No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1953

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, et al., *Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al., *Appellees.*

Appeal from the United States District Court
for the District of Kansas

BRIEF FOR THE STATE OF KANSAS ON REARGUMENT

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25-1774

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Statement

Appellants seek reversal of a judgment of the United States District Court for the District of Kansas whereby said court refused to enjoin the Appellee board of education from maintaining separate public elementary schools for negro children, pursuant to section 72-1724, General Statutes of Kansas, 1949, and to hold said statute violative of the Constitution of the United States. The State of Kansas, acting through its Attorney General, filed a separate answer in the court below for the sole and specific

purpose of defending the validity of the statute,[1] and appeared in this court for that purpose.

Briefs were submitted and the cause was argued before this court on December 10, 1952.[2] Citation to the opinion below, jurisdictional statement, statement of the case, the questions presented and statute involved are fully set out in appellees' original brief. Hence, they are not repeated here.

The Court's Order

On June 8, 1953, the Court ordered that the case be restored to the docket and assigned for reargument. Counsel were requested to give their special attention to the questions set out below insofar as they are germane to this case:

> "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

1. R. 14.
2. October Term, 1952, No. 8.

"(*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 Interest of the State of Kansas

On September 3, 1953, the appellee board of education adopted the following resolution:

> "Be it resolved that it is the policy of the Topeka Board of Education to terminate maintenance of segregation in the elementary schools as rapidly as practicable."

Two of the twenty-four elementary schools of the city are being operated on an integrated basis during the current school year. Segregation is presently practiced in the remaining schools.

Obviously, the State's relation to this litigation is not affected by the action of the Topeka Board of Education. The constitutionality of the statute is still under attack. The State intervened in the court below for the sole purpose of defending its validity. Counsel for the State have never advocated or defended the *policy* of racial segregation in the public schools or elsewhere. We advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels. We defend only the validity of the statute that enables the Topeka Board of Education to determine its own course. We believe that no other position is consistent with the meaning and purpose of the Constitution of the United States.

SUMMARY OF ARGUMENT

1. All available evidence points to the conclusion that a majority of the Congress which submitted the Fourteenth Amendment, did not contemplate or understand that it would abolish segregation in the public schools. An analysis of the Congressional debates and the currents of Abolitionist thought during the period prior to and contemporaneous with the adoption of the Fourteenth Amendment indicates that the general concern was with the fundamental rights of life, liberty and property and that by Section 1 of the Fourteenth Amendment they sought to guarantee the negro equality of enjoyment of these rights. The right to mingle with other races in the public schools was not included in this concept of basic rights. The Congress further demonstrated by direct legislation that it did not consider segregation to be a violation of constitutional rights. By its own act it provided segregated schools for the District of Columbia, over which it has exclusive legislative power. Furthermore, subsequent to adoption of the Fourteenth Amendment, the Congress specifically refused to enact legislation prohibiting segregation in the public schools.

2. Neither was it the understanding of the states which ratified the Fourteenth Amendment that it would abolish segregation in the public schools. The laws of a majority of the states authorized segregation at the time the Fourteenth Amendment was ratified. There is no evidence that any state altered its policy in this respect by reason of the Fourteenth Amendment. On the other hand, it is a fact that in at least ten states the same legislatures that ratified the Fourteenth Amendment enacted legislation providing separate schools. This we deem evidence that the states did not contemplate that segregation was precluded by the Fourteenth Amendment.

3. Inasmuch as it was the understanding of the framers, the Congress which submitted, and the states which ratified the Fourteenth Amendment, that segregation in the public schools was not included within its purview, it could not have been contemplated at that time that any future federal authority, either legislative or judicial, might abolish segregation without further grant of constitutional authority. However, if, in spite of evidence to the contrary, it is conceived that segregation might be brought within the purview of federal authority, then, consistent with the intent of the framers, it is for the Congress and not the judiciary to act.

4. It is not within the judicial powers to construe the Fourteenth Amendment in a manner differently than the framers intended with reference to facts existing at the time the amendment was adopted, where no substantial change in conditions is shown. It was the intent of the framers of the Fourteenth Amendment that the management of the public schools should be left to the state legislatures. The federal judiciary may not now assume jurisdiction over this phase of state activity in disregard of the framers' intent.

5. The people of Kansas, through the normal processes of local government, are demonstrating their willingness and capacity to deal with local race problems in a manner most beneficial to all concerned. Federal interference is neither necessary nor justified.

ARGUMENT

I

The Legislative Intent

A. The Evidence is Persuasive that the Majority of the Members of the Thirty-ninth Congress neither Contemplated nor Understood that the Fourteenth Amendment would Abolish Segregation in the Public Schools.

The Fourteenth Amendment was proposed and submitted to the legislatures of the several states by the first session of the 39th Congress. The record of debates in that session is barren of relevant comment on the impact of the Fourteenth Amendment upon segregation in the public schools. Logically, the record could not be otherwise. The Congress simply did not deem itself to be legislating with respect to segregation in the public schools or elsewhere.

The Republican congressmen who conceived and enacted the reconstruction legislation of 1866 were concerned with far graver forms of discrimination than that incident to segregation and the relatively refined concept of "separate but equal" facilities. They were mindful of the welfare of a people that had within the decade been forcibly wrested from slavery; who were still subject to the extraordinary burdens and disabilities imposed by the Black Codes enacted by their late masters. The Congress was seeking to confer upon the emancipated race the essential incidents of citizenship, theretofore denied them by decision of the Supreme Court of the United States.[1] These were the conditions that Congress sought to alleviate. To infer more is unwarranted conjecture. At the same time the dominant group sought to discipline the states of the conquered Confederacy, and to perpetuate its own ascendancy.

1. *Scott v. Sanford,* 19 How. 393.

> ". . . we must not suppose that the men who fashioned the Fourteenth Amendment were concentered upon our nice constitutional question. Whether the freedman should be given the suffrage, what should be the new basis of representation in Congress and what would be the consequences for the two parties, how could the Confederate leaders best be excluded from the councils of the nation—political questions such as these dominated the hour." [2]

An analysis of the currents of Abolitionist thought and the conditions that produced them reinforces this conclusion.

1. The Concept of Equality

There can be no doubt that certain of the Abolitionist leaders demonstrated no tolerance for segregation. At the same time, there can be no doubt that they failed to impress their views upon the majority of their colleagues and to incorporate their philosophy into the legislation of Congress. Charles Sumner of Massachusetts, the most brilliant of them all, had long protested segregation. In 1850 he had urged to the Supreme Judicial Court of Massachusetts that segregation in the public schools of Boston violated the constitutional principle of "equality before the law." He failed, however, to make his point.[3] In 1866, in a new forum, the United States Senate, he contended for a proposition that struck down "all laws and customs . . . establishing any oligarchical prejudices and any distinctions of rights on account of color or race." [4] Doubtless, Sumner's view precluded segregation. But again his view did not prevail. The Fourteenth Amendment, as

2. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights," 2 *Stanford Law Review* 5, 8.

3. *Roberts v. The City of Boston*, 5 Cush. 198 (Mass. 1850).

4. Cong. Globe, 39th Cong. First Session (1866) 91.

adopted by the Congress, did not approach Sumner's broad concept of equal protection.

What then did the framers of the Fourteenth Amendment intend? It is suggested that the terms "full" and "equal" protection are synonymous. The central concern on the part of the proponents was with "the racial protection of persons or citizens in their natural rights. . . ." [5]

> "The language of the equal protection clause was held to be very little different from the command in the due process clause to protect men in the rights of life, liberty and property. . . ." [6]

In 1690, John Locke had argued that "all men are by nature equal . . . in that equal right that every man hath to his natural freedom, without being subject to the will or the authority of any other man; . . . being equal . . . no one ought to harm another in his life, health, liberty or possessions." [7]

In Locke's view, governments are instituted by compact which impose on the government the duty to preserve the life, liberty and fortunes of its citizens. The author of the Declaration of Independence may have been influenced by Locke's philosophy when he declared "that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." However, it would be indeed speculative to suggest that Locke in the 17th century deemed freedom from segregation as part of the guarantee of life, health, liberty or possessions. And it would be equally untenable to suggest that Jefferson, a century later, regarded the Declaration of Independence as forbidding separate but equal facilities.

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5. Ten Broek, *The Anti-slavery Origins of the Fourteenth Amendment* (1951) 192.

6. ibid. 194.

7. Locke, *Second Treatise on Government* (1698) Chap. 2, Sec. 6.

Equal protection, due process, and the term "civil rights" all represented to the abolitionists the protection of certain fundamental rights guaranteed by the basic law. Howard Jay Graham has suggested that as early as 1836 the abolitionist argument had crystallized around these major propositions.

> "The great natural and fundamental rights of life, liberty and property, long deemed inherent and inalienable, were now held to be secured . . . and . . . race and color . . . whenever and wherever employed as criterion and determinant of fundamental rights, violated both the letter and spirit of American institutions." [8]

Scholars disagree as to whether all the guaranties of the first eight amendments were incorporated into the 14th Amendment, but they agree unanimously that Section 1 was intended to place the Civil Rights Bill of 1866 in the constitution. Says Flack:

> "The very men who passed the Civil Rights Bill submitted the 14th Amendment, the first section of which practically incorporated that bill." [9]

Fairman points out that the Civil Rights Bill in turn rests on the concept of fundamental rights pronounced by Justice Washington in *Corfield v. Coryell.*[10] These were:

> ". . . the protection of government, enjoyment of life and liberty, the right to acquire and possess property of all kinds, pursue happiness and safety, the right to move from state to state for trade,

8. Graham, "Early Backgrounds of the Fourteenth Amendment," 1950, *Wisconsin Law Review* 479.

9. Flack, The Adoption of the Fourteenth Amendment (1908), 212.

10. 6 Fed. Cases 546.

> agricultural and professional pursuits, the right to the writ of habeas corpus, the right to institute and maintain suits in courts of law and not be subject to unfair taxes."

This, the Civil Rights Bill becomes especially significant. Its provisions were in part:

> ". . . That all persons born in the United States and not subject to any foreign Power, . . . are hereby declared to be citizens of the United States; and such citizens, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, . . ." [11]

However liberally we may construe these provisions, we find no evidence that they were intended to preclude segregation. The authors were concerned with protecting personal security and personal rights and were not proposing that every person should enjoy the privilege of exercising those rights at the same time and in the same place and manner as every other citizen. Only in those areas where the safety of the individual and his property were jeopardized was the law to operate.

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11. 14 Stat. 27.

II

The Concept of Equality in Congress

Senator Trumbull opened in support of the Civil Rights Bill on January 29, 1866. He alluded to

> ". . . the rights of citizens. And what are they? The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman." [12]

Trumbull's concept seemed to include both the rights mentioned in the Declaration of Independence and those enumerated in *Corfield v. Coryell,* supra. In either case, however, only a most speculative mind can conceive these rights to include the abolition of segregation.

It is not merely because it was not argued that we believe the proponents did not intend to abolish segregation. It is because the rights which are emphasized throughout the debates belong to an entirely different class that we are persuaded that the Civil Rights Act did not limit the states' power to segregate.

In all the discussion preceding the adoption of the Civil Rights Bill Senator Trumbull's statement as to the scope of the act was not contraverted. It is true that Senator Johnson, an opponent, did suggest that the Civil Rights Bill would abolish state laws prohibiting mixed marriages, since all persons would have a right to contract equally. But Senator Fessenden, Chairman of the Joint Committee on Reconstruction, rejected the implication of this *argumentum in terrorem* and said that such would not be the

12. Cong. Globe, 39th Cong., 1st Sess. 1866, 475.

result since the black "has the same right to make a contract of marriage with a white woman that a white man has with a black woman." [13]

The express terms of Civil Rights Bill may give some color to Senator Johnson's contention since the bill gave to all persons the same right to make and enforce contracts. Nevertheless, in the minds of the acknowledged pro civil rights leaders, it would not have that effect. How much more certain is it that the bill was not intended to abolish segregation in the schools, since none of its terms can even by implication be construed to have this effect. Senator Trumbull himself agreed that the rights enumerated in the bill did not give a person the right to vote nor does the mere act of making him a citizen give him such a right.[14] If the cherished privilege of suffrage is not included within the "rights of citizens," nor if it does not flow naturally from the fact of citizenship, is it not an untenable suggestion that freedom from segregation in schools is one of the rights embraced by the act.

James Wilson of Iowa, Chairman of the Committee on Judiciary, introduced the Civil Rights Bill in the House.[15] He mentioned "civil rights and immunities." "What," he asks, "do these terms mean? Do they mean that in all things, civil, social, political, all citizens without distinction of race or color, shall be equal?"

He answers:

> "By no means can they be so construed. Do they mean that all citizens shall vote in the several states? No. . . . Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights or immunities."

13. Ibid. 505.
14. Ibid. 599.
15. Ibid. 1117.

Wilson next inquires as to what the fundamental rights are and for his answer he turns to Blackstone. There he finds that they are three-fold:

1. The right of personal security, which consists in one's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

2. The right of personal liberty which consists in the power of locomotion, of changing situation or moving one's person to whatever place one's own inclination may direct without imprisonment or restraint unless by due course of law.

3. The right of personal property which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the laws of the land.[16]

Wilson also mentions to Kent's declaration that the absolute rights of individuals may be resolved into "the right of personal security, the right of personal liberty, and the right to acquire and enjoy property." These are the rights that have been justly considered and frequently declared by the people of this country to be natural, inherent and inalienable.[17]

This would seem to indicate beyond doubt that the proponents of the Civil Rights Bill did not conceive that it went further than to guarantee those rights which were considered in the Declaration of Independence and which Justice Washington had enumerated in *Corfield v. Coryell,* supra. And we note specially that Wilson specifically contemplated that segregation in schools would not be abolished by the Civil Rights Bill.

We dwell at length upon the meaning and intent of the Civil Rights Bill. This we do for the reason that to understand its provisions is to understand the congressional concept of equality. As Professor ten Broek indicates:

16. Ibid. 1118.
17. Ibid. 1117.

> "The one point upon which historians of the 14th Amendment agree, and, indeed, which the evidence places beyond cavil, is that the 14th Amendment was designed to place the constitutionality of the Freedmen's Bureau and Civil Rights Bills, particularly the latter, beyond doubt." [18]

Thaddeus Stevens, like Senator Sumner, may have hoped that the Fourteenth Amendment might be designed to abolish segregation. Stevens' first draft of the proposed amendment offered on December 5, 1865, read:

> "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color."

If this draft had been retained, plaintiffs' contention might well be sustained. But by April 21, 1866, Stevens had submitted a new proposal the language of which is as follows:

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

Thus Stevens, in some four months, had restricted his original proposal in order to limit the prohibition on discrimination to civil rights only, a term that clearly was not understood to include the right of racial amalgamation. Stevens apparently realized that his original proposition could not win the support of a majority of the Congress.

The same connection between the equal protection clause and the trilogy of life, liberty and property appears in Representative John A. Bingham's proposals which were

18. ten Broek, op. cit. 183.

finally adopted by Congress. His first draft suggested to the Joint Committee on Reconstruction was as follows:

> "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this union equal protection in their rights of life, liberty and property." [19]

On January 20, 1866, a clause was inserted in the above granting all "citizens of the United States in every State, the same political rights and privileges." This clause was later dropped and on February 13, 1866, the following draft by Bingham was submitted to Congress by the Committee on Reconstruction:

> "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 of the several states and to all persons in the several states *equal protection in the rights of life, liberty and property.*"

This draft was tabled while the Civil Rights Bill was enacted.

When the Joint Committee on Reconstruction resumed consideration of the Fourteenth Amendment on April 21, Stevens submitted his proposal, *supra.* His understanding of the meaning of his draft may be indicated by his later statement on the floor of Congress.

> "Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in Court shall allow the man of color

19. Journal of Reconstruction Committee, p. 7.

> to do the same. These are great advantages over their present codes." [20]

Here he refers specifically to the "Black Codes," which had been adopted in many southern states to keep the colored population in continued subjection.

Bingham immediately offered an alternate draft; his proposal provided:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens in 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."

While Stevens' draft was limited to a protection of the recently emancipated negro, Bingham's language seems to extend the guarantee of fundamental rights to all persons regardless of color, an enlargement probably suggested by the pre-civil war treatment of the abolitionists in the south. However, there is no evidence that Bingham's notion of the rights to be secured differed greatly from that of Stevens. The content of the guarantees was substantially the same.

We do not deem it significant that in the final draft of the Amendment the terms "life, liberty or property" became coupled with the due process clause. The emphasis then, as always, was on the protection of fundamental rights and the requirement was that these safeguards be made equal. We have already pointed out that the guarantees of equal protection and due process had substantially the same meaning to the abolitionists.[21] This would explain why Bingham so readily changed the por-

20. Cong. Globe, 39th Cong. 1st Sess. (1866) 2459.
21. ten Broek, op. cit., 96-101.

tion of the phrase "life, liberty or property" from the equal protection to the due process clause. Bingham's draft in committee on February 3 further emphasizes this point. It provided:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each state all privileges and immunities of citizens in the several states (Art. II, Sec. 2), and to all persons in the several states equal protection in the rights of life, liberty and property. (5th Amendment.)" [22]

The parenthesized notations are in Bingham's handwriting and indicate that he considered the term equal protection as used in his text to be equivalent to the term due process as it appears in the Fifth Amendment. Bingham's own explanation as to why he altered certain provisions of his draft is that he did so in order that the Fourteenth Amendment might as much as possible "conform to the original form of the Constitution." [23] Life, liberty and property are mentioned in conjunction with due process in the Fifth Amendment. Bingham felt, therefore, that they should be similarly connected in the Fourteenth Amendment. Rights protected are still the fundamental and basic rights already described, and nothing more.

In the somewhat incomplete debates in Congress as to the meaning of the guarantees of Section 1 of the proposed Fourteenth Amendment, there is nothing from which we can infer that the proponents intended to give it a broader meaning than to protect the basic and fundamental rights about which the abolitionists had spoken theretofore. Abolition of segregation was not one of these. It is significant, perhaps, that a majority of the members

22. Jnl. of Reconstruction Committee, 15.
23. Cong. Rec. 42d Congress, 1st sess., Appendix 83-85.

of Congress represented states where segregation in the public schools was practiced with sanction of law. The same statement is true of a majority of the members of the Joint Committee on Reconstruction. Had there been an intent to disturb a social pattern so firmly established we believe that that intent would have been reflected in the Congressional debates. William Higby argued that the language of the proposed amendment was very little different from the privileges and immunities clause and the Fifth Amendment's guarantee of life, liberty and property.[24] Kelley of Pennsylvania said the amendment would give to the general government the right to defend the rights, liberties, privileges and immunities of the humblest citizen.[25]

Woodbridge of Vermont said:

> "It (the Fourteenth Amendment) is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever state he may be that protection to his property which is extended to the other citizens of the state."[26]

Hale of New York saw the amendment as a grant to Congress of the right to legislate for the protection of life, liberty and property, simply qualified with the condition that all such legislation should apply to all persons equally.[27] Bingham argued that the proposed amendment gave Congress the power to enforce the Bill of Rights. A consideration of Bingham's position throughout the session inclines us to the belief that the Bill of Rights to which Bingham referred was not the first eight amendments, but

24. Cong. Globe, 39th Cong. 1st sess. 1054.
25. Ibid. 1057.
26. Ibid. 1088.
27. Ibid. 1063, 1064.

rather the privileges and immunities clause in Article IV, and the guarantee that no person shall be deprived of life, liberty or property without due process of law. Again Bingham contended that the Bill of Rights provides that "all shall be protected alike in life, liberty, and property." [28] Notice how this argument telescopes equal protection and due process. "Bingham, in fact, . . . speaks of equal protection and due process as but a single expression." [29]

Senator Howard of Michigan presented the Fourteenth Amendment to the Senate. There he announced:

> "The great object of the first section of this amendment is, therefore, to restrain the powers of the States and compel them at all times to respect these great fundamental guarantees." [30]

Research suggests that the fundamental guarantees about which the Senator speaks are those that had been outlined when the Civil Rights Bill was being debated. Because of the extensive debates in connection with the Civil Rights Bill, it was apparently not deemed necessary to repeat what had been said concerning the scope of these fundamental rights. We think, however, the record is conclusive that the framers of the Fourteenth Amendment did not contemplate that it would have the effect of abolishing segregation in the schools. In every instance, where they describe the guarantee of equal protection, they related it to the protection of the fundamental rights of life, liberty and property. The abolition of segregation has never been included within the terms of this guarantee. The fact that after the Fourteenth Amendment was adopted some members of Congress may have felt that it abolished or authorized the abolishment of segregation in the schools is not decisive. Senator Carpenter's argument

28. Ibid. 1088.
29. ten Broeck, op. cit. 199, 200.
30. Cong. Globe, 39th Cong., First Sess. 2766.

in the 42nd Congress that the Fourteenth Amendment gave Congress the right to abolish segregation in the schools does not prove that Congress had agreed that the Fourteenth Amendment would abolish segregation.[31] Nor does the Civil Rights Bill of March 1, 1875, giving to negroes full and equal privileges in hotels, streetcars, passenger trains, steamboats or other public conveyances, in theaters and other places of public amusement prove that Congress had intended to abolish segregation by the Fourteenth Amendment. Self-serving declarations after the event cannot be used to prove prior intent. To determine prior intent we must rely exclusively on those statements made public before the amendment was adopted. When these are investigated, there is a complete absence of evidence that the equal protection clause was calculated to abolish segregation. Furthermore, an enumeration of the guarantees which were included, expressly negatives the possibility that the framers of the Fourteenth Amendment contemplated such an effect.

III

Contemporaneous Congressional Policies in the District of Columbia

However persuasive may be the evidence thus far assembled, it is still circumstantial. It has been adduced by a process of analysis and inference. But there is other testimony that is positive and direct. We refer to the congressional acts establishing racial segregation in the public schools of the District of Columbia.

Congress has exclusive power to legislate for the District of Columbia. The 37th and 38th Congresses, in 1862 and 1864, established segregated public school systems in the District.[32] The 39th Congress, at the very

31. 42d Cong. 2d Sess. 763.
32. 12 Stat. 394 (1862); 13 Stat. 187 (1864).

time that the Fourteenth Amendment was being debated, enacted laws to implement and expedite the administration of the segregated system of public schools.[33] Measures specifically designed to end segregation in the District failed to pass in both the 41st and 42d Congresses.[34]

It is hardly credible that the Congress would have disregarded a limitation that it intended to impose on the states. It is equally incredible that the Congress would have denied negro citizens of the District of Columbia rights that it sought to assure elsewhere in the country.

B. There Is Conclusive Evidence that a Majority of the States in the Union, at the Time of the Adoption of the Fourteenth Amendment, Did Not Contemplate that Its Effect Would Be to Abolish Segregation in the Public Schools.

The Fourteenth Amendment was proposed to the legislatures of the several states by the 39th Congress on the 16th day of June, 1866. On the 21st day of June, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of . . . three-fourths and more of the several states of the Union have ratified the Fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress." It was therefore resolved, "that the said fourteenth article is hereby declared to be a part of the Constitution of the United States. . . ."

At the time of ratification there were thirty-seven component states in the Union. Of these thirty-seven, thirty had ratified at the time of the promulgation.[32] Three states, Mississippi, Texas and Virginia, later completed ratification. Delaware, Maryland and Kentucky had re-

32. See App. B.

33. 14 Stat. 342 (1866); 14 Stat. 216 (1866).

34. Cong. Globe, 41st Cong., 2d Sess., 3273; 3d Sess., 1053-1061; 42d Cong. 2d Sess., 68, 2484, 2539-42, 3057-8, 3099-3100, 3122-3125, 3174.

ratification. Delaware, Maryland and Kentucky had rejected the amendment, although Delaware reconsidered and ratified it some thirty years later. Only the legislature of California had taken no action.

To develop a concensus of attitudes of the ratifying legislatures is a task that virtually defies accomplishment. On one hand we have Massachusetts, the home of Charles Sumner; on the other is South Carolina, the birthplace of secession. The group includes Minnesota, with a negro population of less than one-fifth of one percent, and Mississippi, where the negro population included more than fifty-three percent of the total. It is indeed futile to attempt to reconcile the intent and understanding of the legislative bodies in these divergent situations. Furthermore, in evaluating the legislative intent, we must be mindful of the attitudes of the states that had comprised the late Confederacy. Of these eleven, only Tennessee ratified the amendment when it was first submitted. All others rejected it in the first instance, and ratification was later accomplished by reconstruction legislatures which could hardly be described as representative bodies. For these states ratification was a condition precedent to readmission of their representatives to Congress.[33] Certainly, to regain their representation in the national Congress was the main if not the only objective of this group of states. In other states, particularly in the north, where the Republican party was in the ascendancy, ratification was accomplished summarily and without thorough consideration of its meaning. Kansas is typical of these states. In his message to the legislature on January 8, 1867, Governor Crawford commented upon the Fourteenth Amendment as follows:

> "Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I be-

33. 14 Stat. 428.

> lieve the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood. And as we are but their servants, to do their will, it is now our unquestionable duty to accept it, and give it our cheerful and hearty support. I, therefore, hope that Kansas, in the just legislative enactment of this session will give the unanimous vote of her Legislature in favor of this measure." [34]

Following the receipt of the amendment, without reference to committee, the Senate ratified the Fourteenth Amendment unanimously and the House vote was 76 to 7.

Under these circumstances it is most difficult to determine the effect that the ratifying states deemed the amendment to have upon public school segregation and other local policies. Our insight in part must come from an analysis of the currents of thought that were prevailing in those states. These have been analyzed in Part I-A of this argument. The other evidence of intent, and indeed the more positive and direct evidence, are the contemporaneous acts and policies of those legislative bodies. Our researches have disclosed that of the 37 states that comprised the Union at the time of adoption of the Fourteenth Amendment, 24 of them maintained legal segregation in the public schools at the time of adoption or subsequent thereto.[35] In 10 states legislation providing for segregated schools was enacted by the same legislatures at the same sessions at which ratification was accomplished. This we deem positive evidence that none of those 24 states considered that segregation was abolished by the Fourteenth

34. Kan. S. J. 43 (1867); Kan. H. J. 62 (1867).
35. See App. B.

Amendment. A further analysis convinces us that in those states where segregation was never practiced or abolished prior to the ratification of the amendment, state and local policies were influenced by local conditions only and bore no relationship to national reconstruction policies. Thus, we conclude that the state legislatures ratifying the Fourteenth Amendment did not understand or contemplate that it would preclude segregation.

The Kansas Understanding

Of the states currently before the Bar of this Court, Kansas is unique in its Abolitionist tradition. Both Virginia and South Carolina were members of the Confederacy. Delaware remained in the Union, but did so reluctantly.[36] Appellants' denunciation of the local customs and statutes in those states as "custom, usage and tradition rooted in the slave tradition" may be apt.[37] Such an accusation, however, cannot be leveled at Kansas. The issues produced by the clash between the Abolitionist and proslavery ideologies had been drawn in Kansas for a decade prior to the civil war, and the abolitionist victory was decisive. Throughout the entire period of reconstruction the Republican party was dominant. Kansas was the home of John Brown, leader of the abortive insurrection at Harper's Ferry. Kansas, in proportion to its population, contributed a larger number of troops to the Union armies than any other loyal state.[38] At the same time it is perhaps significant that Kansas had a substantial negro population—only a little less than ten percent of the total in 1866.[39] Therefore, we proceed to analyze the Kansas experience and attitudes in some detail.

36. *Gebhart, et al., v. Belton, et al.*, No. 10, Oct. 1953 Term, Supreme Court of the U. S., Brief for Petitioners on Reargument, p. 7.

37. Appellants' Brief, p. 42.

38. Blackmar, *History of Kansas* (1912) p. 875.

39. (127,270 white; 12,527 negro.)

The early history of Kansas is the record of a struggle to assure freedom to the negro. Kansans bitterly opposed the degrading of the negro race by the institution of slavery. They championed negro rights as they conceived them. However, it does not appear that their concept of equality included racial integration in any sphere.

The first territorial legislature of Kansas assembled in 1855. It enacted laws providing for a system of public education.[40] The benefits thereof were restricted to "every class of *white* citizens between the ages of 5 and 21 years." [41] This perhaps follows from the fact that the territorial legislature of 1855, commonly called the "Bogus Legislature," was elected largely by the votes of Missourians, whose pro-slavery sympathies were accepted. However, at the convention of the Free State party at Big Springs, September 5, 1855, James H. Lane, as chairman of the committee on platform, introduced resolutions declaring in favor of excluding all negroes, both bond and free, from the territory. These resolutions were adopted and incorporated into the "Big Springs Platform," which marked the formal beginning of the Free State party.[42]

The Topeka Constitutional Convention, which met about two months later, gave long discussion on the question of excluding negroes from the full rights of citizenship, resulting in a vote of 45 to 17 in favor of such exclusion. The proposition to exclude all negroes from the state was submitted to the people along with the constitution on December 15, 1855, and was approved by a vote of 1287 to 458.[43]

While a law enacted in 1858 seemed to make the com-

40. Chap. 144, Sec. 1, Statutes of Kansas Territory (1855).
41. See App. C-1.
42. Andreas, A. T., *History of the State of Kansas* (1883) pp. 1, 94.
43. Ibid., 112.

mon schools accessible to all,[44] the negroes of the territory were largely without educational opportunity. During this period cities were incorporated by special acts of the legislature. These acts defined the cities powers with respect to schools. Illustrative is the act incorporating the city of Marysville.[45] Although the corporation was specifically authorized to maintain a system of public schools, the act provided that nothing therein "shall be so construed as to permit black or mulatto persons to attend said schools or either of them or to receive instruction therein." [46] Provision was made for the appropriation of school taxes paid by negroes to the exclusive purpose of education of the members of the negro race.

Kansas became a state under the Wyandotte constitution, written in 1859. The attitude of that convention was similar to that expressed by earlier assemblies. A resolution to exclude free negroes from the state was laid on the table by a vote of only 26 to 21. The committee on suffrage limited the vote to "every white male citizen." Efforts were made to strike out the word "white." A resolution to that effect was defeated by a vote of 37 to 3.[47] Also in the Wyandotte constitutional convention, numerous attempts were made to restrict all educational privileges to whites. Resolutions were introduced to prohibit colored people from attending the common schools, to exclude them from the universities and to forbid appropriation of any kind for their education. While these measures were defeated, their defeat was not the result of lack of sympathy with such policies. The dominant group apparently did not believe that constitutional restrictions were necessary, their attitude being that such determinations should be left to the legislature and to the

44. Laws of K. T., 1858, Chap. 8, Sec. 71.
45. Private Laws of K. T., 1861, Chap. 43, Sec. 5.
46. App. C-3.
47. Wyandotte Constitution, Proceedings and Debates, 1859, 301.

people of the several communities within the state. S. A. Kingman, delegate from Brown County and one of the acknowledged Free State leaders, addressed the convention thusly: "I have no hesitancy in saying that if ever a negro family should come into my neighborhood, I should immediately object to their attending school with the children of my neighbors—and I believe that the neighborhood could protect itself. The law does not say they shall ever go to school. It leaves it for the people from time to time to regulate. But more than all, and beyond all, and above all, it does not say that those who choose to go to school with negroes shall not to do so." [48] Blunt, a former resident of Maine, added this:

> "We don't know what will be the peculiar views of the people of Kansas upon this subject before there will be a change of the organic law. There may be a progress made by which the prejudices which involve and surround this question of the admission of negroes or mulattoes to our common schools may be laid aside; and then the Legislature could provide for the education of persons of color." [49]

The state legislature of 1861 enacted a comprehensive system of statutes relating to common schools. Among other powers conferred upon the electors at the annual district meeting was the following: "To make such order as they deem proper for the separate education of white and colored children, securing to them equal educational advantages." [50] This act remained effective until 1876. In 1862, an act relating to cities of the first class (over 7,000) provided for the appropriation of taxes collected from black or mulatto persons to maintain separate schools

48. Ibid., 176.
49. Ibid., 177.
50. Laws of Kansas 1861, Chap. 76, Art. III, Sec. 1.

for negroes.[51] This act was amended in 1865 to provide for equal distribution of the tax burden for public school purposes over all citizens, and, at the same time, to authorize boards of education in such cities to organize and maintain separate schools for the education of white and colored children whenever the educational interests demanded.[52]

It is difficult to determine how many colored children were enrolled in the common schools of Kansas prior to 1867. The reports to the state superintendent were meager and inadequate with no separate statistics for the different races. But, it seems likely that little attention was given to the education of colored children. On February 7, 1863, the editor of the *Leavenworth Conservative* was remonstrating that there were no free schools for the large colored population in Leavenworth. He advocated a law to compel district trustees to provide for the instruction of colored children in either separate or mixed schools.[53] In 1864, Leavenworth city made provisions for a special school for her colored population—two grades, one primary and one intermediate, were provided with one teacher for each.[54]

In 1866 a move to counteract prejudice against negro education was initiated by the teachers in the public schools. At the meeting of the state teachers association in July it was resolved "that we as teachers use our best endeavors to overcome unreasonable prejudice existing in certain localities against the admission of colored children upon equal terms with the white children as guaranteed by the spirit of the law of our state." [55]

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51. Compiled Laws of 1862, Chap. 46, Art. IV, Sec. 19.
52. Laws of 1865, Chap. 46, Sec. 1.
53. *Leavenworth Conservative Daily,* February 7, 1863.
54. David J. Brewer, later associate justice of the supreme court of the United States, was president of the Leavenworth Board of Education in 1864. Later, 1865-68, he was superintendent of Leavenworth schools.
55. Kansas Educational Journal, Aug., 1866, 69.

On January 18, 1867, the Kansas legislature ratified the Fourteenth Amendment.[56] Within six weeks thereafter the same legislature specifically empowered boards of education in cities of the second class (between 1,000 and 15,000) "to provide separate schools for the education of colored and white children." [57] Thus, in that year segregation became legally possible in all areas of the state. By its earlier acts the legislature had authorized separate schools in cities of the first class and in rural districts. The 1867 act extended this authorization to cities of the second class. With minor amendments these statutes remained effective until 1876.

The 1867 legislature also took definite action to assure educational opportunity to negro children. It provided that when any children are denied admittance to the schools by a board of directors the members of the board would be subject to fine of $100 "for every school month so offending." Those refusing or neglecting to pay the fine might be imprisoned in the county jail.[58] However, this provision was never construed to preclude the maintenance of separate schools of equal facility. Evidence of that fact is found in the almost simultaneous action of the legislature in enacting other legislation, supra, providing for separate schools in cities of the second class.

In 1870, an effort was made to amend the bill to require separate schools for members of different races.[59] The committee to whom the bill was referred recommended its rejection. The following appears in the report of the majority of the committee:

> "According to the provisions of law now in force in this State, the district boards of the several school districts of the State, the trustees and other officers

56. See App. B.
57. Laws of 1867, Chap. 49, Sec. 7.
58. Laws of 1867, Chap. 125, Sec. 1.
59. H. B. 219 (1870).

> of the boards of education in our cities and villages, having authority in the premises, are authorized to provide separate schools for the education of white and colored children, whenever in their opinion the educational interests intrusted to their care demand the same.
>
> "By the provisions of the bill under consideration, the board of education having authority in the premises are required to establish separate schools for the education of white and colored children.
>
> "We deem the law as it now stands preferable to the bill in this, and also in other particulars, and therefore recommend the rejection of the bill." [60]

This would appear to refute any contention that Chapter 125, Section 1, Laws of 1867, was designed to prohibit segregation. Note, also, the minority report with reference to H. B. 219. In part it states:

> "It is a notorious fact that in many districts of the State, the public schools have been broken up and discontinued the moment that an attempt was made to force colored children into such schools with white children, and that in such districts the schools have been discontinued entirely, or replaced by subscription schools. In the former cases both classes of children are deprived of educational advantages; in the latter cases the poorer portion of the white children, and all the colored children are excluded in consequence of their poverty or color, from school, and placed beyond the reach of the liberal provisions of the constitution and laws of the State, which were designed to be equally free to all classes."

60. Proceedings of the Legislative Assembly of the State of Kansas (1870), 661.

Also significant is the view of the chief school administrator for Kansas in the year 1867. In that year the state superintendent reports:

> "The law of the State provides, that the legal voters of a school district 'shall have power to make such order as they may deem proper, for the education of the white and colored children separately, or otherwise, securing to them equal educational advantages.' According to the fair and obvious construction of this law, the schools maintained for colored children must afford equal advantages as to quality of instruction and gradation, as well as in other respects. It will not do to establish a graded school for white children and keep the colored children always in a primary department. It will not do to build fine edifices for the one class and crowd the other into poorly lighted and ill-ventilated rooms. The law secures to each class equal educational advantages.
>
> "If a colored child is in the primary department, he must be allowed to enter with white children, or have provided a separate school equally as good. If a colored pupil is prepared to enter a higher grade, he must either be admitted with white children into that particular grade, or a separate grade equal in all respects must be maintained for his benefit. *Such is the law.*" [61]

Obviously, Superintendent McVicar did not deem separate schools precluded by the action of the legislature in ratifying the Fourteenth Amendment. This, despite the fact that Mr. McVicar did not sympathize with separate schools. Elsewhere in his report he states:

61. 7th Annual Report State Supt. of Pub. Instr., P. McVicar (1867), 50.

> "Why should a small district struggle to maintain separate schools, when the thing is impracticable, and cannot be done without injury to all classes. Why not permit all the children of the community, without distinction of condition or color, to enter our public schools together. . . . And I submit, that the course which I have indicated, is the only course worthy a citizen of Kansas." [62]

In 1876, the school laws of Kansas were codified. For reasons not apparent in the record, all the provisions relating to separation of schools were omitted.[63] It may be significant that at the end of the same year, the superintendent of public instruction in Wyandotte County reported to the state department: "There are a large number of colored pupils in this county, and where they predominate, or attend schools in considerable numbers, these mixed schools are not a success." [64]

In 1878, there occurred a mass migration of former negro slaves from Mississippi and Louisiana to Kansas. Local historians refer to this movement as the "Exodus." In that year the negro population of Kansas substantially increased.[65] Many of these persons settled in the urban communities. In 1879, the legislature enacted new legislation applying to elementary schools in first class cities of the state and authorizing the boards of education to maintain separate schools on that level.[66] This act was amended in 1905 to provide for the maintenance of separate high schools in the city of Kansas City.

The message of Governor Hoch on February 22, 1905, announcing his approval of the 1905 act expresses an attitude then and now characteristic of Kansas officials, and is set out at length:

62. Ibid., 51.
63. Laws of 1876, Chap. 122.
64. Annual Report State Supt. of Pub. Instr. (1876), 72.
65. See Files, Kansas State Historical Society.
66. Laws of 1879, Chap. 81, Sec. 1.

"No question that has yet come to me in my official capacity has given me so much concern as House bill No. 890, providing for the separation of the whites and blacks in the high school of Kansas City, Kan., and no problem has been more difficult for me to solve satisfactorily to myself than this one. It has seemed to me to be a question vastly more than local, and to involve great moral, educational and racial principles, and incidentally some legal and financial considerations also. My father, though living in the South before the war of the rebellion, was an original and intense abolitionist, and I have believed from boyhood that the black people should have all the rights and privileges under the law enjoyed by the whites. I have watched with increasing admiration and pride the wonderful progress made by this people since the immortal Lincoln made them free. I am in hearty sympathy with them in their great struggle for higher and better things, and in perfect accord with the Roosevelt idea that every man should have a square deal, regardless of race or color. This Kansas City proposition has seemed to me in its general aspects to be a step backward, a concession to the Southern ideas in such matters, with which I have no sympathy whatever; but the local conditions are peculiar, and I have all along believed that it were better for both races in Kansas City, Kan., that the separation proposed in this bill should be made. Under the law in this state in cities of the first class such separation is optional with the boards of education in all grades up to the high school, and the whites and blacks have been separated in all the lower grades in Kansas City, Kan., for years. Without yielding an iota of my conviction in reference to the race problem, with all my sympathies going out to-

> ward these struggling people, and without sympathy or patience with those who would put a straw in the way of their progress, I have simply come to the conclusion that, under present unfortunate local conditions, the permanent and best interests of whites and blacks alike, in Kansas City, Kan., will be best subserved by permitting this bill to become a law, and in this opinion I seem to be sustained by an overwhelming majority of the people on the ground, as well as by a very large majority of the many able and conservative men with whom I have counseled from other parts of the state."

We dare say that Governor Hoch would have been distressed by the suggestion that his act violated the constitutional rights of the negro citizen.

In 1937, the Kansas legislature again demonstrated its special concern for negro education. An act of that year permitted Kansas City to construct a new high school for colored children, and to issue bonds to finance such construction, "without the necessity of an election" as is required under the general laws of Kansas relating to issuance of bonds of indebtedness by municipal corporations.[67] A sponsor of that bill was a respected negro lawyer of Kansas City who was long a member of the Kansas House of Representatives.

The foregoing suggests two obvious conclusions. Kansas legislators and public officials have repeatedly shown a determination to assure to negro citizens the same educational opportunity that other citizens enjoy. At the same time, they have recognized circumstances where this objective can best be accomplished in separate schools. They have not viewed the Fourteenth Amendment as a deterrent to this effort. This, emphatically, was the attitude of the legislature that ratified the amendment.

67. Laws of 1937, Chap. 309.

II

The Intended Future Effect of the Amendment

A. The Evidence Sustains the Position That Neither the Congress Nor the States Understood That the Fourteenth Amendment Would Empower the Congress, Acting Pursuant to Section 5 Thereof, or the Judiciary in the Light of Future Conditions to Abolish Segregation in the Public Schools.

There is a complete absence of evidence of a contemporary understanding that either the Congress or the Judiciary might at some future date, acting within the powers granted by the Fourteenth Amendment, abolish segregation in the public schools of the state. That the amendment did enlarge the federal power is self-evident. Congress was specifically empowered "to enforce, by appropriate legislation, the provisions of this Article." The power of the federal courts to give effect to constitutional guarantees, to interpret constitutional provisions, and to apply such provisions to new situations brought within their purview by changed conditions, was firmly embedded in our Constitution long prior to 1866. That these conditions were understood and accepted by the Congress that submitted and the states that ratified the Fourteenth Amendment is apparent.

At the same time, other concepts, equally basic, and equally well understood, both then and now, compel our attention. These principles necessarily were within the understanding of the framers of the Fourteenth Amendment.

> "Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves. *The federal union is a government of delegated powers.*" (*U. S. v. Butler*, 297 U. S. 1 [63].)

> "It (the national government) can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction." (*U. S. v. Cruikshank,* 92 U. S. 542 [550].)
>
> "The Fourteenth Amendment did not alter the basic relations between the States and the national government." (*Screws v. U. S.,* 325 U. S. 91 [109].)
>
> "The words of the Constitution should be given the meaning they were intended to bear, when that instrument was framed and adopted." (*Scott v. Sanford,* 19 How. 393.)
>
> "Where the intention of a constitutional provision is clear, there is no room for construction, and no excuse for interpolation or addition." (*U. S. v. Sprague,* 282 U. S. 716.)

The foregoing statements, illustrative of principles too elementary and too familiar to require comment, undoubtedly were understood to condition the powers delegated to the national government by the Fourteenth Amendment.

In Part I of this argument we sought to demonstrate that neither the framers, the Congress which submitted, nor the states that ratified the Fourteenth Amendment deemed public school segregation to be within the purview of Section 1 thereof. A necessary corollary to this conclusion is that those who were concerned with the adoption of the amendment intended that the education of the people in schools maintained by state taxation should remain within the sphere of state authority. This manifest understanding that the Fourteenth Amendment did not abolish segregation in the public schools and did not bring the schools within the scope of national authority precludes any possibility of an understanding that at some undetermined future time Congress or the Judiciary might without further grant of constitutional authority

take from the states this power not intended to be granted. Such a suggestion is repugnant to the basic theory of written constitutions.

> "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. . . . Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . ." (Cooley, *Constitutional Limitations,* 8th ed. [1927], pp. 123, 124.)

B. The Emphasis on Congressional Power

If, in spite of evidence to the contrary, it be conceived that the equal protection clause does provide for the abolition of segregation in the public schools, then Congress must so indicate by an exercise of its power under section 5. It is apparent that in the understanding of the framers the emphasis was on congressional action. Ten Broeck notes that "equality, protection, due process, *congressional power* are the constitutional elements recurrently emphasized . . . in the abolitionist platforms." [1] Fairman also notes this trend. He points out that "the current of thought in 1866 . . . ran strongly in the direction of *congressional* action. . . . Congress was going to preside over reconstruction." [2] He also mentions the fact that direct application of the several clauses of the Fourteenth Amendment by the Judiciary received no mention. Flack agrees that Congress intended that it would have the right to enact affirmative legislation to implement the policy of the Fourteenth Amendment.[3]

The debates which preceded the adoption of the Fourteenth Amendment emphasize this theme. Says Stevens, ". . . 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 injust legislation of the states." [4] Senator Howard in presenting the amendment said, "The great object of the first section of this amendment is, therefore, to restrain the powers of the states. . . . How will it be done under the present amendment? . . . (It) is done by the fifth section of this amendment which declares that, 'The Congress shall have power to enforce by appropriate

1. ten Broeck, op. cit., 118.
2. Fairman, op. cit., 23.
3. Flack, op. cit., 225, 245, 249.
4. Cong. Globe, 39th Congress, First Sess., 2459.

legislation. . . .'" [5] Representative Bingham, in his last major speech before the House voted on the Amendment, and said "There was a want hereto 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. . . ." [6]

These statements are only illustrative of the many expressions of the same sentiment. They clearly indicate that the framers intended that the Congress should actively participate in administering the guarantees of the Fourteenth Amendment. This attitude may not have had due consideration in the *Slaughterhouse Cases*, 16 Wall. 36, and the *Civil Rights Cases*, 109 U. S. 3.

We do not suggest that it was intended that the judiciary have no function in the interpretation and enforcement of the amendment. Certainly, the courts have a duty in any case to declare those guarantees that are generally recognized and accepted as being within the scope of the amendment. However, when it is sought to extend the federal jurisdiction into those undefined areas on the periphery of equal protection, we believe the framers intended that the Congress and not the courts should supply the impetus.

The fact that it was the intent of the framers that Congress should be the prime mover in this area, suggests that this court might adopt a rule of construction with regard to the Fourteenth Amendment similar to that which it has applied in the commerce cases. In these, a harmonious arrangement has been reached as between national and state power. The states, in the absence of

5. Ibid. 2766.
6. Ibid. 2542.

federal action, may enact laws regulating interstate commerce as to matters of local concern, not requiring uniform national control.[7]

The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise.

By this latter argument, we do not presume to retreat from our initial position that the Fourteenth Amendment does not bring segregation in the public schools within the national power. However, should the court disagree with our initial position, we then respectfully suggest that the field is one for Congress and not the courts. And until Congress acts, state legislative policy should prevail.

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7. *Cooley v. Board of Port Wardens of Philadelphia,* 12 How. 299; *So. Car. State Highway Dept. v. Barnwell,* 303 U. S. 177; *California v. Thompson,* 313 U. S. 109. See, also, a similar result in the Tax cases. *Graves v. O'Keefe,* 306 U. S. 466; *Helvering v. Gerhardt,* 304 U. S. 405; *Pittman v. H. O. L. C.,* 308 U. S. 21; *Alabama v. King and Boozer,* 314 U. S. 1.

III

To Abolish Segregation in the Public Schools Is Not Within the Judicial Power

The arguments heretofore advanced effectively dispose of this problem. Heretofore we have established the proposition that clearly it was not the contemporary understanding of those in responsible places that the Fourteenth Amendment would of its own force abolish segregation, or that it would otherwise bring the policy of segregation within the purview of the federal power. It was the current understanding and intent that control of the public schools should remain in the states that maintained them. The judicial power can be applied to factual situations existing at the time of the adoption of the Fourteenth Amendment only to the extent and in the manner that the framers contemplated.

It is not our intent to disregard the concept of a "living constitution," nor do we deny that changed conditions produce new factual situations and require new interpretations of constitutional provisions. However, it is our view that the present case presents neither a factual situation that did not exist at the time the amendment was adopted, nor a record that reveals a substantial change in the conditions surrounding the situation. It is a fact of history that racial segregation in the public schools was an established pattern in a majority of the states when the amendment was adopted. (See appendix B.) It is equally well established that there were repeated efforts in the Congress, contemporaneous with the adoption of the amendment, to enact legislation prohibiting segregation in the public schools. We deem it significant that most of the arguments here advanced by our adversaries were then urged upon Congress by certain of the abolitionists. The arguments today are basically the same as those offered in support of the Civil Rights Bill of 1875.[1]

1. Cong. Rec., 43d Cong. 1st Sess. 4115-4116 (1874).

Thus, the record discloses neither new facts nor changed conditions. We have the same problem, the same arguments. To be sure, there is a variation in the language employed, and to the record has been added the somewhat speculative conclusions of a few individuals whose own assertion is that their theses are "admittedly on the frontiers of scientific knowledge." [2] We feel that this court would be going far beyond the limits of the judicial power if, on the basis of such a record, it should reverse the trend of nearly ninety years and strike down a state statute that during all those years has been universally deemed a proper exercise of legislative power. It is not within the province of the federal judiciary to legislate, particularly beyond the limits of the federal constitution.

One more consideration militates against the judicial power. In Part II-B of this Argument we pointed out the framers' emphasis on congressional rather than judicial action to implement the amendment. The Congress and not the courts was intended to define the guarantees of section 1 and give them meaning. Thus, we suggest that in the light of that original understanding the re-definition of equal protection must be a legislative rather than a judicial function.

Appellants appear to seek to re-argue *Plessy v. Ferguson,* 163 U. S. 537, and the questions presented to the Court in the original briefs. We do not deem it necessary to again go over that ground. For us, the Plessy case and *Gong Lum v. Rice,* 275 U. S. 78, are "directly in point, and absolutely controlling." *Briggs v. Elliott,* 98 Fed. Supp. 529.

> "Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of

2. Appendix to Appellants' Brief, No. 8, October Term, 1952, p. 18.

> the state legislatures to settle, without intervention of the federal courts under the federal constitution." (*Gong Lum v. Rice*, supra.)

Appellants urge that the inescapable conclusion of *Sweatt v. Painter*, 339 U. S. 629, and *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, is that the separate but equal doctrine be overthrown. Such has not been the view of this Court.

In the Sweatt case the Court specifically announced:

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

Finally, in disposing of this question, we are constrained again to refer to the statement of Chief Judge Parker in *Briggs v. Elliott*, supra. We know of no comment more apt:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance

of the meaning of its provisions. *The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.*"

IV

Kansas Communities, Through the Normal Processes of Local Government, Are Effectually Accomplishing Desegregation of Their Public Schools

The justification for the exercise of federal jurisdiction to determine local policy in local affairs is that the states fail or refuse to effect the proper policy. The appellants argue that the purpose of segregation is to perpetuate the inferior status of negroes and to organize the community upon the basis of a white supremacy.[1] We suggest that the experience in Kansas indicates another conclusion.

We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal. Those considerations vary from time to time and from place to place. In recognition of these facts, the Kansas legislature provided for an exercise of local autonomy. The statute merely authorizes, but does not require, boards of education in cities of over 15,000 population, to maintain separate schools for the elementary grades.[2]

Twelve cities of the state come within its provisions. Of those twelve, only one, Hutchinson, has never maintained segregated schools. As recently as 1950 separate elementary schools were maintained in eleven cities of the state, with aggregate enrollments in excess of 70,000 students. In September, 1952, the city of Pittsburg abandoned a policy of segregation that had existed since 1913. At the same time the city of Wichita concluded a process of desegregation that had extended over a period of two years, affecting some 25,000 children, approximately 8% of whom were colored. The city of Lawrence presently maintains a school system less than one-

1. Appellants' Brief on Reargument, p. 50.

2. The present extent of segregated schools in Kansas is shown in Appendix D.

third segregated. At the outset of this brief we called attention to the resolution of the Board of Education of the City of Topeka, dated September 3, 1953, stating its intention to abandon segregation at the earliest practicable date, and to its first affirmative step in that direction. On September 12, 1953, the Board of Education of the City of Atchison adopted a resolution with a similar effect.

Thus, in step with the changing inter-racial attitudes and the growing spirit of inter-racial co-operation, the people of Kansas, pursuant to our statute and through the normal process of local government, are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible. We submit that this is a more wholesome process than to accomplish the same result by the coercive decrees of federal courts. We submit that, more than any other, this process is consistent with the historic intent and purpose of our Constitution.

V

The Appropriate Decree

Finally, we are requested to discuss the characteristics of the decree that should be entered in event the Court should reach the improbable conclusion that racial segregation in the public schools per se is violative of constitutional rights. With respect to these questions, the Appellee Board of Education has filed its separate brief herein, setting out its views in detail and calling attention to certain local conditions that would be affected by such a decree.

Inasmuch as the abolishment of the policy of segregation would require no change in state policy, and in view of the fact that Appellee Board of Education has discussed these questions fully in its separate brief, detailed comment by us is not necessary. We recognize, however, that other communities of Kansas would necessarily be affected by the consequences of a decree abolishing segregation, and for that reason we offer the following general views, based on our knowledge of conditions prevailing in Kansas:

We do not believe that the reversal of the judgment of the court below would necessarily require admission of Negro children forthwith to the schools of their choice. On the contrary, we believe that the Court in the exercise of its equity powers may permit an effective gradual adjustment. We think that the necessity for safeguarding the integrity of the school system at large must be reconciled with the necessity of effecting constitutional guaranties. We feel that any order that might currently disrupt the orderly conduct of the public school system would not be consistent with a proper exercise of equity jurisdiction.

It is our further view that this Court should not undertake to formulate a detailed decree in this case. Should it deem the judgment of the court below to be improper,

we suggest that that judgment should simply be reversed and the cause remanded to that court with directions to frame an appropriate decree. In the preparation of such a decree the District Court might properly conduct such investigations and hearings as are necessary to apprise itself of the various interests to be reconciled. However, that is a problem that should be determined on the local level by the court of original jurisdiction. We can assure this Court that the State of Kansas and its local boards of education will act in complete good faith to comply with the letter and the spirit of any decree that may be entered.

Conclusion

For the reasons heretofore set forth, Appellee, the State of Kansas, again respectfully submits that the judgment of the court below should be affirmed.

HAROLD R. FATZER, Attorney General,
PAUL E. WILSON, Asst. Attorney General,
Attorneys for the State of Kansas.

APPENDIX

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APPENDIX A

Antecedents and Chronology of the Fourteenth Amendment—Thirty-ninth Congress

1. Freedmen's Bureau Bill

January 5, 1866

Senate Bill No. 60 entitled "An Act to amend an act entitled 'An act to establish a Bureau for the relief of Freedmen and Refugees' and for other purposes" introduced by Senator Trumbull of Illinois and referred to Judiciary Committee. (p. 129.) *

January 11, 1866

Reported by Judiciary Committee with amendments. (p. 184.)

January 25, 1866

Passed Senate by vote of 37 to 10. (p. 421.)

February 6, 1866

Passed House by vote of 136 to 33. (p. 688.) On final passage the texts of sections 7 and 8 were as follows (Sen. Doc. 39th Cong., 1st Ses. Ex. Doc., No. 24, p. 9):

> "Sec. 7. And be it further enacted, That whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes, mulattoes, freedmen, refugees,

* References are to Cong. Globe, 39th Cong. 1st Sess. (1866) unless otherwise stated.

or any other persons, on account of race, color or any previous condition of slavery or involuntary servitude, or wherein they or any of them are subjected to any other or different punishment, pains or penalties, for the commission of any act or offence, than are prescribed for white persons committing like acts or offences, it shall be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.

"Sec. 8. *And be it further enacted*, That any person who, under color of any State or local law, ordinance, police, or other regulation or custom, shall, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, subject, or cause to be subjected, any negro, mulatto, freedman, refugee, or other person, on account of race or color, or any previous condition of slavery or involuntary servitude, or for any other cause, to the deprivation of any civil right secured to white persons, or to any other or different punishment than white persons are subject to for the commission of like acts or offences, shall be deemed guilty of a misdemeanor, . . ."

February 19, 1866

Vetoed by President Johnson. (p. 915.)

February 20, 1866

Veto sustained. (p. 943.)

2. Civil Rights Act

January 5, 1866

Senate Bill No. 61 entitled "An Act to protect all Persons in the United States in their civil Rights, and to furnish the Means of their Vindication," introduced in Senate by Senator Trumbull of Illinois and referred to the Committee on Judiciary. (p. 129.)

January 11, 1866

Reported with amendments by Judiciary Committee. (p. 184.)

February 2, 1866

Passed Senate, 33 to 12. (p. 607.)

March 13, 1866

Passed House with amendments, 111 to 38. (p. 1367.)

March 15, 1866

Senate concurred in House amendments. On final passage sections 1 and 2 appeared in the following form (14 Stat. 27):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.
>
> "Sec. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude,

except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

March 27, 1866

Vetoed by President Johnson. (p. 1679.)

April 6, 1866

Veto overridden in Senate, 33 to 15. (p. 1809.)

April 9, 1866

Veto overridden in House, 122 to 41. (p. 1861.)

3. The Resolution to Amend the Constitution

December 4, 1865

Resolution by Stevens of Pennsylvania to create the Joint Committee on Reconstruction introduced and passed in House of Representatives. (p. 6.)

December 5, 1865

Joint resolution to amend the constitution introduced by Stevens and referred to the Committee on Judiciary. Text of proposed amendment as follows:

"All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."

December 6, 1865

Bingham of Ohio introduced a joint resolution to amend the constitution of the United States so as to empower congress to pass all necessary and proper laws to secure to all persons in every state of the Union equal protection in their rights, life, liberty and property. Referred to Judiciary Committee. (p. 14.)

December 12, 1865

Resolution to create Joint Committee on Reconstruction, as amended, concurred in by Senate. (p. 30.)

December 13, 1865

Senate amendments agreed to in House. On final passage the Resolution was as follows (p. 47):

> "Resolution by the House of Representatives, (the Senate concurring,) That a joint committee of 15 members be appointed, 9 of whom shall be members of the House and 6 members of the Senate, who shall inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress, with leave to report at any time by bill or otherwise."

MEMBERS OF JOINT COMMITTEE ON RECONSTRUCTION

HOUSE

Stevens of Pennsylvania (R)	Bingham of Ohio (R)
Washburne of Illinois (R)	Conkling of New York (R)
Morrill of Vermont (R)	Boutwell of Massachusetts (R)
Grider of Kentucky (D)	Blow of Missouri (R)

Rogers of New Jersey (D)

SENATE

Fressenden of Maine (R)	Williams of Oregon (R)
Grimes of Iowa (R)	Howard of Michigan (R)
Harris of New York (R)	Johnson of Maryland (D)

January 12, 1866

Bingham's proposal submitted to Joint Committee on Reconstruction (Journal of Reconstruction Committee, p. 7):

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

Steven's Proposal (Journal, p. 9):

> "All laws, State or National, shall operate impartially and equally on all persons without regard to race or color."

February 3, 1866

Committee on Reconstruction approved Bingham's substitute draft, as follows:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State the 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)."

February 13, 1866

Committee proposed Amendment as above stated, to Congress. No further action. (p. 813.)

April 21, 1866

New Stevens proposal submitted to Joint Committee on Reconstruction. Text as follows (Journal, pp. 24-26):

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

Bingham's proposal to add following amendment rejected:

> "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 compensation."

Bingham proposed a new Section 5 as follows; approved:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any law 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."

April 25, 1866

Motion to strike out Bingham's Section 5 carried. (Journal, p. 31.)

April 28, 1866

Motion to approve Bingham's amendment carried. (Journal, p. 35.)

April 30, 1866

Senate Resolution No. 78 proposing to amend the Constitution of the United States introduced in Senate by Fessenden, and House Resolution No. 127 being an identical proposition, introduced into House of Representatives by Stevens. Section 1 read (pp. 2265, 2286):

> "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."

May 10, 1866

H. R. No. 127 passed House—128 to 37. (p. 2545.)

May 30, 1866

Section 1 amended in Senate by inserting at the beginning the following (p. 2897):

> "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

June 8, 1866

Passed in Senate, 33 to 11. (p. 3042.)

June 13

Senate amendments concurred in by House, 120 to 32. (p. 3149.)

APPENDIX B

The States, the Fourteenth Amendment and Segregation

1. Introduction

On the 16th day of July, 1866, the Fourteenth Amendment was proposed by the Thirty-ninth Congress to the legislatures of the several states. Thirty-seven states comprised the Union at the time ratification was proclaimed on July 28, 1867. Of those thirty-seven the legislatures of thirty had adopted resolutions ratifying the amendment by the date of proclamation. Three states were to complete ratification within the next two years.[1] Three other states had finally rejected the amendment and were not again to consider it during the period of reconstruction.[2] Only the legislature of California had neither ratified nor rejected the amendment. Of the thirty-three states ratifying the amendment, ten had initially rejected it,[3] while subsequent to ratification the legislatures of three states adopted resolutions withdrawing their assent.[4]

Few records of legislative debates on propositions to ratify the Fourteenth Amendment are available. Those documents that do exist contain no evidence that any of the ratifying legislatures contemplated or understood that the Fourteenth Amendment would abolish segregation in the public schools. Indeed, statements relating to the public schools are rare and the few comments that appear in the legislative journals are general and inconclusive. We believe that the best evidence (perhaps the only competent evidence) of the attitudes of state legislatures toward the relationship of the Fourteenth Amendment to racial segre-

1. Mississippi, Texas and Virginia.
2. Delaware, Maryland and Kentucky.
3. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Caroline, South Carolina, Texas and Virginia.
4. New Jersey, Ohio and Oregon.

gation in the public schools may be found in their contemporaneous acts. Thus we examine specifically the provisions of the laws relating to segregation in the public schools found in the constitutions and statute books of the component states of the Union at the time the Fourteenth Amendment was proposed and ratified.

2. Analysis

ALABAMA. On December 6, 1866, the Governor of Alabama recommended that the legislature ratify the Fourteenth Amendment in order that Alabama congressmen might be seated in the federal Congress. Nevertheless, on the next day the House and Senate of Alabama jointly refused to ratify the amendment.[1] The amendment was again submitted to the reconstruction legislature of Alabama and was ratified by it on July 13, 1868.[2]

Prior to the civil war the problem of segregation in public schools did not exist in Alabama, for the reason that statutory penalties were provided for persons who undertook to teach negroes.[3] It is significant that the legislature of 1868, which ratified the Fourteenth Amendment, also enacted legislation providing for segregation in the public schools.[4] This statute required segregated schools unless all parents in the district consented to integration. The constitution of Alabama, adopted in 1875, provides for separate but equal facilities for children of citizens of African descent.[5] Since that date, legal segregation has been maintained in Alabama. The present constitution provides for separate schools for white and colored races and specifically requires that "no child of either race shall be permitted to attend the school of the other race." [6]

1. Ala. H. J. (1866) 210, 213; Ala. S. J. (1866) 183.
2. Ala. H. J. (1868) 10; Ala. S. J. (1868) 10.
3. Acts of Ala. (1830-1833) 12.
4. Acts of Ala. 1868 148.
5. Art. 13, Sec. 1.
6. Art. 14, Sec. 256, Constitution of Ala. of 1901.

ARKANSAS. The legislature of Arkansas rejected the Fourteenth Amendment on December 17, 1866.[1] The amendment was again submitted to the reconstruction military legislature of Arkansas and was ratified on April 6, 1868.[2] Arkansas was the only state which ratified an amendment by a unanimous vote of both its legislative bodies.[3] The legislature that ratified the amendment on July 23, 1868, enacted laws to establish a public school system which directed the state agency responsible for schools to "make the necessary provisions for establishing separate schools for white and colored children." [4] Arkansas maintains segregated schools at the present time.[5]

CALIFORNIA. California neither ratified nor rejected the Fourteenth Amendment. However, both prior and subsequent to incorporation of the Amendment into the Constitution of the United States, racially segregated public schools were permitted in California.[1] Statutes providing especially for racially segregated schools were enacted by the California legislature of 1863, 1864, 1866 and 1870.[2]

CONNECTICUT. Connecticut was the first state to ratify the Fourteenth Amendment. The ratification was completed on June 30, 1866.[1] Prior to 1866, segregated schools may have been maintained in Connecticut. However, the same legislature that ratified the Fourteenth Amendment prohibited segregation in public schools on account of race or color.[2] There is no record of legal segregation in Connecticut during or subsequent to the reconstruction period.

1. Ark. S. J. (1866-1867) 262; Ark. H. J. (1866-1867) 268.
2. Ark. S. J. (1868-1869) 24; Ark. H. J. (1868) 22.
3. See Flack, The Adoption of the 14th Amendment, 190.
4. Ark. Stat. 1868, No. LII, Sec. 107.
5. Ark. Stat. 1947, 80-509.

1. Constitution of California of 1849, Art. IX, Sec. 8.
2. Calif. Stat. 1863, No. CLIX, Sec. 68; 1864, No. CCIX, Sec. 13; 1866, No. CCCXLII, Sec. 57-59; 1870, No. DLVI, Sec. 56-57.

1. Conn. S. J. (1866) 135; Conn. H. J. (1866) 410.
2. Conn. Pub. Acts (1866) No. CVIII.

However, negroes were not permitted to vote until the Fifteenth Amendment to the federal constitution made the Connecticut constitutional provision unoperative.[3]

DELAWARE. The Fourteenth Amendment was rejected by the legislature of Delaware in 1867.[1] The amendment was not ratified by the state of Delaware until more than thirty years thereafter. Public schools for negro children were not provided in Delaware until after the civil war. In 1881 the first direct appropriation from the state treasury was made for the maintenance of negro schools.[2] The constitution of 1897, which is presently effective, provides for the maintenance of separate but equal school facilities in Delaware for children of different races.[3] This provision was effective when the legislature of 1901 finally ratified the Fourteenth Amendment.

FLORIDA. Pursuant to the recommendation of its Governor, the legislature of Florida unanimously rejected the Fourteenth Amendment in December, 1866.[1] Eighteen months later under pressure of the reconstruction act, Florida adopted a new constitution and the Fourteenth Amendment was ratified on June 9, 1868.[2] At the time of reconstruction, Florida apparently did not maintain a free public school system for white students although public funds had been appropriated for the education of negroes.[3] Research indicates that segregation in the public schools was not established by law in Florida until the constitution of 1887 became effective.[4] Although specific provision was not made, segregation was in fact practiced widely

3. Conn. Pub. Acts (1871) No. CXXXVI.
1. Del. H. J. (1866) 226; Del. S. J. (1867) 176.
2. Del. Laws 1901, Ch. 235.
3. Art. 10, Sec. 2.
1. Fla. S. J. (1866) 101; Fla. H. J. (1866) 149.
2. Fla. S. J. (1868) 9; Fla. H. J. (1868) 9.
3. Laws of Fla., 1866, Chap. 1475.
4. Art. XII, Sec. 12.

prior to 1887. Since that time there has always been segregation of races in the public schools of Florida.[5]

GEORGIA. The Fourteenth Amendment was presented to the legislature of Georgia on November 1, 1866, and was subsequently rejected by both houses of the legislature.[1] The amendment was submitted to the provisional legislature of Georgia and was ratified in July, 1868.[2] This ratification was not accepted by Congress, inasmuch as negroes had been excluded from their seats in the 1868 legislature. Therefore, the amendment was again submitted to the 1879 session and was ratified.[3] It is significant that the session of 1870, which effectively ratified the Fourteenth Amendment, also enacted a law providing a system of public schools for Georgia.[4] This act specifically provided ". . . the children of the white and colored races shall not be taught together in any sub-district of the State." An effort to eliminate this provision in the House of Representatives failed.[5] The present constitution and laws of Georgia provide for segregation in the public schools.[6]

ILLINOIS. The Fourteenth Amendment was ratified by the Illinois legislature in January, 1867.[1] Prior to the civil war, no system of public education was maintained for students of other than the white race. However, segregation was not specifically forbidden by the laws of Illinois prior to 1874.[2] The report of the state superintendent of public instruction of Illinois for the year 1865-66 indicates that while there were at that time about 6,000 negroes of

5. See Fla. Stat. Ann., Sec. 228.09; 228.10; 230.23 (6a); 242.25 and 242.26.
1. Ga. H. J. (1866) 68; Ga. S. J. (1866) 72.
2. Ga. H. J. (1868) 50; Ga. S. J. (1868) 46.
3. Ga. H. J. (1879) 74; Ga. S. J. (1879) 74.
4. Ga. Pub. Laws (1870) 49.
5. Ga. H. J. (1870) 449.
6. Art. VII, Sec. I, par. 1, Ga. Const. of 1945 and Ga. Code of 1933, Sec. 32-909.
1. Ill. S. J. (1867) 76; Ill. H. J. (1867) 134.
2. Ill. Rev. Stat. 1874, Chap. 122, Sec. 100.

school age in Illinois, the statutes then effective excluded them from participation in the benefits of the free school system.[3] The report of the same officer for the next biennium recommends the repeal of the provision limiting public school facilities to pupils of the white race. However, with respect to segregation the same report says:

> "The question of co-attendance, or of separate schools, is an entire and distinct one and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of little importance, and one which need not and cannot be regulated by the legislature." [4]

INDIANA. Indiana is one of the two states wherein a full record of legislative debates on the Fourteenth Amendment is available. Governor Morton in delivering his message to the legislature of Jan. 11, 1867, pointed out that the laws of Indiana then excluded colored children from the common schools and made no provision for their education. He suggested that an enumeration of the colored children of the state be made and that a portion of the school fund in proportion to their number be set apart and applied to their education by the establishment of separate schools. He further stated,

> "I would not recommend that white children and colored children be placed together in the same schools, believing, as I do, that in the present state of public opinion, that to do so would create dissatisfaction and conflict and impair the usefulness of the schools . . ." [1]

In the same message, Governor Morton recommended passage of the Fourteenth Amendment. The amendment

3. Report of Superintendent of Public Instruction of Ill. (1865-6) 28.
4. Report of Superintendent of Public Instruction of Ill. (1867-8) 18-21.
1. Message of the Governor of Indiana to the Legislature, Jan. 11, 1867, 21.

was ratified on January 29, 1867, by substantial majorities in each of the houses.[2] As had been pointed out in the Governor's message, the Indiana school laws then made no provision for education of negroes. However, pursuant to legislation enacted in 1865, negroes and mulattoes were excused from payment of the school tax.[3] There were no amendments to the school laws in the 1867 session. In 1869, taxation for common school purposes was extended to all persons otherwise liable, and the education of negro children was provided for in separate schools.[4] Debates on this measure do not indicate that any of the legislators considered the Fourteenth Amendment an impediment to the establishment of separate schools.[5] Further legislation providing for separate schools was enacted by the legislature of 1877.[6] This act continued in effect until it was specifically repealed in 1949.[7]

IOWA. Iowa ratified the Fourteenth Amendment on April 3, 1868.[1] Ten years before the legislature had authorized district boards to provide separate schools for the education of colored children "except in cases where by the unanimous consent of the persons sending to the school in the sub-district, they may be permitted to attend with the white youth." [2] This statute was held by the Supreme Court of Iowa to violate the constitution of that state.[3] But that opinion reveals no objections made with reference to the Fourteenth Amendment or any part of the Constitution of the United States. Iowa has not maintained segregated schools since that time.

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2. Brevier, Legislative Reports 1867, 58, 90.
3. Ind. Laws 1865, 31.
4. Ind. Laws 1869, 41.
5. Brevier, Legislative Reports 1869, 34, 341-2, 491-6, 506-12, 533.
6. Ind. Laws 1877, 124.
7. Acts of 1949, Sec. 10, Chap. 168.
1. Iowa S. J. (1868) 264; Iowa H. J. (1868) 132.
2. Iowa Laws, 1858, Chap. 52, Sec. 30.
3. *Clark vs. Independent School District of Muscatine* (1868) 24 Iowa 266.

KANSAS. The Fourteenth Amendment was recommended for passage by Governor Samuel J. Crawford on January 8, 1867, on the ground that while the amendment was not fully what the Governor might desire, it had received the approval of the electors at the preceding general election.[1] Without reference to committee and apparently without debate the resolution for ratification of the amendment was adopted by both houses of the legislature, said ratification being completed on January 18, 1867.[2] It is significant that at the time the amendment was ratified segregation was authorized by the statutes of Kansas.[3] Indeed, the legislature which ratified the Fourteenth Amendment almost simultaneously enacted legislation specifically authorizing segregation in cities of the second class.[4] In 1876 the statutes authorizing separate schools were repealed but three years later an act was passed specifically empowering boards of education in cities of the first class to maintain separate schools. This section remains substantially unchanged.[5]

KENTUCKY. The Kentucky legislature, pursuant to recommendation of its Governor, rejected the Fourteenth Amendment in January, 1867.[1] There is no indication in the legislative journals that the amendment was ever again considered in the state of Kentucky. The same year the legislature enacted laws permitting the establishment of schools for negroes to be supported by taxes collected from negroes.[2] The fact appears, however, that no effective system of negro education existed prior to 1882, in which year the legislature merged white and negro schools into a seg-

1. Kan. S. J. (1867) 43.
2. Kan. S. J. (1867) 76, 128; Kan. H. J. (1867) 79.
3. Ch. 76, Art. III, Sec. 1, Laws of Kansas, 1861; Ch. 46, Sec. 1, Laws of Kansas, 1865.
4. Ch. 49, Sec. 7, Laws of Kansas, 1867.
5. Gen. Stat. of Kan. 1949, 72-1724.

1. Ky. H. J. (1867) 63; Ky. S. J. (1867) 64.
2. Ky. Acts 1867, 94.

regated system with one tax levy applicable to all taxpayers alike.[3] This principle of equal tax and tax support was written into the present Kentucky constitution in 1890-91.[4]

LOUISIANA. The Governor of Louisiana recommended ratification of the Fourteenth Amendment in his message to the legislature of 1867. He also recommended separate schools for negro children in the same message.[1] However, the Fourteenth Amendment was unanimously rejected by both houses.[2] Reconstruction brought a new provisional governor and a new legislature, composed principally of negroes. Upon recommendation of the Governor, the resolution to ratify the amendment was overwhelmingly adopted in both houses of the legislature and ratification completed on July 9, 1868.[3] The same year a new constitution of Louisiana provided that there should be no segregation in the public schools.[4] It appears that no effective school system was established while this constitution was in effect.[5] In 1879 the constitutional requirement for mixed schools was eliminated, but since that time, segregated schools have been mandatory in Louisiana.[6]

MAINE. The Fourteenth Amendment was ratified by the legislature of Maine upon recommendation of the Governor, and with only two dissenting votes in the entire legislature, on January 19, 1867.[1] There is no evidence that segregation was ever practiced in the public schools of Maine or in the other public facilities of the state. How-

3. Trout, *Negro Education in Kentucky,* Courier Journal, May, 1953.
4. Section 187.
1. La. S. J. (1867) 4, 5.
2. La. S. J. (1867) 20; La. H. J. (1867) 23.
3. La. H. J. (1868) 8; La. S. J. (1868) 21.
4. Const. 1868, Art. 135.
5. Ann. Rep. of the La. State Supt. Pub. Instr. 1867, IV.
6. Art. 224.
1. Me. H. J. (1867) 20, 78; Me. S. J. (1867) 101.

ever, miscegenation was prohibited by the statutes of Maine as late as 1875.[2]

MARYLAND. The legislature of Maryland considered and rejected the Fourteenth Amendment in March, 1867.[1] There is no record that any further action on the amendment was ever taken by Maryland. Public facilities for negro education were non-existent in that state prior to the submission of the Fourteenth Amendment. The first general public school system was established in Maryland by a law effective April 1, 1868. That statute provided for free schools open to all white children between the ages of 6 and 18 years. Further provision was made that taxes paid for school purposes by colored taxpayers should be set aside for the purpose of maintaining schools for colored children.[2] Segregation has continued in the public schools of Maryland until the present day.[3]

MASSACHUSETTS. The Governor of Massachusetts addressed the legislature on January 4, 1867, and recommended ratification of the Fourteenth Amendment.[1] A review of that message does not reflect any expression of attitude on the part of the Governor relative to separate schools. Segregated education, although formerly practiced in the city of Boston, had been prohibited by statute in Massachusetts since 1855.[2] Pursuant to the recommendation of the Governor, the amendment was ratified by both houses of the Massachusetts legislature on March 20, 1867.[3] There is no evidence in the record to indicate whether Massachusetts did or did not consider the relationship of the Fourteenth Amendment to a segregated system of public schools.

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2. Me. Rev. Stat. Supp. 1885-95, Chap. 59, Sec. 2.
1. Md. S. J. (1867) 808; Md. H. J. (1867) 1141.
2. Md. Laws 1868, Chap. 407.
3. Ann. Code of Md. 1951, Art. 77, Chap. 9, Sec. 124.
1. Message to the Gen. Court, Jan. 4, 1867, 67 *et seq.*
2. Mass. Acts and Resolves, 1855, Chap. 256.
3. Mass. Gen. Court Doc. 1867, House No. 149, 3-4, 16, 25-6.

MICHIGAN. The Fourteenth Amendment was somewhat summarily ratified by the Michigan legislature on February 15, 1867.[1] Separate schools for negroes existed in the city of Detroit as early as 1839 and continued until after the ratification of the Fourteenth Amendment. In 1867, the legislature provided that "All residents of any district shall have an equal right to attend any school therein . . ."[2] This statute was found to preclude segregation when placed in issue before the Supreme Court of Michigan.[3] However, the Court was apparently oblivious to any possible relationship of the Fourteenth Amendment to segregation. Miscegenation was prohibited in Michigan as early as 1846 and continued until 1883.[4]

MINNESOTA. The Governor recommended ratification of the Fourteenth Amendment and both houses of the legislature approved ratification by overwhelming majorities in January, 1867.[1] Ratification was completed on February 1. At that time Minnesota had fewer than one thousand negro residents; therefore, there is little reason to believe that the matter of negro segregation was considered by the Governor and the legislature at the time of ratification. There is no history of segregation in Minnesota.

MISSISSIPPI. The Fourteenth Amendment was first presented to the legislature of Mississippi in 1867. Disapproval was recommended by the Governor and both houses of the legislature unanimously voted for rejection.[1] The amendment was again submitted to the reconstruction legislature of 1870, along with the Fifteenth Amendment. Both were ratified.[2] Constitutional and statutory provi-

1. Mich. S. J. (1867) 125; Mich. H. J. (1867) 180-2.
2. 1 Mich. Laws (1867) 43.
3. *People, ex rel. Workman, vs. Board of Education of Detroit* (1869), 18 Mich. 400.
4. Pub. Acts of 1883, 23.
1. Minn. S. J. (1867) 23; Minn. H. J. (1867) 26.
1. Miss. H. J. (1867) 201-202, App. 77; Miss. S. J. (1867) 195-6.
2. Miss. S. J. (1870) 19; Miss. H. J. (1870) 26.

sions of Mississippi at the time of ratification did not specifically require or permit segregation by races. However, the evidence is abundant that segregation was almost universally practiced in Mississippi during this period.[3] School segregation has been specifically required by the laws of Mississippi since 1878.

MISSOURI. Missouri ratified the Fourteenth Amendment on January 26, 1867. Its ratification was recommended by the Governor and adopted by substantial majorities of both houses in that month.[1] No reference to the schools is found in these proceedings. At the time of ratification Missouri permitted establishment of separate schools for negroes under its constitution of 1865.[2] In 1875 the constitution required separate schools for children of African descent.[3] Statutory provisions relative to segregation in the public schools were enacted in Missouri in 1865, 1868, 1869, 1874, 1879, 1887 and 1895.

NEBRASKA. Nebraska was admitted to the Union in 1867 and on June 15 of that year ratified the Fourteenth Amendment.[1] Apparently there has never been legal authority for the maintenance of a segregated school system in Nebraska, nor is segregation authorized by law in other areas of life. However, the statutes of Nebraska prohibit the marriage of white persons with persons of one-eighth or more of negro, Japanese or Chinese blood.[2]

NEVADA. The legislature of Nevada ratified the Fourteenth Amendment on January 22, 1867.[1] Ratification had been urged by the Governor in his message. At the same time he had mentioned the failure of the state of Nevada

3. Ann. Rep. of Supt. of Pub. Instr. of Miss. (1871) 66, 124-7; App. 4-5, 11.
1. Mo. S. J. (1867) 30; Mo. H. J. (1867) 50.
2. Art. IX, Sec. 2.
3. Art. XI, Sec. 3.
1. Neb. H. J. (1867) 15; Neb. S. J. (1867) 174.
2. Rev. Stat. Neb. 1943, Sec. 42-103.
1. Nev. S. J. (1867) 47; Nev. Ass. J. (1867) 25.

to provide education for negro students and suggested that such failure violated the constitution of the state of Nevada.[2] In 1867 the legislature that ratified the Fourteenth Amendment enacted legislation providing

> "Negroes, Mongolians, and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate fund for their education and use the public school funds for the support of the amendment." [3]

In 1872 the Supreme Court of Nevada held that the school trustees could not legally deny to any resident person of proper age an equal participation in the benefits of the common schools.[4] However, the holding is based entirely on provisions of the Nevada constitution and not upon the Fourteenth Amendment. Furthermore, the opinion apparently permits the school trustees to make any appropriate classification of students with reference to existing conditions including separation of races. The fact that the Nevada Supreme Court did not consider the Fourteenth Amendment applicable to school segregation is indicated by the following excerpt in the dissenting opinion in the Duffey case:

> "The case of relator was sought to be maintained on the ground that the statute was in violation of the Fourteenth Amendment to the constitution of the U. S. I fully agree with my associates that this proposal of counsel is utterly untenable."

NEW HAMPSHIRE. The Fourteenth Amendment was ratified by the legislature of New Hampshire on July 7, 1866, it being the second state to approve the amendment.[1] New

2. Nev. S. J. (1867) App. 9.
3. Rev. Stat. (1867) 95.
4. *State vs. Duffey,* 7 Nev. 342, 8 Am. Rep. 713.
1. New Hamp. H. J. (1866) 231; New Hamp. S. J. (1866) 94.

Hampshire did not then, and does not now, maintain segregation in the public schools or elsewhere. However, in 1870 there were fewer than five hundred negroes in the entire state.

NEW JERSEY. The Fourteenth Amendment was ratified in New Jersey at an extra session of the legislature on September 11, 1866. The amendment was presented and ratification accomplished in two days.[1] However, in 1868 the legislature of New Jersey adopted a resolution rescinding ratification of the Fourteenth Amendment.[2]

It appears that at no time has segregation by race been established by law in the public schools of New Jersey, although segregation has been practiced in fact in a few New Jersey communities. In 1881 the New Jersey legislature specifically prohibited exclusion from the public schools on the ground of color.[3] However, a separate state manual training school for negro children, established in 1894, existed as late as 1910.[4]

NEW YORK. The Fourteenth Amendment as proposed by Congress was ratified in New York on January 10, 1867.[1] Separate schools had long existed in the state of New York. In 1864 a statute authorizing local authorities to establish separate schools for negroes was enacted as part of the general school law.[2] There is evidence that in 1867 separate schools for negroes were actually maintained in New York City and in Brooklyn. Various statutes of New York, upholding the establishment of separate schools for negroes, have been upheld against objections on constitutional grounds in numerous cases before the Supreme

1. N. J. S. J. Extra Session (1866) 14; Minutes of Assembly (1866) 8 and 17.
2. N. J. Acts (1868) 1225.
3. Laws 1881, Chap. CXLIX.
4. N. J. Laws (1894) 536; N. J. Comp. Stat. 1709-1010 Schools, Art. XXI.
1. N. Y. S. J. (1867) 34; N. Y. H. J. (1867) 77.
2. N. Y. Laws 1864, Chap. 555, Title X, Sec. 1.

Court of New York.[3] This record of litigation indicates that segregation was widely practiced in New York during the period subsequent to the ratification of the Fourteenth Amendment until as recently as 1900.

North Carolina. North Carolina, like the other states of the confederacy, rejected the Fourteenth Amendment when it was first submitted to the legislature of that state on November 19, 1866.[1] The provisional governor recommended ratification to the reconstruction legislature of 1868 and such ratification was accomplished on July 4 of that year.[2] Simultaneously, North Carolina adopted a new constitution. This constitution of 1868 provided for segregated education.[3] Two days after the Fourteenth Amendment was ratified, the Governor of North Carolina in his inaugural address stated: "It is believed to be better for both races and more satisfactory to both, that the schools should be distinct and separate." Less than two weeks after the amendment was ratified the House and Senate adopted a joint resolution stating that it was the duty of the joint assembly to adopt a system of free schools but that the races should be segregated.[4] The same year the legislature, pursuant to a recommendation by the Governor, enacted Chapter 184 of the North Carolina Laws of 1868-9, which provides: "The school authorities of each and every township shall establish a separate school or separate schools for the instruction of children and youth of each race. . . ."

Ohio. Ohio ratified the Fourteenth Amendment in 1867. The Governor's message recommending ratification

3. *Dallas vs. Fosdick*, 40 How. Prac. 249 (1869) (Buffalo); *People, ex rel. Dietz, vs. Easton*, 13 Abb. Prac. (N. S.) 159 (1872) (Albany); *People, ex rel. King, vs. Gallagher*, 93 N. Y. 438, 45 Am. R. 232 (1883) (Brooklyn); *People, ex rel. Cisco, vs. School Board*, 161 N. Y. 598, 56 N. E. 81 (1900) (Queens Co.).

1. No. Car. S. J. (1866) 7, 138; No. Car. H. J. (1866) 7, 182.
2. No. Car. Laws (1868) 89.
3. Art. IX, Sec. 2.
4. No. Car. H. J. (1868) 54; No. Car. S. J. (1868) 237.

did not refer to the relationship of the Fourteenth Amendment to segregation in the public schools, a policy maintained by Ohio at that time. Ratification was accomplished on January 11, 1867.[1] However, in the following year a resolution rescinding ratification was passed by both houses of the legislature.[2] Ohio had long maintained separate schools for negroes under various constitutional and statutory provisions. A statute establishing common schools for negroes was enacted as early as 1831.[3] By 1860 separate schools for negro children were required when there were more than thirty children in the school districts.[4] Segregation was not prohibited by statute until 1887.[5] Pursuant to the authority conferred by statute, separate schools were maintained for negro children in more than half of the counties of Ohio.[6] Such schools were attacked as contrary to the Fourteenth Amendment in 1871 but the Supreme Court of Ohio found that such separate systems did not contravene the provisions of that amendment.[7]

OREGON. Ratification of the Fourteenth Amendment was accomplished in Oregon on September 19, 1866.[1] However, on October 15, 1868, the legislature adopted a resolution to rescind its ratification of the amendment.[2] In view of the fact that there were few negroes in Oregon at this time (346 in 1870) it is doubtful if the legislature entertained any concept of the relationship of the Fourteenth Amendment to segregation in the public schools. We note, however, that in 1866 Oregon enacted a statute

1. Ohio S. J. (1867) 7; Ohio H. J. (1867) 12.
2. Ohio H. J. (1868) 33; Ohio S. J. (1868) 39.
3. Ohio Laws (1831) 414.
4. 2 Ohio Rev. Stat. (1860) 1357.
5. Ohio Laws (1887) 34.
6. Rep. Comm. of Common Schools (1867) 477 Table B.
7. *State, ex rel. Garnes, vs. McCann,* 21 Ohio Stat. 198.
1. Ore. S. J. (1866) 34; Ore. H. J. (1866) 74.
2. Ore. S. J. (1868) 32, 12; Ore. H. J. (1868) 271.

forbidding miscegenation and voiding such marriages.[3] This statute was not repealed until 1951.

PENNSYLVANIA. Pennsylvania ratified the Fourteenth Amendment on February 13, 1867.[1] While debates on the amendment were preserved in Pennsylvania, there appears to have been no reference to the relationship between the Fourteenth Amendment and segregation in the public schools. At that time, legislation in Pennsylvania required separate schools to be established for negroes in those districts when twenty or more pupils were available.[2] Such segregation was actually practiced in Pennsylvania and was upheld when attacked on constitutional grounds in 1873.[3] The practice continued until 1881 when it was abolished by statute.[4] There is no other evidence of legal segregation in Pennsylvania, subsequent to the enactment of the Fourteenth Amendment.

RHODE ISLAND. On February 7, 1867, the legislature of Rhode Island ratified the Fourteenth Amendment.[1] Although school segregation had existed prior to 1865 in certain communities in Rhode Island, there is no evidence that it was practiced in Rhode Island with sanction of law at the time of ratification of the Fourteenth Amendment or at any time subsequent thereto.

SOUTH CAROLINA. South Carolina considered the Fourteenth Amendment in November, 1866. The Governor in his message to the legislature transmitting the amendment recommended rejection.[1] In the legislature only one member voted in favor of ratification.[2] The reconstruction government of South Carolina adopted a new constitution in

3. Sec. 23-1010 O. C. L. A.
1. Pa. S. J. (1867) 125; Pa. H. J. (1867) 278.
2. Pa. Laws (1854) 623.
3. *Commonwealth vs. Williamson,* 30 Legal Int. 406.
4. Pa. Pub. Laws 76.
1. R. I. Acts and Res. (1867) 161.
1. Charleston *Courier,* Nov. 28, 1866.
2. id. Dec. 20, 1866, Dec. 22, 1866.

1868. That constitution required the legislature, immediately after its organization, to ratify the Fourteenth Amendment.[3] Apparently the move was prompted by a consciousness that the ratification of the amendment was a prerequisite to readmission to the Union.[4] The constitution further required that the general assembly establish a system of free schools "free and open to all the children and youths in the state, without regard to race or color." [5] The Fourteenth Amendment was ratified in July, 1868.[6] Despite ratification and despite the provision in the new constitution of South Carolina, requiring a system of amalgamated schools, a recommendation against this practice was made by Governor Orr in his message to the legislature on July 8, 1868. Two days later the new Governor, Robert K. Scott, formerly of Maine and formerly Brigadier General in the Union Army, expressed his views on segregation. Governor Scott said:

> "I respectfully recommend that the General Assembly will provide by law for the establishment of at least two schools in each school district when necessary and that one of said schools shall be set apart and designated as a school for colored children and the other for white children, the school fund to be distributed equally to each class, proportionate to the number of children between the ages of six and sixteen years. I deem this separation of the two races in the public schools as a matter of greatest importance to all classes of our people. . . . It is the declared design of the constitution that all classes of our people shall be educated, but not to provide for this separation of the two races will be to repel the masses of whites from the educational training they so much need, and virtually to give to our colored population the exclusive benefit of our public schools." [7]

3. Art. 5, Sec. 33.
4. Proceedings of Constitutional Convention of So. Car. (1868) 904-6.
5. Art. 10, Sec. 3.
6. Charleston *Daily Courier*, July 10, 1868.
7. id.

The record further indicates that the legislature of 1870 passed a statute providing a general system of public education. A negro was appointed the first superintendent of public instruction. Despite this fact, there was no real effort made on the part of the reconstruction government of South Carolina to require amalgamated schools in that state. A review of legislative debates and discussions and other assemblies during this period does not reveal any evidence that the persons and leadership in South Carolina deemed the Fourteenth Amendment to prohibit the principle of segregated schools.

TENNESSEE. Ratification of the Fourteenth Amendment was accomplished in Tennessee on July 19, 1866.[1] We note that the legislature that ratified the Fourteenth Amendment amended the school law on March 5, 1867, to require segregated education in Tennessee.[2] This act was described by the Republican Governor as a wise and desirable school law. A requirement for segregated schools was written into the Tennessee Constitution in 1870.[3] Schools remain segregated in Tennessee at the present time.[4]

TEXAS. The legislature of Texas rejected the Fourteenth Amendment on November 1, 1866.[1] The reconstruction legislature of Texas ratified the amendment February 18, 1870.[2] There is no record that schools were discussed in connection with either of these proceedings. The Texas constitution of 1866 provided that school taxes levied on negroes should be appropriated for use of negro schools.[3] However, this constitution was not acceptable to Congress and, therefore, another constitution was drafted in 1869.

1. Tenn. S. J. (1866) 41; Tenn. H. J. (1866) 25.
2. Tenn. Stat. 1866-1867, Chap. XXVII, Sec. 17.
3. Art. XI, Sec. 12.
4. Williams Tenn. Code, 1932, Sec. 2377, 2393-9.
1. Tex. H. J. (1866) 584; Tex. S. J. (1866) 471.
2. Tex. H. J. (1866) 584; Tex. S. J. (1866) 471.
3. Art. 10, Sec. 7.

This later constitution provided for a free school system but did not mention segregation. Texas was re-admitted to representation in Congress by an act dated March 30, 1870. This statute stated that the Texas constitution should not be amended: "To deprive any citizen or class of citizens in the United States of school rights or privileges secured by the constitution of said state." [4] The same legislature enacted laws empowering boards of directors of public school districts "when, in their opinion, the harmony and success of the school require it," to "make any separation of the students or school necessary to assure success, so as not to deprive any student or students of scholastic benefits . . ." [5] A committee report made in connection with such legislation makes it clear that the purpose of this provision was to authorize segregation to be maintained on a local basis.[6] Segregated schools were required by the constitution of 1876 and schools have remained segregated in Texas ever since.[7]

VERMONT. Pursuant to recommendation of Governor Dillingham, the Vermont legislature ratified the Fourteenth Amendment on October 23, 1866.[1] The proceedings in connection with ratification revealed no evidence of the attitude of legislators toward the question of segregation. Vermont apparently had never had segregated schools.

VIRGINIA. In spite of Governor Pierpont's recommendation, the legislature of Virginia refused to ratify the Fourteenth Amendment when it was initially submitted in 1867.[1] The government of Virginia was then reorganized pursuant to the reconstruction acts of Congress and a new constitution was adopted in 1869. The reconstruction gov-

4. Tex. H. J. (1870) 5.
5. Tex. Gen. Laws (1870) 113.
6. Tex. S. J. (1870) 482.
7. Art. VII, Sec. 7.
1. Vt. S. J. (1866) 28; Vt. H. J. (1866) 140.
1. Va. H. J. (1866) 7, 108; Va. S. J. (1866) 7, 103.

ernor urged ratification, saying that there was no satisfactory alternative.[2] The constitution of 1869 had directed the legislature at its first session to establish a system of free schools. The legislature, which was the same legislature that ratified the Fourteenth Amendment, promptly proceeded to do so and specifically required "White and colored persons shall not be taught in the same schools but in separate schools." [3] While this bill was under consideration, efforts were made to strike out the provision requiring segregation and to substitute permissive segregation for the mandatory provision contained in the bill. Both of these propositions were decisively defeated.[4]

WEST VIRGINIA. West Virginia completed ratification of the Fourteenth Amendment after a summary consideration on January 16, 1867.[1] On February 27, 1867, six weeks later, the same legislature adopted a statute providing that: "White and colored persons shall not be taught in the same schools." [2] Segregation had existed by law in West Virginia many years prior to the civil war.

WISCONSIN. Wisconsin ratified the Fourteenth Amendment on February 7, 1867.[1] The proceedings in connection with the ratification of the amendment contain no mention of public schools. Wisconsin has apparently never had racial segregation in this area of public activity.

The foregoing detailed analysis, summarized and classified, shows the following:

2. Va. H. J. (1869) 70, 26.
3. Va. Acts (1869) 70, Chap. 259, Sec. 47.
4. Va. S. J. (1869) 70, 489; Va. H. J. (1869) 70, 606-7.
1. W. Va. S. J. (1867) 24; W. Va. H. J. (1867) 10.
2. W. Va. Acts (1867) Chap. 98.
1. Wis. S. J. (1867) 96; Wis. H. J. (1867) 223.

3. Summary and Conclusion

A. States where segregation existed with legislative or constitutional sanction contemporaneous with and/or subsequent to adoption of the Fourteenth Amendment:

Alabama
Arkansas
California
Delaware
Florida
Georgia
Illinois
Indiana
Kansas
Kentucky
Louisiana
Maryland
Mississippi
Missouri
Nevada
New York
North Carolina
Ohio
Pennsylvania
South Carolina
Tennessee
Texas
Virginia
West Virginia

B. States in which laws authorizing or requiring segregation were passed by the same legislatures that ratified the Fourteenth Amendment:

Alabama
Arkansas
Georgia
Kansas
Nevada
North Carolina
Tennessee
Texas
Virginia
West Virginia

C. States where segregation has not been authorized by state law since the adoption of the Fourteenth Amendment:

Connecticut
Iowa
Maine
Massachusetts
Michigan
Minnesota
Nebraska
New Hampshire
New Jersey
Oregon
Rhode Island
Vermont
Wisconsin

We deem the foregoing positive evidence that the legislatures of twenty-four states neither understood nor contemplated that the Fourteenth Amendment would abolish segregation in the public schools. On the other hand, we challenge the appellants to demonstrate by competent evidence that the legislatures of any of the thirteen remaining states contemplated or understood that the amendment would preclude racial segregation in the public schools. Our analysis of the public documents of those states indicates that the impact of the Fourteenth Amendment upon the policy of segregation was simply never considered, for the reason that such a policy had never existed or had been abandoned for reasons of local policy. The absence of such policies in those states is readily explained by reference to the federal census of 1870 which shows their average negro population to be less than one percent of the total.

APPENDIX C

Evolution of Kansas Statutes Relating to Racial Segregation in the Public Schools

Pertinent portions of the texts of the several Kansas statutes mentioned in the argument, *supra,* are set out hereafter.

1. Chapter 144, Section 1, Statutes of Kansas Territory, 1855: [1]

   "That there shall be established a common school, or schools, in each of the counties of this territory, which shall be open and free for every class of white citizens between the ages of five and twenty-one years . . ."

1. Repealed by Ch. 8, Sec. 132, Laws of K. T., 1858.

2. Chapter 8, Section 71, Laws of Kansas Territory, 1858: [2]

"That all district schools established under the authority of this Act, shall be free and without charge for tuition to all children between the ages of five and twenty-one years . . ."

3. Chapter 43, Section 5, Private Laws of Kansas Territory, 1861: [3]

"That said schools, in the several districts of said city, shall, at all times, be equally free and accessible to the children not less than five nor more than twenty-one years of age, who may reside therein, . . .: *Provided,* That nothing in this Act contained, shall be so construed as to permit black or mulatto persons to attend said schools, or either of them or to receive instruction therein; but all taxes assessed on the property of black or mulatto persons, in said city, for school purposes, shall be appropriated, as the trustees hereinafter mentioned may direct, for the education of black or mulatto persons in said city, and for no other purpose whatever."

4. Chapter 76, Laws of Kansas, 1861: [4]

"The inhabitants, qualified to vote at a school district meeting, lawfully assembled, shall have power: . . . Tenth, To make such order as they deem proper for the separate education of white and colored children, securing to them equal education advantages; . . ." (Art. III, Sec. 1.)

. . . . . .

"The district schools established under the provisions of this act shall, at all times, be equally free and accessible to all the children resident therein, over

2. Remained in effect until statehood—1861—with minor amendments in 1859 (Ch. 116, Sec. 70, Laws of K. T., 1859).

3. Act incorporating the city of Marysville.

4. Relates to Common School Districts. Repealed by Ch. 122, Laws of 1876.

five and under the age of twenty-one years, subject to such regulations as the district board in each may prescribe." (Art. IV, Sec. 6.)

5. Chapter 46, Article 4, Section 18, Compiled Laws of 1862: [5]

"The city council of any city under this act shall make provision for the appropriation of all taxes for school purposes collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons."

6. Chapter 46, Section 1, Laws of 1865: [6]

"The board of education shall have power to select their own officers, make their rules and regulations, subject to the provisions of this act, to organize and maintain separate schools for the education of white and colored children, . . ."

7. Chapter 49, Section 7, Laws of 1867: [7]

"The Board of Education shall have power to elect their own officers, make their own rules and regulations, subject to the provisions of this Act, to organize and maintain a system of graded schools, to provide separate schools for the education of colored and white children, . . ."

8. Chapter 125, Section 1, Laws of 1867:

"That any district board refusing the admission of any children into the common schools, shall forfeit to the county the sum of one hundred dollars each

5. Applies to cities of more than 7,000 population. Repealed by Ch. 46, Laws of 1865.

6. Applied to cities of more than 15,000 population. Repealed by Ch. 18, Laws of 1868.

7. Applied to cities of less than 15,000 and more than 1,000 inhabitants. Identical provision enacted in 1868 with reference to cities over 15,000. Ch. 18, Sec. 75, Laws of 1868. Both repealed by Ch. 122, Laws of 1876.

for every month so offending, during which such schools are taught, and all moneys forfeited to the common school fund of the county under this Act, shall be expended by the County Superintendent for the education of such children in the school district thus denied equal educational advantages; Provided, That any member of said district board who shall protest against the action of his said board in excluding any children from equal educational advantages shall not be subject to the penalty herein named."

9. Chapter 81, Section 1, Laws of 1879:

"The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of said city under its charge and control, and of the said board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, except in the high school, where no discrimination shall be made on account of color; . . ."

10. Chapter 414, Section 1, Laws of 1905: [8]

"The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kan.; no discrimination on account of color shall be made in high schools, except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city."

8. Now Section 72-1724, General Statutes of Kansas, 1949.

APPENDIX D

Segregated School Systems in Kansas

1953-1954

City	Number of students			Number of teachers			Number of schools		
	Negro	White	Total	Negro	White	Total	Negro	White	Total
Atchison	138	1,016	1,154	6	48	54	1	4	5
Coffeyville	341	2,075	2,416	11	66	77	2	5	7
Fort Scott	74	1,069	1,143	5	46	51	1	3	4
Kansas City[1]	6,004	17,223	23,227	169	535	704	9	35	44
Lawrence[2]	159	2,221	2,380	2	83	85	1	5	6
Leavenworth	367	2,125	2,492	13	72	85	2	7	9
Parsons	250	2,020	2,270	9	64	73	1	4	5
Salina	101	3,694	3,795	5	129	134	1	13	14
Topeka[3]	836	7,418	8,254	28	245	273	4	18	22
Totals	8,270	38,861	47,131	248	1,288	1,536	22	94	116

1. Segregation authorized and practiced in both elementary and high schools.
2. Partially segregated—includes one negro school, one white, and four integrated but substantially white.
3. Two integrated schools, with aggregate negro enrollment of 9, classified as white.