accomplished three days later. The journals indicate virtually no opposition or advocacy of the Amendment. Nev. Sen. J. 9, 47 (1867); Nev. Ass. J. 25 (1867).

inactive after the decision in *State* v. *Duffy*, 7 Nev. 342 (1872), which vitiated the first section of the school law. There is no subsequent reference to the subject of separate schools in the statute books and the segregatory statute itself was dropped from subsequent compilations of laws.[422]

The Oregon evidence is singularly meager. There were no laws requiring or permitting racial separation in schools either prior or subsequent to ratification of the Amendment on September 9, 1866. What the ratifying legislature understood as to the force of the Amendment and the significance of the abortive attempt to withdraw its ratification in 1868 on this subject is unavailable from the bare notations contained in the legislative journals.[423] The contemporary newspapers are also barren of information on this point.[424] What evidence there is, indicates that separate schools did exist at least in Portland as late as 1867 and that they were discontinued in 1871.[425]

Almost two years after the Amendment was submitted to the states, Iowa ratified on April 3, 1868.[426] Neither the state constitution nor laws required or in any manner au-

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[422] See Nev. Comp. Laws (1929).

[423] Ore. Sen. J. 25, 34-36 (1866); *Id.*, at 271-272 (1868); Ore. House J. 273 (1868); Ore. Laws 1868, 114; *Id.*, "Joint Resolutions and Memorials" 13.

[424] The Oregonian, the state's leading newspaper, purportedly carried all the legislative happenings in full. See The Oregonian, September 14, 1866. None of its 1866 issues indicate more than that the legislature considered the Amendment dealt with "equality" and that the primary controversy was with respect to suffrage. *Ibid.*, September 21, 1866.

[425] See Reynolds, Portland Public Schools, 1875, 33 Ore. Hist. Q. 344 (1932); W. P. A. Adult Education Project, History of Education in Portland 34 (1937).

[426] Ratification was almost perfunctorily effected. Iowa Sen. J. 265 (1868) Iowa House J. 132 (1868).

thorized racial separation in schools at that time.[427] Instances of exclusion and segregation were being quickly remedied without recourse to the courts.[428] Where the courts were called upon, local practices of segregation in schools were never sustained as lawful. *Clark* v. *School Directors,* 24 Iowa 266 (1868); *Smith* v. *Directors of Independent Schools Dist.,* 40 Iowa 518 (1875); *Dove* v. *Independent School Dist.,* 41 Iowa 689 (1875). The state supreme court also forbade segregation by a common carrier in its dining facilities, predicating its decision squarely upon the Fourteenth Amendment. *Coger* v. *N. W. Union Packet Co.,* 37 Iowa 145 (1873).

In sum, the legislatures in all of the Union States which ratified the Fourteenth Amendment, except three, understood and contemplated that the Amendment proscribed State laws compelling segregation in public schools.

C. The Non-Ratifying States Understood that the Fourteenth Amendment Forbade Enforced Segregation in Public Schools.

Four states did not ratify the Amendment, three specifically withholding endorsement and the other being unable to arrive at any definitive position. Delaware, in the anomalous position of a former slave state which sided with the Union, rejected it on February 7, 1867 with a resolution which declared that "this General Assembly believes the adoption of the said proposed amendment to the Constitution would have a tendency to destroy the rights of the States in their Sovereign capacity as states, would be an attempt to establish an equality not sanctioned by the laws

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[427] IOWA CONST. 1857, Art. IX, § 12; Iowa Laws 1866, p. 158, reinforcing the Acts of 1860 and 1862 which required the instruction of all children without regard to race. SCHAFFTER, THE IOWA CIVIL RIGHTS ACT, 14 IOWA L. REV. 63, 64-65 (1928).

[428] Dubuque Weekly Herald, January 30, 1867, p. 2; Des Moines Iowa State Register, January 29, 1868, p. 1; *Id.,* February 19, 1868, p. 1.

of nature or God. . . .'' [429] Again, in 1873, the state legislators denounced

> ''. . . all other measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially, and especially do they proclaim unceasing opposition to making Negroes eligible to public office, to sit on juries, and to their admission into public schools where white children attend, and to the admission on terms of equality with white people in the churches, public conveyances, places of amusement or hotels, and to any measure designed or having the effect to promote the equality of the Negro with the white man in any of the relations of life, or which may possibly conduce to such result.'' [430]

Then, shortly thereafter, the General Assembly in a series of discriminatory statutes demonstrated that it fully understood that equality before the law demanded non-segregation. It passed laws permitting segregation in schools,[431] places of public accommodation, places of public amusement and on public carriers.[432] Delaware, however, deferred sanctioning compulsory racial separation in public schools until after this Court handed down the *Plessy* decision.[433]

Maryland.

Maryland was also a loyal former slave-holding state. It rejected the Amendment on March 23, 1867.[434] The

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[429] 13 Del. Laws 256. See Del. Sen. J. 76 (1867); Del. House J. 88 (1867) for speech of Governor Saulsbury recommending rejection on the ground that it was a flagrant invasion of state rights.

[430] Del. Laws 1871-73, pp. 686-87.

[431] Del. Rev. Stats. c. 42 § 12 (1874); Del. Laws 1875, pp. 82-83; Del. Laws 1881, c. 362.

[432] Del. Laws 1875-77, c. 194.

[433] Del. Const. 1897, Art. X, § 2.

[434] Md. Sen. J. 808 (1867); Md. House J. 1141 (1867).

establishment of universal free public education here coincided with the Reconstruction Period. Although Maryland has always maintained a dual school system, it has never enacted a law specifically forbidding racial integration in its public schools. Rather, separate and parallel provisions were made for the education of white and colored children.[435]

Kentucky.

The third of the states which rejected the Amendment was Kentucky, a state with a slaveholding background and generally sympathetic with the South with regard to the status of Negroes although it did not secede. It was the first to refuse ratification: its rejection was enrolled on January 10, 1867.[436] While Negroes were denied or severely limited in the enjoyment of many citizenship rights at that time, including exclusion from juries,[437] the legislature was silent on the specific question of compulsory segregated schools.[438] Like its Maryland brothers, it passed two discrete series of laws, one for the benefit of white children and the other for colored children. But no definite compulsory education statute was enacted until 1904[439] although the constitution had been previously amended so as to support such legislation.[440]

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[435] Md. Laws 1865, c. 160, tit. i-iv; Md. Rev. Code §§ 47, 60, 119 (1861-67 Supp.); Md. Laws 1868, c. 407; Md. Laws 1870, c. 311; Md. Laws 1872, c. 377; Md. Rev. Code, tit. xvii §§ 95, 98 (1878).

[436] Ky. House J. 60 (1867); Ky. Sen. J. 63 (1867).

[437] Ky. Laws 1865-66, pp. 38-39, 49-50, 68-69.

[438] Ky. Laws 1869, c. 1634; 1 Ky. Laws 1869-70, pp. 113-127; Ky. Laws 1871-72, ch. 112; Ky. Stats., c. 18 (1873); Ky. Gen. Stats., c. 18, pp. 371 *et seq.* (1881).

[439] Ky. Laws 1904, pp. 181-82.

[440] Ky. Const. 1891, § 187.

California.

California was the only state whose legislature considered the Amendment and yet did not reach an official stand on the matter.[441] Before the Fourteenth Amendment was proclaimed the law of the land, the legislature in 1866, relaxed the pattern of compulsory segregation when the school law was revised to permit Negro children to enter "white" schools, provided a majority of the white parents did not object.[442] This provision survived changes made in the school laws in 1870 and 1872; and, in 1874, a bill to eliminate segregated schools led to the adoption of a law which required the admission of colored children "into schools for white children" if separate schools were not provided.[443] Later in this same year the state supreme court upheld segregated schools despite the petitioner's claim that this practice violated the Amendment. *Ward* v. *Flood*, 48 Cal. 36 (1874). The legislature then revised the school laws and eliminated the provisions which had been held to require separate schools for Negro children.[444]

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[441] The Committee on Federal Relations in the Assembly and Senate, respectively, recommended rejection and ratification of the Amendment and no further action was taken. Cal. Ass. J., 17th Sess., p. 611 (1867-68); Cal. Sen. J., 17th Sess., p. 676 (1867-68), p. 676. See Flack, The Adoption of the Fourteenth Amendment 207 (1908).

[442] Cal. Stats. 1866, p. 363. Purusant to this statute a number of "white" schools admitted colored children without untoward incident. Cloud, Education in California 44 (1952).

[443] Cal. Stats. 1873-74, p. 97.

[444] Cal. Stats. 1880, p. 48. See Wysinger v. Crookshank, 82 Cal. 588 (1890). The laws segregating Chinese children remained on the books probably because it was the general impression that only discriminatory laws aimed at Negroes were forbidden by the Fourteenth Amendment. Debates of the California Constitutional Convention of 1873, pp. 631, 642, 649 (1880).

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The evidence from the non-ratifying states also indicates that their legislatures understood or contemplated that the Fourteenth Amendment forbade legislation which enforced the separation of white and colored children in public schools.

CONCLUSIONS OF PART II

There is, therefore, considerable evidence and, we submit, conclusive evidence that the Congress which submitted and the state legislatures and conventions which considered the Fourteenth Amendment contemplated and understood that it would proscribe all racial distinctions in law including segregation in public schools. A part of this evidence consists of the political, social and legal theories which formed the background of the men who framed the Fourteenth Amendment and the Radical Republican majority in Congress at that time.

Congressional debates following the Civil War must be read and understood in the light of the equalitarian principles of absolute and complete equality for all Americans as exemplified throughout the Abolitionist movement prior to the Civil War.

Many of the members of Congress, in debating the bill which became the Civil Rights Act of 1875, made it clear in no uncertain terms that it was generally understood in the 39th Congress that the Fourteenth Amendment was intended to prohibit all racial distinctions, including segregation in public school systems.

Running throughout the 39th Congress was a determination of the Radical Republican majority to transform these equalitarian principles into federal statutory and constitutional law. They realized that these high principles could not be achieved without effective federal legislation. The infamous Black Codes were demonstrative proof that the southern states were determined to prevent the newly freed Negroes from escaping from an inferior

status even after the Thirteenth Amendment. The Radical Republican majority realized that in the status of American law at that time, the only way to achieve fulfillment of their determination to remove caste and racial distinctions from our law would be for them to effect a revolutionary change in the federal-state relationship.

After many drafting experiments, the Committee of Fifteen introduced in Congress the proposed amendment to the Constitution which was to become the Fourteenth Amendment. The broad and comprehensive scope of the bill was clearly set forth by Senator Howard, Chairman of the Judiciary Committee. An appraisal of the Congressional debates during the period the Fourteenth Amendment was being considered show conclusively that in so far as section 1 was concerned, there could be no doubt that it was intended to not only destroy the validity of the existing Black Codes, but also to deprive the states of power to enact any future legislation which would be based upon *class* or *caste* distinctions. It is likewise clear that the Fourteenth Amendment was intended to be even more comprehensive than the scope of the original bill which, subsequently weakened by amendment, became the Civil Rights Act of 1866.

Throughout the debates in the 39th Congress and subsequent Congresses, the framers of the Amendment, the Radical Republican majority in Congress, over and over again, made it clear that: (1) future Congresses might in the exercise of their power under section 5 take whatever action they might deem necessary to enforce the Amendment; (2) that one of the purposes of the Amendment was to take away from future Congresses the power to diminish the rights intended to be protected by the Amendment; and (3) they at all times made it clear that the Amendment was meant to be self-executing and that the judiciary would have the authority to enforce the provisions of the Amendment without further implementation by Congress. All of

the decisions of this Court, without exception, have recognized this principle.

Other Congressional debates, including those on the readmission of certain states, the amnesty bills and other legislation give further evidence of the intent of Congress in regard to the broad scope of the Fourteenth Amendment. The debates in Congress on legislation which was later to become the Civil Rights Act of 1875 made it clear that efforts of states to set up segregated school systems violated the Fourteenth Amendment. These debates were more specific on the question of segregation in public education because some states were already beginning to violate the Fourteenth Amendment by setting up segregated systems.

A study of the statements and actions of those responsible for state ratification of the Amendment remove any doubt as to their understanding that the Fourteenth Amendment was intended to prohibit state imposed racial segregation in public schools.

After addressing ourselves to questions 1 and 2 propounded by this Court, we find that the evidence not only supports but also compels the conclusions reached in Part One hereof. Wherefore, we respectfully submit, this Court should decide that the constitutional provisions and statutes involved in these cases are in violation of the Fourteenth Amendment and therefore unconstitutional.

PART THREE

This portion is directed to questions four and five of the Court's Order:

> *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?*
>
> *5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),*
>
> *(a) should this Court formulate detailed decrees in these cases;*
>
> *(b) if so what specific issues should the decrees reach;*
>
> *(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;*
>
> *(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?*

I.

This Court should declare invalid the constitutional and statutory provisions here involved requiring segregation in public schools. After careful consideration of all of the factors involved in transition from segregated school systems to unsegregated school systems, appellants know of no reasons or considerations which would warrant postponement of the enforcement of appellants' rights by this Court in the exercise of its equity powers.

The questions raised involve consideration of the propriety of postponing relief in these cases, should the Court declare segregation in public schools impermissible under the Constitution. The basic difficulty presented is in the correlation between a grant of effective relief and temporary postponement. After carefully addressing ourselves to the problem, we find that difficulty insurmountable.

A. The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color.

"It is fundamental that these cases concern rights which are personal and present". *Sweatt* v. *Painter,* 339 U. S. 629, 635; see also *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633. These rights are personal because each appellant [445] is asserting his individual constitutional right to grow up in our democratic society without the impress of state-imposed racial segregation in the public schools. They are present because they will be irretrievably lost if their enjoyment is put off. The rights of the adult students in the *Sipuel, Sweatt,* and *McLaurin* cases required, this Court held, vindication forthwith. *A fortiori,* this is true of the rights of

[445] As used herein "appellant" includes the respondents in No. 10.

children to a public education that they must obtain, if at all while they are children. It follows that appellants are entitled to be admitted forthwith to public schools without distinction as to race and color.

B. There is no equitable justification for postponement of appellants' enjoyment of their rights.

Even if the Court should decide that enforcement of individual and personal constitutional rights may be postponed, consideration of the relevant factors discloses no equitable basis for delaying enforcement of appellants' rights.

Appellants have no desire to set precise bounds to the reserve discretion of equity. They concede that, as a court of chancery, this Court has power in a proper case to mold its relief to individual circumstances in ways and to an extent which it is now unnecessary to define with entire precision. But the rights established by these appellants are far outside the classes as to which, whether for denial or delay, a "balance of convenience" has been or ought to be struck.

These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

The Fourteenth Amendment can hardly have been intended for enforcement at a pace geared down to the mores of the very states whose action it was designed to limit. The balance between the customs of the states and the personal rights of these appellants has been struck by that

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Affirming the decree of one of the few judges still carrying the traditional title and power of Chancellor, the highest Court of Delaware epitomized equity in one of the cases now before this bar when it declared in *Gebhart* v. *Belton*, 91 A. 2d 137, 149 that

> "To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled."

Appellants, in the main, are obliged to speculate as to factors which might be urged to justify postponement of the enforcement of their rights. Hitherto, appellees have offered no justification for any such postponement. Instead they have sought to maintain a position which is, essentially, that a state may continue governmentally enforced racism so long as the state government wills it.

In deciding whether sufficient reason exists for postponing the enjoyment of appellants' rights, this Court is not resolving an issue which depends upon a mere preponderance of the evidence. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slow in upholding the vital rights of children accruing to them under the Constitution, must make out an affirmative case of crushing conviction to sustain his plea for delay.

The problem of effective gradual adjustment cannot fairly arise in three of the five cases consolidated for argument. In the Kansas case, there was a frank concession on oral argument that elimination of segregation would not have serious consequences. In Delaware, court-compelled desegregation in this very case has already been accomplished. The case from the District of Columbia is here

on a dismissal of the complaint on motion. In the oral argument the counsel for respondents implied that he foresaw no difficulties in enforcing a decree which would abolish segregation. Surely it would be curious as well as a gratuitous assumption that such a change cannot be expeditiously handled in this nation's capital. Cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

We can, however, put out of the case what is not in dispute. We concede that there may well be delays of a purely administrative nature involved in bringing about desegregation. Any injunction requires time for compliance and we do not ask the impossible. We strongly urge, however, that no reason has been suggested and none has been discovered by us that would warrant denying appellants their full rights beyond the beginning of the next school year.

But we do not understand that the "effective gradual adjustment" mentioned in this Court's fourth and fifth questions referred to such conceded necessities. We proceed then, to consider possible grounds that might be put forth as reasons for added delay, or for the postponement of relief to appellants.

It has been suggested that desegregation may bring about unemployment for Negro teachers. (Appellees' Brief in *Davis* v. *County School Board*, p. 31; *Transcript of Argument* in the same case, p. 71) If this is more than a remote possibility, it undoubtedly can be offset by good faith efforts on the part of the responsible school boards.[446] On the other hand, if appellees' suggestion is based upon an unexpressed intention of discriminating against Negro teachers by wholesale firings, it is not even worthy of notice in a court of equity.

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[446] In view of the nationwide shortage of teachers, it is doubtful that any unemployment would be more than transitory. See *e.g.*, New York Times, August 19, 1953, 31:8 (S. M. Bouthardt puts elementary teachers shortage at 116,000; August 24, 1953, 21:1 (Comm. Thurston and NEA on shortage); 22 J. Neg. Ed. 95 (1953).

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It has been bruited about that certain of the states involved in this litigation will cease to support and perhaps even abolish their public school systems, if segregation is outlawed. (*Davis* v. *County School Board, Transcript of Argument,* pp. 69-70; *Gebhart* v. *Belton, Transcript of Argument,* p. 17; *Briggs* v. *Eliott, Record on Appeal,* p. 113.) We submit that such action is not permissible. *Cf. Rice* v. *Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875. Any such reckless threats cannot be relevant to a consideration of effective "gradual adjustment"; they are based upon opposition to desegregation in any way, at any time.

Finally, there are hints and forebodings of trouble to come, ranging from hostility and deteriorated relations to actual violence. (Appellees' brief in *Briggs* v. *Eliott,* p. 267; Appellees' brief in *Davis* v. *County School Board,* p. 17) Obviously this Court will not be deterred by threats of unlawful action. *Buchanan* v. *Warley,* 245 U. S. 60, 81.

Moreover, there are powerful reasons to confirm the belief that immediate desegregation will not have the untoward consequences anticipated. The states in question are inhabited in the main by law-abiding people who up to now have relied upon what they believe—erroneously, as we have demonstrated—to be the law. It cannot be presumed that they will not obey the law as expounded by this Court. Such evidence as there is lends no support to defendants' forebodings. Note, *Grade School Segregation: The Latest Attack on Racial Discrimination,* 61 Yale L. J. 730, 739, 743 (1952).

A higher public interest than any yet urged by appellees is the need for the enforcement of constitutional rights fought for and won about a century ago. Public interest requires that racial distinctions proscribed by our Constitution be given the fullest protection. Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.

The greatest strength of our democracy grows out of its people working together as equals. Our public schools are "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people...." Mr. Justice Frankfurter, concurring in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 206, 216-217.

C. Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect appellants' rights.

Question 5 assumes that the Court, having decided that segregation in public schools violates the Fourteenth Amendment, will, nevertheless, in the exercise of its equity powers, permit an effective gradual adjustment from segregated schools to systems not operated on the basis of color distinctions. This necessarily assumes further that reasons might be produced to justify consideration of postponement of the enforcement of the present and personal rights here involved. As we have pointed out immediately hereinbefore we are unable to identify any such reason.

Appellants obviously are aware of the existence of segregated school systems throughout the South similar to those presently before this Court. Similarly, appellants realize that the thrust of decisions in these cases may appear to present complex problems of adjustment because segregated schools have existed for nearly a century in many areas of this country. Generalizations, however, as to the scope and character of the complexities which might arise from immediate enforcement of appellants' rights would be unwarranted. This is demonstrated in part by the fact that even in the five cases joined for hearing, there appears to be no uniformity in the extent of the task of adjustment from segregated to non-segregated schools.

Necessarily, consideration of the specific issues which decrees should reach on the basis of the assumptions of Question 5 likewise requires the assumption that reasons will be adduced to warrant consideration of postponement of enforcement of appellants' rights.[447]

Though no cogent reasons were offered to support them, two suggestions of methods of postponement of relief to appellants were made to this Court in the original brief for the United States. The first of these was "integration on a grade basis," i.e., to integrate the first grades immediately, and to continue such integration until completed as to all grades in the elementary schools (Brief, pp. 30-31). The second was integration "on a school-by school" basis (Brief, p. 31).

The first suggestion is intolerable. It would mean the flat denial of the right of every appellant in these cases. The second plan is likewise impossible to defend because it would mean the deliberate denial of the rights of many of the plaintiffs. If desegregation is possible in some schools in a district, why not in all? Must some appellants' rights be denied altogether so that others may be more conveniently protected?

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[447] It follows that there is no need for this Court to appoint a Master. Since repeal in 1948 of the 1805 statute, 28 U. S. C., § 863 (1946), forbidding the introduction of new evidence at an appellate level, there would appear to be no reason why such master could not be appointed. Certainly respected authorities have recommended the practice of appellate courts' taking evidence. See 1 WIGMORE, EVIDENCE 41 (3d ed., 1940); POUND, APPELLATE PROCEDURE IN CIVIL CASES pp. 303, 387 (1941); Note, 56 HARV. L. REV. 1313 (1943), and in other times and jurisdictions it has been respected practice. See SMITH, APPEALS OF THE PRIVY COUNCIL FROM AMERICAN PLANTATIONS 310 (1950); Rules of the Supreme Court of Judicature, Order 58, Rules 1, 2; cf. New Mexico, Stat. 1949, c. 168, § 19. However, taking of evidence by a Master is undoubtedly a departure from normal practice on appeal and it may result in loss of time to the prejudice of plaintiffs' rights.

Whether any given plan for gradual adjustment would be effective would depend on the showing of reasons valid in equity for postponement of enforcement of appellants' rights. In accordance with instructions of this Court we have addressed ourselves to all of the plans for gradual adjustment which we have been able to find. None would be effective. We recognize that the appellees, as school officials and state officers, might offer reasons for seeking postponement of the effect of decrees in these cases. Therefore, we submit, affirmative answers to questions 4(b) and 5 can come only from appellees since they alone can adduce reasons for postponement of enforcement of appellants' rights.

In the absence of any such reasons the only specific issue which appellants can recommend to the Court that the decrees should reach is the substantive one presented here, namely, that appellees should be required in the future to discharge their obligations as state officers without drawing distinctions based on race and color. Once this is done not only the local communities involved in these several cases, but communities throughout the South, would be left free to work out individual plans for conforming to the then established precedent free from the statutory requirement of rigid racial segregation.

In the very nature of the judicial process once a right is judicially declared proposals for postponement of the remedy must originate with the party desiring that postponement.

We submit that it would be customary procedure for the appellees to first produce whatever reasons they might urge to justify postponement of relief. Appellants then would be in a position to advise the Court of their views with respect to the matter.

Necessarily, consideration of the specific issues which decrees should reach on the basis of the assumptions of Question 5 likewise requires the assumption that reasons will be adduced to warrant consideration of postponement of enforcement of appellants' rights.[447]

Though no cogent reasons were offered to support them, two suggestions of methods of postponement of relief to appellants were made to this Court in the original brief for the United States. The first of these was "integration on a grade basis," i.e., to integrate the first grades immediately, and to continue such integration until completed as to all grades in the elementary schools (Brief, pp. 30-31). The second was integration "on a school-by school" basis (Brief, p. 31).

The first suggestion is intolerable. It would mean the flat denial of the right of every appellant in these cases. The second plan is likewise impossible to defend because it would mean the deliberate denial of the rights of many of the plaintiffs. If desegregation is possible in some schools in a district, why not in all? Must some appellants' rights be denied altogether so that others may be more conveniently protected?

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Conclusion

Under the applicable decisions of this Court the state constitutional and statutory provisions herein involved are clearly unconstitutional. Moreover, the historical evidence surrounding the adoption, submission and ratification of the Fourteenth Amendment compels the conclusion that it was the intent, understanding and contemplation that the Amendment proscribed all state imposed racial restrictions. The Negro children in these cases are arbitrarily excluded from state public schools set apart for the dominant white groups. Such a pratice can only be continued on a theory that Negroes, *qua* Negroes, are inferior to all other Americans. The constitutional and statutory provisions herein challenged cannot be upheld without a clear determination that Negroes are inferior and, therefore, must be segregated from other human beings. Certainly, such a ruling would destroy the intent and purpose of the Fourteenth Amendment and the very equalitarian basis of our Government.

WHEREFORE, it is respectfully submitted that the judgments in cases No. 1, 2 and 4 should be reversed and the judgment in No. 10 should be affirmed on the grounds that the constitutional and statutory provisions involved in each of the cases violate the Fourteenth Amendment.

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SUPPLEMENT

An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment

The first Section of the Fourteenth Amendment did not spring full blown from the brow of any individual proponent. Primitive natural rights theories and earlier constitutional forms were the origins of its equal protection-due process-privileges and immunities trilogy. The occasion for the metamorphosis of moral premises to full-fledged constitutional status was the attack on the American system of slavery. During the long antislavery crusade, the trilogy became a form of shorthand for, and the spearhead of, the whole of the argument against distinctions and caste based on race.

Section One of the Fourteenth Amendment thus marks the "constitutionalization" of an ethico-moral argument. The really decisive shifts occurred before the Civil War, and the synthesis was made, not by lawyers or judges, but by laymen. Doctrines originally worked out and propagated by a dissident minority became, by 1866, the dominant constitutional theory of the country.

In both language and form, Section One was the distillation of basic constitutional and legal theories long understood and voiced by leaders in a Congress upon which history had cast both the opportunity and the obligation to amend the Constitution to regulate relationships profoundly altered by the abolition of slavery.[1] None can doubt that the thrust of the Amendment was equalitarian and that it was adopted to wipe out the racial inequalities that were the legacies of that system. But beyond this, the majestic generalities of the Section can be seen to have

[1] Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479-507, 610-661, hereinafter cited *Early Antislavery Backgrounds*.

evolved naturally and logically in the minds of the anti-slavery generation.[2]

At the outset we point out that we do not set forth the arguments of pamphleteers, or even of lawyers or congressmen, to justify the validity of their constitutional theories. We do not say that these theories were universally held, or deny that they were vigorously challenged. Nor do we urge that the pre-Civil War Constitution contained the sweeping guarantees that the Abolitionists claimed for Negroes. These are beside our present point. What we do undertake in this section is illumination of the constitutional language—the moral and ethical opinions that were the matrix of the Amendment, the development under terriffic counter-pressures of the principal texts and forms, the meaning of "equal protection" and "due process" as understood and contemplated by those who wrote those phrases into the Amendment.

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[2] Basic monographs and articles on the Fourteenth Amendment and its major clauses are: 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES cc. 31-32 (1953); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); THE JOURNALS OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (Kendrick ed. 1914); tenBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) hereinafter cited ANTISLAVERY ORIGINS; WARSOFF, EQUALITY AND THE LAW (1938); Boudin, *Truth and Fiction About the Fourteenth Amendment,* 16 N. Y. U. L. Q. REV. 19 (1938); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L. J. 371, 48 YALE L. J. 171 (1938); McLaughlin, *The Court, The Corporation, and Conkling,* 46 AM. HIST. REV. 45 (1940).

1. The Declaration of The "Self-Evident Truths"

The roots of our American equalitarian ideal extend deep into the history of the western world. Philosophers of the seventeenth and eighteenth centuries produced an intellectual climate in which the equality of man was a central concept. Their beliefs rested upon the basic proposition that all men were endowed with certain natural rights, some of which were surrendered under the so-called "social contract." The state, in return, guaranteed individual rights, and owed protection equally to all men. Thus, governments existed, not to give, but to protect rights; and allegiance and protection were reciprocal. For his allegiance, the citizen was guaranteed his rights and the equal protection of the law.[3]

This doctrine was the core of the first great statement of American principles. To Jefferson and the other draftsmen of the Declaration of Independence, it was "self-evident" that "all men are created equal," and "are endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty and the pursuit of Happiness," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." [4]

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[3] LOCKE, SECOND TREATISE ON GOVERNMENT c. 2 (1698). See also BECKER, THE DECLARATION OF INDEPENDENCE (1926); SMITH, AMERICAN PHILOSOPHY OF EQUALITY (1927); WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928); Graham, *Early Antislavery Backgrounds*, *supra* note 1, at 610-611; Hamilton, *Property According to Locke*, 41 YALE L. J. 864 (1932).

[4] It is interesting to note in this context that Jefferson's original draft of the Declaration, accepted by Franklin and Adams, the other members of the sub-committee responsible for the drafting, contained severe strictures on the King because of the slave trade. See BECKER, *op. cit. supra* note 3, at 212-213.

Abhorrence of arbitrariness—the central element of due process—and the ideal of a general and equal law—the core of equal protection—both were implicit in the Lockean-Jeffersonian premises. Slavery—with its theories of racial damnation, racial inferiority, and racial discrimination—was inherently repugnant to the American creed and the Christian ethic. This fact was being rapidly and increasingly sensed. As men sensed it, they had to fit it into the only political theory they knew: Governments existed, not to give, but to *protect* human rights; allegiance and protection were reciprocal—i.e., *ought to be reciprocal;* rights and duties were correlative—i.e., *had to be correlative* if Americans ever were to live with their consciences and to justify their declared political faith.

Long before the Revolution, Quakers and Puritans attacked slavery as a violation of the social compact and Christian ethic.[5] After 1776, Jefferson's "self-evident truths" put a cutting edge on all such pleas—made them the broadswords in every attack. Idealists demanded that America live up to her Declaration. "All men" must mean all men. "Unalienable Rights . . . of Life, Liberty and the pursuit of Happiness" must be given its full human, not merely a restricted racial, application. Race and color were arbitrary, insubstantial bases for accord or denial of natural, human rights. Sensitive leaders soon found themselves confronted with what Gunnar Myrdal

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[5] German Quakers of Pennsylvania had argued as early as 1688, "Though they are black, we cannot conceive there is more liberty to have them slaves [than] . . . to have other white ones. . . . We should do to all men like as we will be done ourselves, making no difference of what descent or colour they are. . . . Here is liberty of conscience, which is right and reasonable; here ought to be likewise liberty of body. . . ." MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 75 (1866). In 1700, in his antislavery tract, THE SELLING OF JOSEPH, the great Puritan elder, Judge Samuel Sewall, declared, "All men, as they are . . . Sons of Adam, are co-heirs, and have equal Right unto Liberty." *Id.* at 83-87. See also Graham, *Early Antislavery Backgrounds, supra* note 1, at 614-615.

treated recently as *An American Dilemma*.[6] Having pledged their "Lives . . . Fortunes, and sacred Honor" to the causes of liberty and freedom, either Americans endeavored to live up to their creed or stultified themselves before the world.

After the Revolution, the "self-evident truths" and the provisions of the state Bills of Rights were employed as weapons against slavery and against racial distinctions.[7] Down through the Civil War, moreover, the "self-evident truths" constituted precisely what Jefferson declared them to be—political axioms—except in the South after the invention of the cotton gin.[8] They were on every tongue as rhetorical shorthand, and were popularly regarded as the marrow of the Constitution itself. In justifying one

[6] 2 vols. (1944).

[7] In 1783, Chief Justice Cushing, pointing to the "All men are born free and equal" clause of the Massachusetts Bill of Rights, declared that ". . . slavery is inconsistent with our conduct and Constitution, and there can be no such thing as perpetual servitude of a rational creature." MOORE, *op. cit. supra* note 5, at 209-221. Four years later, Congress passed the Northwest Ordinance outlawing slavery in the territories. 2 THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 957-962 (1909). Vermont effected abolition by constitutional clause; other northern states by prospective legislative action. Graham, *Early Antislavery Backgrounds, supra* note 1, at 617.

[8] While early southern leaders in Virginia accepted Jeffersonian concepts of natural rights, contract, and equality, later leaders and theorists defended the slave society on the basis of Greek concepts. Man had no rights save those created by the state. Men were inherently unequal, and the end of the state was not equality but justice. Each man would have status in accordance with his ability. Such theorists posited the inherent inferiority of the Negro. Their theory was broad enough to justify slavery for any man, irrespective of race or color. See THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES (1853). See also 1 THE WORKS OF JOHN C. CALHOUN 393-394, 6 *id.* at 182-183 (Crallé ed. 1854-1855); SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN c. 8 (1951).

revolution, Jefferson no less than Locke had laid the groundwork for another. The dominating premise that governments were instituted for protection and that they derived their just powers from the consent of the governed had begun to make slavery, and with it race distinctions, untenable. What slowly took shape was an ethical interpretation of American origins and destiny.

2. The Moral Suasion Campaign and Its Rejection

The Age of Enlightenment of the seventeenth and eighteenth centuries gave birth to a world-wide antislavery movement. A wave of humanitarianism, embracing quests for abolition of slavery, suffrage for women, and penal, land, and other reforms, swept across the United States of the early nineteenth century. Because of its dramatic qualities, the American antislavery movement assumed even larger proportions and eventually overshadowed the other phases.[9] Like them, it was based fundamentally on Judeo-Christian ethic and was formulated in terms of equalitarianism and natural rights.

The early antislavery movement was a campaign of moral suasion. Rational men appealed to other rational men to square precept with practice. Proponents of equality, who were by that definition opponents of slavery, sought to persuade slaveholders of the error of enslaving other men, i.e., of denying equality to those held as slaves. That campaign bore early fruit in Virginia, in the uplands of the Carolinas, and even in the deeper South. The appeal to the South ultimately broke on the hard rock of economic self-interest after invention of the cotton gin. Geography and migrations tended further to sectionalize the institution. Quakers and Scotch-Irish yeomen from Virginia and the Carolinas, unable to arrest spread of a labor system they detested, and others from the deeper South, fled *en masse,* settling generally in Ohio and Indiana. There

[9] Nye, Fettered Freedom 2, 10-11, 217-218, and *passim* (1949).

they were joined by staunch Puritan and Calvinist stocks from New York and New England. Thus, the antislavery movement became sectionalized with important centers in Ohio, western New York, and Pennsylvania.

Spearheading the movement was the American Anti-Slavery Society, founded in 1833 and headed by the wealthy Tappan brothers. Recruited and led by Theodore Weld,[10] a brilliant orator and organizer, and by his co-leader, James G. Birney,[11] a converted Alabama slaveholder and lawyer, whole communities were abolitionized in the years 1835-1837. Appeals were aimed at influential leaders; lawyers in particular were sought out and recruited by the score.

This appeal was an ethico-moral-religious-natural rights argument. It was addressed by the revivalists to their countrymen as patriots, Christians, and "free moral agents." "The law of nature *clearly teaches the natural* republican equality of all mankind. *Nature* revolts at human slavery. . . . The Law of God renders all Natural Rights inalienable. . . . Governments and laws are estab-

[10] See THOMAS, THEODORE WELD (1950); LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKE WELD AND SARAH GRIMKE, 1822-1844, 2 vols. (Barnes and Dumond ed. 1934) cited hereinafter as WELD-GRIMKE LETTERS. See also BARNES, THE ANTI-SLAVERY IMPULSE, 1830-1844 (1933). Weld was a tireless speaker and pamphleteer who turned out documents that became guide posts in the antislavery movement: SLAVERY AS IT IS (1839); THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (1838); THE BIBLE AGAINST SLAVERY (1837). Such persons as William Jay, John Quincy Adams and Senator Robert C. Winthrop relied on Weld for legal research. See 2 WELD-GRIMKE LETTERS 748, 956-958. The evangelical character of the antislavery movement helps account for the flood of arguments that poured from it. It was even organized on an analogy drawn from early Christian evangelists with its Seventy and its Council of Twelve.

[11] See BIRNEY, JAMES G. BIRNEY AND HIS TIMES (1890); LETTERS OF JAMES G. BIRNEY, 1831-1857, 2 vols. (Dumond ed. 1938), referred to hereinafter as BIRNEY LETTERS.

lished, not to give, but to protect . . . rights."[12] Negroes, they continued, were "not naturally inferior." They simply had been degraded by slavery. They were persons, endowed by God with all the attributes of personality. Their enslavement could no more be justified than could chattelization of men with red hair. Slavery rested on a capricious, discredited classification.[13] It simply was institutionalized false imprisonment. White men were protected against enslavement and against false imprisonment. "What abolitionists demand as naked justice is that the benefit and protection of these just laws be extended to all human being alike . . . without regard to color or any other physical peculiarities."[14]

Racial discrimination, in short, was repugnant both as a breach of equality and as a breach of protection. Because it was a breach of protection, it also was a breach of equality; and because it was a breach of equality, it was thereby an even greater breach of protection. This was the outcome of Americans' triple-barreled major premise which posited the purpose of *all* government to be the protection of inalienable rights bestowed upon *all* men by their Creator. Once that compound premise was granted—and in the generations since 1776 virtually all Americans

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[12] OLCOTT, TWO LECTURES ON THE SUBJECT OF SLAVERY AND ABOLITION 24-29 (1838).

[13] The idea that race and color were arbitrary, capricious standards on which to base denial of human rights was implicit in all anti-slavery attacks on discrimination and prejudice. Yet it was when the constitutional-legal attack began to reinforce the religious one that such arguments became explicit, and the concept of an arbitrary classification developed. Lawyers like Ellsworth, Goddard, Birney (Philanthropist, Dec. 9, 1836, p. 3, cols. 4-5), Gerrit Smith (see AMERICAN ANTI-SLAVERY SOCIETY, 3 ANNUAL REPORTS 16-17 (1836)) and Salmon P. Chase (SPEECH . . . IN THE CASE OF THE COLORED WOMAN, MATILDA . . . 32 (1837)) helped to formulate the concept and linked it with the principles of equality, affirmative protection, and national citizenship.

[14] OLCOTT, *op. cit. supra* note 12, at 44.

outside the South had *spoken* as if they granted it—the abolitionists' conclusions were unassailable. The heart of it was that these basic ideals of liberty, equality, and protection were deemed to be paramount by reason of their place in the Declaration and determinative by reason of the place of the Declaration in American life and history.

The issue had to be resolved within the framework of the constitutional system. Appeals to ethico-moral concepts and to natural rights were good enough to argue as to what ought to be. Reality was something else again. Constitutional reality was that the status of inhabitants of the United States, white or Negro, was fixed by the Constitution. Social reality was that the great mass of Negroes were slaves.

Inevitably, then, the first skirmishes as to the rights claimed for Negroes had to be fought out in the case of free Negroes.[15] The targets here were northern black laws—the laws in Ohio and Connecticut; the techniques were persuasion, conversion, and demonstration. It was in the course of this campaign that what presently became the constitutional trinity of the antislavery movement received its decisive synthesis.

The first comprehensive crystallization of antislavery constitutional theory occurred in 1834 in the arguments of W. W. Ellsworth and Calvin Goddard, two of the outstanding lawyers and statesmen of Connecticut, on the appeal [16] of the conviction of Prudence Crandall for viola-

[15] For characteristic references to plans for bettering the lot of the free Negro, see 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 132-135, 262; AMERICAN ANTI-SLAVERY SOCIETY, 4 ANNUAL REPORTS 32-35, 105-111 (1837), 5 ANNUAL REPORTS 127 (1838). For evidence of how large the condition of the free Negroes, and plans for their betterment, figured in the early A. A. S. S. strategy, see *The Condition of Free People of Color in the United States,* The Anti-slavery Examiner #13a (1839), apparently written by Judge William Jay, reprinted in his MISCELLANEOUS WORKS 371-395 (1853).

[16] Crandall v. State, 10 Conn. 339 (1834).

tion of an ordinance forbidding the education of non-resident colored persons without the consent of the civil authorities.[17] They reveal this theory as based on broad natural rights premises and on an ethical interpretation of American origins and history. Four ideals were central and interrelated: the ideal of human equality, the ideal of a general and equal law, the ideal of reciprocal protection and allegiance, and the ideal of reason and substantially as the true bases for the necessary discriminations and classifications by government. Race as a standard breached every one of these ideals, as did color. What was attacked was denial of human equality and denial of protection of the laws—denials inherent in any racial discrimination backed by public authority. Slavery was the arch evil in this respect, and the primary one, both because of the magnitude of its denials and deprivations and abridgments, and because these necessarily established a whole pattern of discrimination based upon race and color alone. It was this pattern of public discrimination that was combatted no less than slavery. It had to be combatted because it was deemed a part of slavery.

Although neither slavery nor segregated schools was the issue in the case, the Ellsworth-Goddard argument is one of the classic statements of the social and ethical case for equality of opportunity irrespective of race. It gave immense impetus to the emerging concept of American nationality and citizenship. Fully reported and widely cir-

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[17] REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT, BEFORE THE SUPREME COURT OF ERRORS, AT THEIR SESSION AT BROOKLYN, JULY TERM, 1834. The arguments are printed in condensed form in the official report, Crandall v. State, *supra* note 16, at 349-353 (1834). See also JAY, MISCELLANEOUS WRITINGS ON SLAVERY 34-51 (1853); STIENER, HISTORY OF SLAVERY IN CONN. 45-52 (1893); VON HOLST, CONSTITUTIONAL HISTORY 1828-1846 98, 99 (1881); McCarron, *Trial of Prudence Crandall*, 12 CONN. MAG. 225-232 (1908); NYE, *op. cit. supra* note 9, at 83.

culated as a tract, it soon became one of the fountainheads of antislavery constitutional theory. It figured prominently in Abolitionist writings throughout the 'thirties. In the spring of 1835, Judge William Jay, Abolitionist son of the first Chief Justice and one of the founders and vice-presidents of the American Anti-Slavery Society, devoted fifteen pages of his *Inquiry into the Character and Tendency of the Colonization and Anti-Slavery Societies* [18] to a slashing attack on the trial court's decision.

The due process element of our modern trilogy was introduced in the course of a determined attack made in 1835 by the Weld-Birney group upon Ohio's black laws. Enacted in 1807, these laws embodied prohibtions against Negro immigration, employment, education, and testimony. A report [19] prepared at Weld's direction by a committee of the newly formed Ohio Anti-Slavery Society appealed to the American and Christian conscience. Notwithstanding the affirmative duty of all government to "promote the happiness and secure the rights and liberties of man," and despite the fact that American government was predicated on the "broad and universal principle of equal and unalienable rights," these statutes had singled out a "weak and defenseless class of citizens—a class convicted of no crime —no natural inferiority," and had invidiously demanded their exclusion from "the rights and privileges of citizenship." This, it was argued, the Constitution forbade. "Our Constitution does not say, *All men* of a *certain color* are entitled to certain rights, and are born free and independent. . . . The expression is unlimited. . . . *All* men are so born, and have the *unalienable* rights of life and liberty —the pursuit of happiness, and the acquisition and possession of wealth."

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[18] Reprinted in JAY, MISCELLANEOUS WRITINGS ON SLAVERY 36 (1853).

[19] PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION HELD AT PUTNAM 17-36 (April 22-24, 1835).

These were the doctrinal cornerstones.[20] They were the heart of the ethico-moral-historical-natural rights argument which the American Anti-Slavery Society broadcast in the mid- and late-'thirties. They were broadcast particularly throughout Ohio, western New York and Pennsylvania,

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[20] It is not implied that these arguments were without antecedents. Earlier (1819-21) in the controversy over Missouri's admission, the provision in its Constitution prohibiting immigration of free Negroes prompted antislavery arguments based on the republican form of government and comity clauses. See BURGESS, THE MIDDLE PERIOD, 1817-58 c. 4 (1897); MCLAUGHLIN, CONSTITUTIONAL HISTORY OF THE UNITED STATES c. 29 (1935); WILSON, RISE AND FALL OF THE SLAVE POWER cc. 11-12 (1872), especially at 154.

Later, the Horton episode, and the protracted controversy over southern seamen's laws whereunder northern and British free Negro seamen were confined to quarters or jailed while in southern ports, gave further impetus to theories of *national* or *American* citizenship. The former was a *cause célèbre* of 1826-1827 involving a statute of the District of Columbia which authorized sale for jail fees of *suspected* fugitive slaves. Horton, a free Negro of New York, who had been arrested and threatened with sale, was saved by timely aid of Abolitionist friends who capitalized the incident. See JAY, MISCELLANEOUS WRITINGS ON SLAVERY 48, 238-242 (1853); TUCKERMAN, WILLIAM JAY AND THE CONSTITUTIONAL MOVEMENT FOR ABOLITION OF SLAVERY 31-33 (1893); 3 CONG. DEB. 555 (1826). Regarding the seamen's controversy, see Hamer, *Great Britain, the United States and the Negro Seamen Acts, 1822-1848*, 1 J. OF SO. HIST. 1-28 (1935); H. R. REP. NO. 80, 27th Cong., 3rd Sess. (1843).

Later, in 1844, the Hoar incident occurred, in which Judge Samuel Hoar of Massachusetts, proceeding to Charleston to defend imprisoned Negro seamen, was expelled from South Carolina by legislative resolution. See Hamer, *supra*, and the elaborate documentation in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 237-238 (Ames ed. 1904).

The Hoar expulsion and the numerous laws, both North and South, excluding free Negroes and mulattoes, were cited repeatedly in the debates of the 'fifties and in 1866. See, for example, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Remarks of Sen. Trumbull).

Rhode Island, and Massachusetts.[21] Weld was the director and master strategist; Birney, the forensic quartermaster and attorney general. The "Twelve" and the "Seventy" were the chosen instruments. These were the two dedicated hand-picked groups of trained teachers, ministers, divinity students, self-named after the early Christian Apostles. Their revivals converted thousands before funds ran out and southern antagonism crippled the movement. Numerous anti-slavery newspapers and coordinated pamphlet and petition campaigns were reinforcing media.

The trouble, of course, was that northerners were still largely indifferent to or unreached by this program, while the South rejected it almost without a hearing. Coincidence played a great part here. Alarmed lest educated Negroes foment slave insurrections, the South further tightened its controls.[22] Fortuitously, the Vesey and Turner uprisings had seemed to offer frightening confirmation of fears in this regard. Meanwhile, cotton profits and politics had begun to rationalize slavery as "a positive good." The insidious belief spread that the South must insulate herself, safeguard her "peculiar institutions," and remove them even from discussion and criticism.[23] In the Pinckney Report of 1836,[24] pro-slave theorists sought to implement these convictions. To reinforce Calhoun's defensive doctrines of concurrent majority and state interposition, and in a de-

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[21] See especially BARNES, *op. cit. supra* note 10, cc. 2, 3, 4, and WELD-GRIMKE LETTERS and BIRNEY LETTERS, *op. cit. supra* notes 10, 11.

[22] See EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH c. 5 (1940) and statutes there cited; SYDNOR, DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848 (1948).

[23] See JENKINS, PROSLAVERY THOUGHT IN THE OLD SOUTH (1935); and the histories of Eaton and Sydnor, *op. cit. supra* note 22; and WILTSIE, JOHN C. CALHOUN, NULLIFIER, 1828-1839 c. 20, esp. 283-286 (1949); *cf.* Corwin, *National Power and State Interposition, 1787-1861*, 10 MICH. L. REV. 535 (1912).

[24] H. R. REP. No. 691, 24th Cong., 1st Sess. (1836).

termined attempt to protect slavery in the Federal District from possible interference or abolition by Congress under its sweeping powers over the District and territories, Pinckney and his colleagues in the House employed the due process clause of the Fifth Amendment and "the principles of natural justice and of the social compact." [25]

3. The Political Action Campaign

A. Systemization

Thus, the antislavery campaign was set back, its piecemeal conversion and demonstration program was frustrated at the outset by barriers that held slavery to be a positive good—untouchable even where Congress had full powers over it. Antislavery men were denied the use of the mails. Their antislavery petitions were throttled by Congressional "gags". They were forced to defend even their own rights to speak and write and proselytize. In consequence, the antislavery leaders had to reorient their whole movement and strategy.[26]

This reorientation, greatly accelerated by the Pinckney Report, was marked by rapid "constitutionalization" of the higher law argument. There was a shift from an overwhelming faith in moral suasion to a reluctant resort to political action, from efforts to convince Americans of the expediency and justice of freeing their slaves, to a search for constitutional power to free them.[27]

These tendencies may be traced today in the pages of the *Weld-Grimke* and *Birney Letters,* in a vast pamphlet literature, in annual reports of the state and national

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[25] *Id.* at 14.

[26] DUMOND, THE ANTISLAVERY ORIGINS OF THE CIVIL WAR (1938); NYE, *op. cit. supra* note 9.

[27] DUMOND, *op. cit. supra* note 26, especially cc. 5-6; T. C. SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST (1897); NYE, *op. cit. supra* note 9. *Cf.* CRAVEN, THE COMING OF THE CIVIL WAR (1943); NEVINS, ORDEAL OF THE UNION (1947).

societies,[28] but most satisfactorily in the columns of Birney's *Philanthropist*.[29] Calhoun and "positive good" theorists had fashioned a constitional system that promised absolute protection for slavery and ignored the constitutional reference to slaves as "persons," referring to them whenever possible as "property." These theorists also employed the "compact" and "compromises" of 1787 as a device that removed slavery from the reach not merely of state and federal legislatures but from adverse discussion and criticism.

Birney and his colleagues now formulated a counter-system, one which exalted liberty and exploited the founding fathers' use of "persons." Denying all limiting force to the "compact" or "compromises," this group hailed the spirit of the Declaration, of the Constitution, and American institutions generally. They seized on the leading provisions of the state and federal bills of rights as affirmative guarantees of the freedom of the slaves.[30]

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[28] Read straight through, the six ANNUAL PROC. AND REP. OF AMERICAN ANTISLAVERY SOCIETY (1833-1839) and the five ANNIVERSARY PROC. OF THE OHIO ANTISLAVERY SOCIETY (1836-1840) reveal the shift from confident evangelism to determined self-defense and political action. Not until after the Pinckney Report (*supra* note 24), the "Gags" denying antislavery petitions, and the refusal of the South to countenance discussion of the issue, does one find serious interest in political movements and tactics. The THIRD ANNUAL REPORT OF THE A. A. S. S. (May 10, 1836) signed by Elizur Wright is thus the turning point and a catalog of the factors that had reoriented opinion. By the SIXTH ANNUAL REPORT OF THE A. A. S. S. (1839), the "imperative necessity of political action" caused Wright to devote much of his space to convincing the still hesitant and divided membership.

[29] Birney's career as an editor can be followed in the BIRNEY LETTERS, *op. cit. supra* note 11 (see index entries "Philanthropist"), and in his pamphlet NARRATIVE OF THE LATE RIOTOUS PROCEEDINGS AGAINST THE LIBERTY OF THE PRESS IN CINCINNATI (1836).

[30] Sometimes Abolitionists, in desperation, appealed to a higher law beyond the Constitution, but this was not a consistent argument or one possible within the legal framework.

In his earlier writings,[31] Birney's ethical interpretation of American origins and history was essentially that of the *Crandall* argument and the Ohio Anti-Slavery Society reports. The natural rights creed of the Declaration, the universality of guarantees of the state bills of rights, the Signers' and the Fathers' known aversion to slavery, the "color blindness" of the Articles of Confederation, the outright prohibition of slavery in the territories by the Northwest Ordinance, and above all, the silence, the euphemisms, the circumlocutions of the Constitution—these were the recurrent and expanding points. Not merely slavery, but *all public race discrimination* was ethically and morally wrong. It was so because it was a denial of the rights and protections that governments were established to secure.

After the Pinckney Report, however, and especially after the growing mob action against Abolitionists began to make it clear that state bills of rights were not self-executing but rested on local enforcement, Birney re-examined his position. Everywhere there was this anomaly: the great natural and fundamental rights of conscience, inquiry and communication, secured *on paper* in every constitution, nevertheless were denied and abridged daily for want of sanctions. All men by nature "possessed" these indispensable rights; all constitutions "declared" and "secured" them. It was the bounden duty of all governments "created for the purposes of protection" to safeguard and enforce them. Yet the hard fact was that state and local governments were flagrantly, increasingly derelict. Nothing, southerners argued, could be done about it.

Challenged in this manner, Birney and his aides shifted their ground. They advanced from the old position that

[31] BIRNEY LETTERS, *op. cit. supra* note 11. For a fuller and documented summary, see Graham, *Early Antislavery Backgrounds*, *supra* note 1, at 638-650.

the Federal Constitution was neutral—"or at least not pro-slavery"—to the stand that the document was anti-slavery. Constitutionalization of the natural rights agrument proceeded at a much more rapid pace. No longer was the fight waged merely defensively in behalf of the right to proselytize, or counter-defensively to support sweeping Federal powers over the District and territories; more and more the antislavery forces took the offensive against slavery itself.[32]

Thus, by December 1836, the Abolitionists' argument was recrystallizing around three major propositions:

First, the great natural and fundamental rights of life, liberty, and property, long deemed inherent and inalienable, were now held to be secured by *both* state and national constitutions.

Second, notwithstanding this double security, and in disregard of the obligation of governments to extend protection in return for allegiance, these rights were being violated with impunity both on national soil and in the states, (a) by the fact of slavery itself, (b) by mob action directed against those working for abolition, (c) by flagrant discriminations against free Negroes and mulattoes.

Third, race and color—"grades and shades"—whenever and wherever employed as criteria and determinants of fundamental rights, violated both the letter and spirit of American institutions; race *per se* was not only an ignoble standard; it was an irrational and unsubstantial one.

The problems of implementing this theory, Birney worked out in several series of articles during 1837. Rescrutinizing the document, he began to make the same rigorous use of the Federal Bill of Rights that previously

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[32] See Graham, *Early Antislavery Backgrounds, supra* note 1, at 650-653.

he and others had made of Ohio's. Ultimately, he focused on the due process clause employed in Pinckney's Report:[33]

> "The Constitution contains provisions which, if literally carried out, would extinguish the entire system of slavery. It guarantees to every state in the union a republican form of government, Art. IV, Sec. 4th. A majority of the people of South Carolina are slaves; can she be said properly to have a republican form of government? It says, that 'the right of the people to be secure in their *persons*, houses, papers and effects . . . against unreasonable searches and *seizures*, shall not be violated.' Slaves, Sir, are men, constitute a portion of the people: Is that no 'unreasonable seizure,' by which the man is deprived of all his earnings [effects?]—by which in fact he is robbed of his own person? Is the perpetual privation of liberty 'no unreasonable seizure'? Suppose this provision of the Constitution were literally and universally enforced; how long would it be before there would not be a single *slave* to mar the prospect of American liberty? Again, '*no* person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, [sic] nor shall any person be compelled in any case to witness against himself; nor be deprived of life, liberty or property without due process of law.' Art. V Amendments.
>
> "Are slaves ever honored with indictment by a grand jury? Are they never compelled 'to witness against themselves'? never tortured until they lie against their own lives? never deprived of life without 'due process of law'? By what 'due process of law' is it, that two millions of 'persons' are deprived every year of the millions of dollars produced by their labor? By what due process of law is it that

[33] Philanthropist, Jan. 13, 1837, p. 2. Birney continued his "Reply to Judge L" in the Jan. 20 and 27, 1837 numbers, and in the former demonstrated his forensic powers by brilliant caricature of the South's efforts to suppress discussion of slavery.

> 56,000 'persons,' the annual increase of the slave population, are annually deprived of their 'liberty'? Such questions may seem impertinent, to Mr. L., but when he shall feel that the slave is a 'person,' in very deed, and has rights, as inalienable as his own, he will acknowledge their propriety. Again 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defense.' Art. VI of the Amendments. Take all the above provisions in connection with that clause under Art. VI, which declares that 'This Constitution and the laws of the United States which shall be made in pursuance thereof' etc., 'shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'—and then carry them out to their full extent, and how long would it be ere slavery would be utterly prostrated? I do not say they were inserted with a specific view toward this end, but I do say, that so long as they shall stand, the Constitution of these U[nited] States will be a perpetual rebuke to the selfishness and injustice of the whole policy of the slaveholder. The provisions embody principles which are at entire enmity with the spirit and practice of slavery. How an instrument, containing such principles, can be tortured to express a *sanction* to slavery, I am yet to learn."[34]

Reassimilation of the old theory into the Bill of Rights now proceeded rapidly.[35] The various clauses restraining the powers of Congress began to be popularly regarded as *sources* of Congressional power. The initial premise in

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[34] *Ibid.*

[35] Resolutions and petitions still were the chief media in evolving this system of constitutional shorthand. Similarity of the revivalists' lectures from place to place, their widespread circulation of the Philanthropist and printed tracts, Birney's own speaking tours, all contributed to resulting stereotypes.

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this regard was that the provisions of the Bill of Rights were not *rights,* they were *guarantees*, and guarantees customarily presumed the intent and capacity, as well as the duty, to make them good.[36] An open letter[37] to his Congressman from an unnamed Abolitionist in Batavia[38] reveals the hold and spread and reach of these ideas:

> "The very Constitution of the United States is attempted to be distorted and made an ally of domestic slavery. That Constitution was established, not by the *citizens* or *voters*, but by '*the people*' of the United States to secure the blessings of *liberty* and establish *justice*. The Union . . . was formed for the same great purposes, . . . yet we have been told that petitioning for *liberty* endangers this Union, that the partnership will be dissolved by extending to all the very right it was intended to secure.
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> "Slavery in the District of Columbia violates the most important and sacred principles of the Constitution. . . . I speak not of the mere *letter*, but of the *principles* . . . —of the *rights* it guarantees, of the *form*, in which the guarantee is expressed. The 5th Amendment declares 'no person shall be deprived of life, *liberty* or property without due process of law.' This petition informs you free men in the District . . . have been first imprisoned, and then sold for their jail fees. [Suppose, he continued, this had happened to American seamen in a foreign port]. Would not Congress upon petition enquire into the fact and redress the wrong if it existed? Would not you, Sir, be one of the foremost in repelling the insult to our seamen and punishing the aggressor? Would you not consider it your *duty*—your *official* duty to do so? And yet you have no power to dis-

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[36] For a striking statement of this theory in 1866 see CONG. GLOBE, 39th Cong., 1st Sess. 1270 (Rep. Thayer, later a distinguished Philadelphia judge).

[37] Graham, *Early Antislavery Backgrounds*, *supra* note 1, at 655.

[38] Perhaps John Joliffe, a local antislavery lawyer, who was a close friend of Birney. See Graham, *Early Antislavery Backgrounds*, *supra* note 1, at 655, n. 256.

> criminate in the object of your protection—a colored sailor is entitled to the *protection* of his country's laws, and Constitution, and flag, and honor, as well as a white one,—he is as much entitled to that protection in Washington city beneath the flag of his country and while he reposes under the tower of the Capitol as he is at *Qualla Ballou* or Halifax, or anywhere on the face of the earth. And all should be protected with equal and exact justice, whether sailors or laborers—citizens or soldiers: if so, you are bound to enquire into the alleged abuses, and if they exist to redress them."

Thus, by October, 1837, the date of Birney's retirement as editor of the Philanthropist, the motivating premise of Abolitionism already was coming to be this: Americans' basic civil rights were truly national, but in practice their basic civil liberty was not. By acts in support and in toleration of slavery and by failure to protect the friends of the enslaved race, the states and the federal government all abridged, and all allowed to be abridged, the dearest privileges and immunities of citizenship. Humanitarianism had attempted to soften race prejudice and meet this challenge squarely but had been frustrated. Failure left no alternative but political action and the instinctive answer that government had the power to do what the governed had the job to do. The answer to denied power and to defective power was the concept of an inherent power derived from the standing duty to protect. The gist of it was that because allegiance and protection were reciprocal—i.e., ought to be reciprocal—because the government protected its citizens abroad without discrimination, and because the text of the Federal Bill of Rights gave no warrant for discrimination, Congress was duty bound *not* to discriminate. It must do "equal and exact justice" irrespective of race. It had no other choice. It lacked power to discriminate between those persons who were equally entitled to protection. It was duty bound also to remove such discrimination as existed. Implicitly, and morally, these same obligations rested on

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the states; yet respect for the constitutional division of power here introduced conflict. Few were yet ready for the extreme proposition that Congress might *constitutionally* abolish slavery *in the states*. The original form, as shown by the Batavian communication, was more often that Congress was duty bound to hear petitions to abolish slavery, or that slavery had been abolished in federal territory by the force of the Preamble and Declaration. Because the great natural rights were now also national constitutional rights, they began to generate and carry with them—*even into the states*—the power for their enforcement.

B. Popularization

Four routes and media of political action "constitutionalizing" the antislavery argument are to be noted.

First were the countless petitions, resolutions, declarations, letters, editorials, speeches, and sermons broadcast by the original antislavery proponents and converts—uniformly men and women of influence and position whose idealism was extraordinary and undoubted. One has to read only the *Weld-Grimke* and the *Birney* [39] *Letters*, or the

[39] The legal and constitutional argument in the BIRNEY LETTERS is remarkable both in range and interest. Note especially the due process arguments at 293, 647, 805-806, 835; the declaration that colored people are "citizens" at 815, and "persons" at 658 and 835; the exceptionally strong references to "natural equality of men" at 272; the composite synthesis of all these elements in the Declaration of 1848 drafted by William Goodell at 1048-1057; the various references to major law cases at 386-387 (Nancy Jackson v. Bulloch, 12 Conn. 38 (1837)), at page 658, 667-670 (Birney's arguments in The Creole, 2 Moore, Digest of International Law 358-361 (1906), for which Weld did much of the research), at 758 (Jones v. Van Zandt, 46 U. S. 215 (1846)) in which Salmon P. Chase was of counsel). By contrast, the legal argument in the WELD-GRIMKE LETTERS is more limited, but see page 798 for the letter of Ebenezer Chaplin, an Athol, Massachusetts physician, to Weld, dated October 1, 1839, urging greater emphasis on the unconstitutionality of slavery and less on its cruelties, and specifically mentioning the Declaration of Independence, the common law, the Ordinance of 1787, the Preamble, and the due process clause of the Fifth Amendment.

monographs of Barnes,[40] Dumond[41] and Nye[42]—and Nevins' great history[43]—to realize the appeal of these peoples' character and of their example and argument. Moreover, many of them were southerners, and of the proudest type who practiced what they preached—Birney alone freeing slaves to the value of thousands of dollars,[44] and the Grimke sisters doing likewise with those they inherited. Every antislavery society was a band of disciples, workers, petitioners, writers, and "free moral agents" committed to the spread of doctrine that had immense intrinsic appeal.

In consequence, simply as an incident of the intense revival campaigns, the equal protection-due process-privileges and immunities theory became the core of thousands of abolitionist petitions, resolutions, and lectures. Now one, now another of the elements was accented, depending on the need and circumstances, but in an astonishing number of cases two or three parts of the trilogy were used. The whole thus became, even before 1840, a form of popular constitutional shorthand.

After that date even stronger forces enter the picture. First, were the compilers and synthesizers—pamphleteers and journalists like Tiffany[45] and Goodell[46] and Mellen[47]

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[40] *Op. cit. supra* note 10.

[41] *Op. cit. supra* note 26.

[42] *Op. cit. supra* note 9.

[43] THE ORDEAL OF THE UNION, 2 vols. (1947).

[44] 1 BIRNEY LETTERS, *op. cit. supra* note 11, at 52, 494, 498, 500-501.

[45] TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849).

[46] GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (1844).

[47] MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY . . . (1841).

who wrote the articles and treatises on the "Unconstitutionality of Slavery" which Dr. tenBroek analyzes so well.[48] Others annotated copies of *Our National Charters*[49] setting down after each clause or phrase of the Constitution and the Declaration (much as Birney had done in his early articles) antislavery arguments and doctrines gleaned "both from reason and authority." Such materials, broadcast by the thousand, reprinted, condensed and paraphrased, were themselves powerful disseminators.

It was the minority party platform that gave antislavery theory its most concise, effective statement. Drafted generally by Salmon P. Chase or Joshua R. Giddings, these documents, first of the Liberty and Free Soil parties in the 'forties, then of the Free Democracy and Republican parties in the 'fifties, and in 1860, all made use, in slightly varying combination, of the cardinal articles of faith: human equality, protection, and equal protection from the Declaration, and due process both as a restraint and a source of congressional power. Such consistent repetition testifies both to the nature and extent of previous distillations and to the power and significance of current ones:

1. Liberty Party Platform (adopted in 1843 for the 1844 campaign):

> "*Resolved,* That the fundamental truth of the Declaration of Independence, that all men are endowed by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government by that amendment of the Constitution which declares that no person shall

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[48] TENBROEK, ANTISLAVERY ORIGINS, *op. cit. supra* note 2, c. 3 and pp. 86-91.

[49] (Goodell ed. 1863).

be deprived of life, liberty, or property without due process of law."[50]

2. Free Soil Party Platform, 1848:

"*Resolved,* That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the federal government, which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.

"*Resolved,* that, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them."[51]

3. Free Democracy Platform, 1852:

"1. That governments deriving their just powers from the consent of the governed are instituted among men to secure to all those unalienable rights of life, liberty, and the pursuit of happiness with which they are endowed by their Creator, and of which none can be deprived by valid legislation, except for crime.

"4. That the Constitution of the United States, ordained to form a more perfect Union, to establish justice, and secure the blessings of liberty, expressly

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[50] The full platform is in STANWOOD, HISTORY OF THE PRESIDENCY 216-220 (1904). In addition to the plank quoted, it contains numerous references to "equality of the rights among men," "the principle of equal rights with all its practical consequences and applications," the "higher law" and "moral law," and the sacredness of rights of speech, press and petition.

[51] *Id.* at 240. This platform was drafted by Salmon P. Chase. See SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST 140 (1897).

denies to the general government all power to deprive any person of life, liberty, or property without due process of law; and, therefore, the government, having no more power to make a slave than to make a king, and no more power to establish slavery than to establish a monarchy, should at once proceed to relieve itself from all responsibility for the existence of slavery wherever it possesses constitutional power to legislate for its extinction."[52]

4. Republican Party Platform, 1856:

"*Resolved,* That with our republican fathers we hold it be a self-evident truth, that all men are endowed with the unalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior designs of our federal government were to secure these rights to all persons within its exclusive jurisdiction; that, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in any Territory of the United States, by positive legislation prohibiting its existence or extension therein; that we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any Territory of the United States, while the present Constitution shall be maintained."[53]

5. Republican Party Platform, 1860:

"8. That the normal condition of all the territory of the United States is that of freedom; that

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[52] STANWOOD, *op. cit. supra* note 50, 253-254. This platform was drafted by Salmon P. Chase (see WARDEN, LIFE OF CHASE 338 (1874)) and Joshua R. Giddings (see SMITH, *op. cit. supra* note 51, 247-248).

[53] STANWOOD, *op. cit. supra* note 50, at 271. This platform was drafted by Joshua R. Giddings. JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 335-336 (1892).

> as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any Territory of the United States.
>
> "14. That the Republican party is opposed to any change in our naturalization laws, or any state legislation by which the rights of citizenship hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad."[54]

True, these were party platforms, but these were the platforms of parties to which leaders in the Congress that would frame the Fourteenth Amendment had given their allegiance.[55]

Many Congressmen whose names later loomed large in the formulation of and debates on the Thirteenth and Fourteenth Amendments and the Civil Rights Acts were men of anti-slavery backgrounds[56] which, it will be recalled, had sought out community leaders, particularly

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[54] STANWOOD, *op. cit. supra* note 50, at 293.

[55] See *infra* pp. 27-36, and notes 56-69.

[56] Among them the following members of the Joint Committee on Reconstruction: George H. Williams, Oregon; Henry W. Grimes, Iowa; William Pitt Fessenden, Maine; Henry T. Blow, Missouri; John A. Bingham, Ohio; George S. Boutwell, Massachusetts; Justin S. Morrill, Vermont; Roscoe Conkling, New York; Elihu B. Washburne, Illinois; and Thaddeus Stevens, Pennsylvania. Two others, Jacob M. Howard of Michigan and Ira Harris of New York, invariably voted with the so-called Radicals. See KENDRICK *op. cit. supra* note 2, at 155-195.

lawyers.[57] Even in the 'forties, antislavery Whigs, Liberty Party-Free Soilers, and later, members of the Free Democracy, converted by the Weld-Birney group, began to enter Congressmen like Joshua R. Giddings,[58] E. S. Hamlin,[59] the Wade brothers,[60] Horace Mann,[61] Philomen Bliss,[62] A. P. Granger,[63] Thaddeus Stevens,[64] Gerrit Smith,[65]

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[57] Among Weld's converts were Reps. Edward Wade, and Philemon Bliss, and John H. Paine, Liberty Party leader. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 236-240.

[58] 1795-1864; represented Ohio's Ashtabula and Jefferson Counties (Western Reserve) in House, 25th-34th Congresses, 1838-1859; with John Quincy Adams one of the original antislavery leaders in the House. 7 DICT. AM. BIOG. 260 (1931).

[59] 1808-1894; represented Lorain County district in 28th Cong. 1844-45; one of the political lieutenants of Salmon P. Chase in the 'fifties. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 1025.

[60] Edward Wade, 1803-1862, elected as a Free Soiler from Cleveland, 1853-55, and as a Republican, 1855-61; Ben Wade, 1800-1878, law partner of Giddings, and Radical Senator, 1851-1869. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 710. 19 DICT. AM. BIOG. 303 (1936).

[61] 1796-1859; one of the organizers of the American public school system; elected as a Whig to succeed J. Q. Adams, Mass. district; re-elected as Free Soiler, served 1848-53; President, Antioch College, 1852-59. 12 DICT. AM. BIOG. 240 (1933).

[62] 1813-1889; Ohio Circuit Judge, 1848-51; elected as a Republican from Elyria-Oberlin district, Ohio, served 1855-59; Chief Justice of Dakota Territory, 1861; Assoc. Justice Missouri Supreme Court, 1868-72; Dean of Univ. of Missouri Law School, 1872-1889. 2 DICT. AM. BIOG. 374 (1929).

[63] 1789-1866; antislavery Whig from Syracuse, N. Y.; served 1855-59. BIOG. DIR. AM. CONG., H. R. Doc. No. 607, 81st Cong., 2d Sess. 1229 (1950).

[64] 1792-1868; elected as a Whig from Lancaster, Pa. district, 1849-53; as a Republican, 1859-68; Radical Republican leader in the House. 17 DICT. AM. BIOG. 620 (1935).

[65] 1797-1874; elected from Peterboro, N. Y. district, one of the regions converted by Weld; served 1853-1854, resigned. 17 DICT. AM. BIOG. 270 (1935).

William Lawrence,[66] James M. Ashley[67] (who introduced the Thirteenth Amendment in the House), Samuel Galloway[68] (a former member of the "Seventy") and John A. Bingham.[69] All were either associates, converts, or disciples of the Weld-Birney group; and after 1854, all were Republicans.

In addition to the western group of antislavery leaders, there was an equally strong and determined group with its focus in New England. From this group emerged Charles Sumner, Wendell Phillips, and Henry Wilson. Sumner later became one of the most intransigent leaders of the Republican party during and after the Civil War.[70] Wilson was also in Congress during the Reconstruction period; and became Vice-President and voted with the Radicals on important tie votes.[71] Other New Englanders who served in Congress, and were members of the Joint Committee on Reconstruction, include William Pitt Fessenden of Maine, Justin Morrill of Vermont, and George S. Boutwell of Massachusetts.[72]

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[66] 1819-1899; grad. Franklin College, New Athens, Ohio, 1838; Cincinnati Law School, 1840; Supreme Court Reporter, 1851; Judge, 1857-64; elected as a Republican, served 1865-71, 1873-77. 11 DICT. AM. BIOG. 52 (1933).

[67] 1824-1896; elected as a Republican from Scioto County, 1859-69. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 333. 1 DICT. AM. BIOG. 389 (1928).

[68] 1811-1872, elected as a Republican from Columbus, 1855-57. See WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 228.

[69] For eight terms (1855-63, 1865-73) Bingham represented the 21st Ohio District, composed of Harrison, Jefferson, Carroll and Columbiana Counties, including the Quaker settlements along Short Creek and the Ohio. See 3 BRENNAN, BIOGRAPHICAL ENCYCLOPEDIA . . . OF OHIO 691 (1884).

[70] 18 DICT. AM. BIOG. 208 (1936).

[71] 20 DICT. AM. BIOG. 322 (1936).

[72] Fessenden was the son of General Samuel Fessenden, the leading Abolitionist of Maine, who was one of the national vice-presidents of the American Anti-Slavery Society. 6 DICT. AM. BIOG. 348 (1931); on Morrill, see 13 DICT. AM. BIOG. 198 (1934); on Boutwell, see 2 DICT. AM. BIOG. 489 (1929).

Because Bingham is known to have drafted Sections One and Five of the Fourteenth Amendment, his speeches are of special interest. From 1855-63 and from 1865-73, he represented the Twenty-first Ohio District, which included the Cadiz-Mt. Pleasant Quaker settlements, antislavery strongholds. Furthermore, as a youth he had attended Franklin College at New Athens in 1837-38. At that date Franklin was second only to Oberlin as an antislavery stronghold;[73] the Weld-Birney crusade was at its height. Indeed, in Birney's Philanthropist, 1836-37, we find various antislavery petitions and resolutions from the Cadiz and Mt. Pleasant societies.[74] These are couched in the very phraseology for which Bingham in 1856-66 manifested his decisive preference.

Four of Bingham's speeches are of particular significance:

I. In his maiden speech in the House, March 6, 1856, attacking laws recently passed by the Kansas pro-slavery legislature which declared it a felony even to agitate against slavery, Bingham argued:

> "These infamous statutes . . . [contravene] the Constitution of the United States. . . . [A]ny territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States 'to know, to argue and to utter freely', according to conscience is absolutely void. . . . [A] felony to utter there, in the hearing of a slave, upon American soil, beneath the American flag . . . the words of the Declaration 'All men are born free and equal, and endowed by their Creator with the inalienable rights of life and liberty;' . . . [A] felony to utter . . . those other words. . . . 'We, the people of the United States, in order to

[73] See Graham, *Early Antislavery Backgrounds*, *op. cit. supra* note 1, at 624, n. 150.

[74] For an example see Philanthropist, Mar. 10, 1837, p. 3, col. 4.

> establish justice,' the attribute of God, and 'to secure liberty,' the imperishable right of man, do 'ordain this Constitution'. . . . It is *too late* to make it a felony to utter the self-evident truth that life and liberty belong of right to every man. . . . This pretended legislation . . . violates the Constitution in this—that it abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law, or any process but that of brute force, while the Constitution provides that Congress shall make no law abridging the freedom of speech or of the press; and it expressly prescribes that 'no person shall be deprived of life, liberty, or property without due process of law.'' [75]

II. On January 13, 1857, Bingham spoke in support of Congress' power over slavery in the territory and attacked President Buchanan's recent defense of the Kansas-Nebraska Act of 1854 repealing the Missouri Compromise. After a long analysis of the provisions of the Federal Bill of Rights, of the Northwest Ordinance, the enabling acts and constitutions of the states carved from the Ohio Territory—emphasizing especially the Federal due process clause and the "all men are born equally free and independent" clauses of the state constitution, he said:

> "The Constitution is based upon EQUALITY of the human race. . . . A State formed under the Constitution and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. . . .

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[75] CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856). Three other antislavery Republicans representing constituencies converted in the Weld-Birney crusade also used all the old rhetoric and theory including due process: Rep. Granger (N. Y.) *id.* at 295-296; Reps. Edward Wade (*id.* at 1076-1081) and Philemon Bliss (*id.* at 553-557), both Ohioans and among Weld's early converts. See also the speech of Rep. Schuyler Colfax (Ind.), *id.* at 644.

> "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides . . . that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life."[76]

III. On January 25, 1858, attacking "The Lecompton Conspiracy"—the proposed pro-slave constitution of Kansas declaring that only "All *freemen,* when they form a compact, are equal in rights,"—and absolutely barring free Negroes from the state, Bingham declared:

> "The [Federal] Constitution . . . declares upon its face that no person, whether white or black, shall be deprived of life, liberty, or property, but by due process of law; and that it was ordained by the people to establish justice! . . . [By sanctioning these provisions] we are asked to say, that the self-evident truth of the Declaration, 'that ALL MEN ARE CREATED EQUAL' is a self-evident lie. . . . We are to say . . . to certain human beings in the Territory of Kansas, though you were born in this Territory, and born of free parents, though you are human beings, and no chattel, yet you are not free to live here . . .; you must be disseized of your freehold liberties and privileges, without the judgment of your peers and without the protection of law. Though born here, you shall not, under any circumstances, be permitted to live here."[77]

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[76] CONG. GLOBE, 34th Cong., 3rd Sess. app. 135-140 (1857).

[77] CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858).

IV. On February 11, 1859, Bingham attacked the admission of Oregon because its constitution forbade immigration of free Negroes and contained other discriminations against them:

> "[T]his constitution . . . is repugnant to the Federal Constitution, and violative of the *rights of citizens of the United States*. . . .
>
> "Who *are citizens of the United States?* They are those, and those only, who owe allegiance to the Government of the United States; not the base allegiance imposed upon the Saxon by the Conqueror . . .; but the allegiance which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country. All free persons born and domiciled within the jurisdiction of the United States; all aliens by act of naturalization, under the laws of the United States."

"The people of the several States", who according to the Constitution are to choose the representatives in Congress, and to whom political powers were reserved by the Tenth Amendment, were to Bingham "the same community, or body politic, called by the Preamble . . . 'the people of the United States' ". Moreover, certain "distinctive political rights"—for example the right to choose representatives and officers of the United States, to hold such offices, etc.—were conferred only on "citizens of the United States."

> ". . . I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this Constitution guaranteed by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those *sacred rights* which *are* as *universal and indestructible* as the human race, that 'no person shall be deprived of life, liberty, or property, but by due process of law, nor shall private property be taken without just com-

> pensation.' And this guarantee *applies* to all citizens within the United States."

Against infringement of "these wise and beneficent guarantees of political rights to the citizens of the United States as such, and of natural rights to all persons, whether citizens or strangers," stood the supremacy clause.

> "There, sir, is the limitation upon State sovereignty—simple, clear, and strong. No State may *rightfully,* by Constitution or statute law, impair any of these guarantied rights, either political or natural. They may not *rightfully or lawfully* declare that the strong citizens may deprive the weak citizens of their rights, natural or political. . . .
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> ". . . This provision [excluding free Negroes and mulattoes] seems to me . . . injustice and oppression incarnate. This provision, sir, excludes from the State of Oregon eight hundred thousand of the native-born citizens of the other States, who are, therefore, *citizens of the United States.* I grant you that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others; but I deny that any State may exclude a law abiding citizen of the United States from coming within its territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the 'privileges and immunities' of *a citizen of the United States.* What says the Constitution:
>
> > " 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.
> >
> > Art. 4, Section 2.'
>
> "Here is no qualification. . . . The citizens of each State, all the citizens of each State, *being citizens of the United States,* shall be entitled to 'all privileges and immunities of citizens of the several States.' Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State

authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States. *There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the* United States . . .' that it guaranties. . . .

". . . [S]ir, I maintain that the persons thus excluded from the State by this section of the Oregon Constitution, are citizens by birth of the several States, and therefore *are citizens of the United States,* and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which *are* the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; . . . .

"Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States, for that word *white;* it is not there. You will look in vain for it in that first form of national Government—the Articles of Confederation; it is not there. The omission of this word—this phrase of caste—from our national charter, was not accidental, but intentional. . . .

". . . This Government rests upon the absolute equality of natural rights amongst men. . . .

". . . Who . . . will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation? . . .

"*The equality of all* to the right to live; *to the right to know;* to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests— . . . . The charm of that Constitution lies in the great democratic idea which it embodies, that *all men,*

> *before the law, are equal in respect of those rights of person which God gives* and *no man or State may rightfully take away*, except as a forfeiture for crime. Before your Constitution, sir, *as it is*, as I trust it ever will be, all men are sacred, whether white or black. . . ."[78]

Several points must here be emphasized. It will be noted that Bingham disavows the color line as a basis for citizenship of the United States; that he regards Milton's rights of communication and conscience, including the *right to know,* to *education,* as one of the great fundamental natural "rights of person which God gives and no man or *state* may *rightfully* take away," and which hence are "embodied" also within, and secured by, "the great democratic idea that all men before the law are equal." In short, the concept and guarantee of the equal protection of the laws is already "embodied" in the Federal Constitution as of 1859; this same concept, moreover, embraces "*the equality of all . . . to the right to know*"; and above all, there is no color line in the Constitution, even of 1859.

Conclusions

From this consideration of the historical background against which the Fourteenth Amendment was written, submitted by Congress, and ratified by the requisite number of states, these important facts develop:

1. To the opponents of slavery, equality was an absolute, not a relative, concept which comprehended that no legal recognition be given to racial distinctions of any kind. Their theories were formulated with reference to the free Negro as well as to slavery—that great reservoir of prejudice and evil that fed the whole system of racial distinctions and caste. The notion that any state could

[78] CONG. GLOBE, 35th Cong., 2nd Sess. 981-985 (1859) (emphasis added throughout).

impose such distinctions was totally incompatible with antislavery doctrine.

2. These proponents of absolute equalitarianism emerged victorious in the Civil War and controlled the Congress that wrote the Fourteenth Amendment. Ten of the fifteen members of the Joint Committee on Reconstruction were men who had antislavery backgrounds.

3. The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have specific significance to opponents of slavery. Proponents of slavery, even as they disagreed, knew and understood what that significance was. Members of the Congress that formulated and submitted the Amendment shared that knowledge and understanding. When they translated the antislavery concepts into constitutional provisions, they employed these by now traditional phrases that had become freighted with equalitarian meaning in its widest sense.