# DEAD END

## *The Development of Nineteenth-Century Litigation on Racial Discrimination in Schools*

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## THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS

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When the first Justice John Marshall Harlan announced in 1899 in the case of *Cumming* v. *Richmond County* that the Supreme Court of the United States would not enjoin the school board of Augusta, Georgia, from supporting white public high schools after it had cut off funds from a black high school, he discussed no precedent cases.[1] Had he entered into an examination of the vast body of relevant litigation, both federal and state, Harlan would have found it more difficult to justify leaving black children's rights to the discretion of almost universally white school boards. Like Harlan, professional historians have paid too little attention to these cases, and no one has yet treated the whole sweep of legal actions on racial discrimination in education in the nineteenth century. Was Harlan in *Cumming*, and was Justice Henry Billings Brown in *Plessy* v. *Ferguson* following the general trend of case law, or were their opinions departures from previous state or federal court decisions? Was the line of cases straight, or did it waver, and if so, how and why? In particular, to what degree did post-bellum court decisions follow Massachusetts Chief Justice Lemuel Shaw's 1850 judgment in *Roberts* v. *Boston*, which Justice Brown quoted so memorably in his 1896 *Plessy* opinion?[2] How large an effect did the Fourteenth Amendment and the wartime and postwar racial egalitarianism have on the protection of black educational rights? How complete was what William Gillette has termed the 'retreat from

Reconstruction', and how long did it take to execute that retrograde manoeuvre?[3] What standards developed in early equal protection law, and upon what bases did judges decide that segregation was or was not legitimate, that racial disparities in education were or were not sufficiently great to merit correction by the courts? In what types of communities did such suits arise, and what sorts of men, judges as well as lawyers, stood for or against equal rights? Was the black struggle against racial discrimination in schools hopelessly lost from the beginning because of unvarying and deeply-held racist beliefs among virtually all white Americans, or were those beliefs sufficiently malleable to allow some black progress? Was the unity of nineteenth-century whites behind racial segregation in schools so solid that the 1954 *Brown* decision, as Raoul Berger has charged, 'upended' the law, reading the Fourteenth Amendment 'to mean exactly the opposite of what its framers designed it to mean'?[4] In the largest sense, what light do the cases throw on the historical development of race relations in America?

*Roberts* serves as an appropriate prelude. In his presentation on behalf of Sarah Roberts, Charles Sumner had first argued that the Anglo-French-American tradition in general and some rather vague provisions of the Massachusetts Constitution in particular established 'equality before the law' as a central legal precept.[5] He then alleged that Boston's racially segregated schools were unequal in two respects: They forced many blacks, including Miss Roberts, to travel further to get to school than white children did; and they deprived blacks of contact with peers of other races, classes, and ethnic groups, a deprivation which damaged their social and economic chances in later life. Adopting a definition of 'reasonable' regulations based on an individualistic conception of natural rights, Sumner condemned segregation because it classified all blacks as morally and intellectually 'deficient' arbitrarily, without making any examination of individual black children. Finally, he alleged

that separate schools perpetuated caste feeling in whites.[6]

In his opinion for a unanimous court, Chief Justice Shaw first granted that the broad principle of equality pervaded the state constitution, but then shrank the operation of that principle by claiming that its statement in the Massachusetts Declaration of Rights merely amounted to advice to the legislature, rather than to a constraint which could serve as a basis for judicial review.[7] Since the legislature had not explicitly outlawed school segregation, the only remaining questions were whether the school committee's racially restrictive regulation was the result of a tainted process, and whether it was so patently 'unreasonable', by which Shaw meant that it was either so obviously based on fallacious logic or so unfairly burdensome on the blacks, as to require the judiciary to overrule it.[8] Citing no precedents and engaging in no lengthy or intricate process of reasoning, Shaw decided that the school committee (on a branch of which he had earlier served for eight years) had acted responsibly and in good faith, that it could well have concluded that societal prejudice would have been either heightened or unaffected by school integration, and that the disparity in distance which Roberts had to walk, compared to her white peers, was within judicially acceptable bounds.[9] The abolitionist Wendall Phillips's remark on the defence of school segregation by the Boston City Solicitor applies as well to Shaw, and, as we shall see, to many other judges. 'It is said to have been the advice given by an eminent lawyer to a friend possessed of good common sense, but not bred to the bar, who was about to accept a judicial appointment', Phillips wrote, 'that he should state his judgments briefly, but never risk giving any reasons for them. Our City Solicitor [Peleg Chandler, Sumner's opposite in *Roberts*] seems to have borne this caution in mind . . .'[10] In the light of the controversy over the *Coleman Report* more than a century later, it would have been interesting if Shaw had discussed Sumner's view that segregation illegally deprived blacks of white peers, but the judge chose to ignore that point.[11]

Often read as an undiluted triumph for discrimination, Shaw's

opinion left three openings for lawyers or judges who were not so antipathetic to blacks as Shaw was.[12] First, he had concluded that the recently refurbished school for blacks was equal to that of the whites in both physical facilities and in quality of instruction.[13] It is possible, although highly improbable, given Shaw's establishmentarian racism, that if the facilities had been more patently unequal, his decision would have gone the other way, and, however Shaw would have acted, other judges might more strictly scrutinize the black and white schools and require integration or more precise equalization and still cite *Roberts* as good authority.[14] Second, judges in states where egalitarian constitutional provisions were less vague and were unambiguously stated as constraints on the legislature or judges anywhere after the 1868 passage of the negatively-phrased Equal Protection and Privileges or Immunities clauses in the Fourteenth Amendment might feel on more solid ground in overruling the racially discriminatory actions of legislatures or school boards.[15] *Roberts* might then be reduced to a geographic or chronological curiosity. Third, the natural rights–common law standard of reasonableness, at least in Shaw's wide-open formulation, was an unconstrained invitation to judges to write their own values into the law.[16] Despite the great prestige of the Massachusetts chief justice, anti-racists might, under the same standard, which was the chief one applied in nineteenth-century equal protection cases, feel segregation so evil or the trend of a later era so adverse to racial discrimination as to justify a refusal to defer to the other branches of government.

Before turning to the doctrines expounded in post-Civil War cases, let us consider the scope and some of the general characteristics of the lawsuits. Tables 1–8 (see Appendix) go a bit beyond the conventional tables of cases. Whereas traditional legal historians or casebook writers are concerned primarily or entirely with the precedential influence or principles embodied in judicial opinions, those who wish to discover not only what

the law *was*, but how the law was *used* will find it equally important to emphasize the sheer incidence and raw outcomes of cases.[17] The first three tables, the reference list of case names in table 1, and the more skeletal views afforded by tables 2 and 3 expose several rather surprising features of the cases.

The most obvious fact is that there were a lot of cases, far more than previous scholars have suspected. Newspaper accounts and secondary sources, in addition to the standard printed court reports from all levels of the judicial system, turned up 82 cases concerned with racial discrimination in schools filed from 1834 to 1903 in 20 states and the District of Columbia. Further newspaper searches may uncover more lawsuits. While in at least 75 of the 82, decisions were rendered, I have as yet found no evidence that the other 7 went to trial.[18]

In an era when black communities were generally small and poor, and before the 1909 founding of the NAACP gave some national co-ordination to the legal struggle for racial equality, blacks were very active in asserting their civil rights through the courts. And these assertions were well worth while, for, rather startingly, blacks won 55 per cent of the cases in which the outcome is known. True, most cases originated in states and counties within those states in which the proportion of blacks was small – the majority, as table 3 and panel D of table 8 show, in places that were less than 6 per cent black. Fewer than a quarter of them were filed in the south, where 90 per cent of the nation's blacks lived in 1880. Doubtless, to have brought a school integration suit in the Mississippi Delta or the Louisiana cotton parishes in the 1880s or 1890s would have been to invite laughter or lynching. None the less, legal remedies for racial discrimination were, and were perceived to be, available across a wide swathe of the country, and historians who have written off their efficacy and blacks' faith in and employment of the courts in the nineteenth century must now reconsider their views.

Table 2 also calls into question the chronological descriptions and associated explanations of the development of race relations

in the US that have been offered by leading scholars. Although I cannot do justice to their nuances here, these can be briefly characterized as the one-, two-, three-, and four-period theories. The first, perhaps most forcefully stated by John Hope Franklin, is that

> . . . the emancipation of the slaves had no discernible effect on the movement for racial equality. . . . The Reconstruction years were marked by halfhearted, lighthearted, inconclusive steps taken by the state and federal governments to introduce a semblance of racial equality in America. The feeble effort was an abject failure. . . . There were few voices raised anywhere against the far-reaching [post-Reconstruction] program looking to the degradation and humiliation of blacks everywhere.[19]

The segregation of free people of colour was pervasive before the war, and virtually uniformly harsh discrimination persisted after it. Laws, and, in particular, the Reconstruction Constitutional Amendments, in this view, made little difference.

The second theory, proposed by Franklin's student Howard N. Rabinowitz, argues that there were two periods – a pre-Civil War era when blacks were totally excluded from public services and the post-1865 years when they were segregated.[20] While this may be an accurate description of the dominant tendencies in race relations for the south outside New Orleans, I shall argue in this paper that north of the Mason-Dixon line, transitions between exclusion, segregation, and partial or complete integration were much more complex and chronologically irregular.

The three-period theory, which is perhaps the one most widely held among American scholars, is that slavery was succeeded by an at least moderately hopeful moment for race relations during Reconstruction, but that northern liberals abandoned black people to the untender mercies of racists after 1877.[21]

The four-period theory, advocated by C. Vann Woodward, adds a post-Reconstruction era lasting until the last decade of the nineteenth century, in which the prevalent mode of race rela-

tions was a loosely enforced segregation, much less harsh and absolute than the later variety, and in which blacks retained some political power and some white allies.[22]

Table 2 casts serious doubt on the first three hypotheses, at least outside the Deep South, and underlines the necessity of adding black forces to Woodward's list of those restraining the triumph of Jim Crow. The most active period of lawsuits came *after* President Rutherford B. Hayes symbolically ended Reconstruction by ordering federal troops back to their barracks. The attack on segregation and discrimination not only continued; it often prevailed, at least outside the south. Northern white liberals did not neglect blacks, benignly or malignly. They fought where there was still a chance to win, and they and their black allies won 60 per cent of the cases filed during the nineteenth century, and 75 per cent after 1880.

Table 5 reveals that seventy-two of the eighty-two cases involved black plaintiffs, while ten involved white plaintiffs, and that the anti-discrimination side won majorities in both. Seven of the ten all-white cases challenged racially separate school taxation laws in North Carolina, Kentucky, and Georgia, and the other three challenged segregation or integration in Illinois and Indiana. While in the northern cases one of the white parties was clearly standing for black interests, the motives of the southern white challengers are harder to discern. Some may just have opposed higher taxes, and tried to use the Fourteenth Amendment as an excuse to avoid paying them. If so, this was a curious strategy since, if taxes were levied to support all schools, the whites would no doubt end up paying higher taxes, because the blacks owned so little property. In any event, uncertainty about the aims of those cases argues for including, but de-emphasizing them.

There is no doubt, however, about black motives. As panel B of table 15 evidences, they wanted integration, and they won it in a majority of the cases whose outcome is known.[23] No traces of any integrationist – separatist or optimistic – pessimistic

cycles within the black community, no shift from an Age of Frederick Douglass to an Age of Booker T. Washington are apparent here.[24] In only five cases did the final decisions involve mere equality within the segregated system, while four raised the almost un-American question of racial identity. These latter trials, all of which occurred before 1860, three of them in Ohio, concerned the definition of a Negro. Was someone whose genes were less than half African in origin black, in which event he or she would be excluded from the common schools, or white, which would allow his or her attendance? This was a problem of some moment to ante-bellum Afro-Americans in the north, since 27.1 per cent of them were listed as 'mulatto', that is, approximately one-half or more white, in the 1860 census.[25] In Ohio, where 45.5 per cent of the Afro-Americans were classed as 'mulatto' in 1860, the courts responded by ruling them white until that state's supreme court reversed a thirty-year line of solid precedents, over the vociferous objections of two abolitionist judges, in 1859.[26] Otherwise, the ante-bellum period was relatively bare of lawsuits, no doubt because black resources were spread thin by the struggles against slavery and the rendition of the fugitives, as well as those against exclusion from juries, the electorate, and even nominal exclusion from emigration to many states.

Blacks were not so successful in the cases that should have been most obviously contrary to the Fourteenth Amendment's Equal Protection Clause, the segregated taxing and spending cases.[27] Racist southern judges' perversion of the constitution is familiar enough, however, to limit one's shock, if not outrage, in these instances.

Discriminators fared significantly worse in local than in state appellate or federal courts. This resulted in part, no doubt, from the fact that a higher proportion of local judges whose party affiliations I have so far been able to identify were Democrats-54 per cent, compared to only 46 per cent for all other judges. Moreover, although all non-federal judges faced the electorate

periodically, most, in the nineteenth century, in partisan elections, local judges generally served shorter terms. Thus, any particular decision would be less easily forgotten in local than in state elections simply because of the greater frequency of such contests. Nevertheless, neither the lack of partisanship of higher court judges nor racist pressures by the public should be exaggerated. Elevation even to the federal bench was, as it continues to be, primarily a reward for past political services, and the life-tenured national government judges were not much more likely to be favourable to black causes than were those whose continued employment was contingent on pleasing the voters. That state judges and legislators did not fear to stake their electoral fortunes by passing integrationist laws, as they did in eleven instances, or drafting anti-discrimination court opinions, implies that the northern masses were less deeply racist than some scholars have claimed, particularly after 1880.

Only one of these cases was prosecuted by a federal district attorney, while two more were brought by authority of a state attorney-general in his official capacity. Blacks in the nineteenth century were thrown on local and private resources, without the legal aid, which they enjoyed at least sporadically from the late New Deal until the Reagan era, of a powerful federal establishment.[29]

Nor was the Fourteenth Amendment the secure foundation for black rights that it was later to become. As table 5, panel D demonstrates, blacks lost nearly three-quarters of the cases that claimed that amendment as their basis, several of them attracting wide attention at the time and serving as important precedents thereafter. Only one judge, in the *Allen* case, to be discussed below, squarely ruled that school segregation *per se* contravened the Fourteenth Amendment. Blacks did much better where they could rely on state laws or constitutions, winning 80 per cent of the cases where decisions are known. What are we to make of this contrast? Does it support Raoul Berger's view that the framers, and, by extension, the nineteenth-century legal

community, believed that the Fourteenth Amendment countenanced segregation?[30] Why did blacks continue to bring cases based on that principle? What accounts for their success when they confined themselves to state grounds?

Correctly seen, the legal history and the writings of theoreticians of the late nineteenth century do not support any extension of Berger's law-office history of the framing and ratification of the Fourteenth Amendment. Not only did several of the most influential legal commentators, such as Thomas M. Cooley and John Forrest Dillon, believe segregation unwarranted in law; the natural law-type arguments that judges and lawyers made in Fourteenth Amendment cases differed not at all from those they offered in state constitutional cases.[31] As we have already seen, Charles Sumner, later one of the leading spokesmen of the Radical Republicans during Reconstruction, contended in his *Roberts* brief that the egalitarian phrases of the Massachusetts Declaration of Rights prohibited school segregation, and his later arguments during the 1870s for a national ban on school segregation based on the Fourteenth Amendment were of exactly the same tenor, merely substituting a federal for a state ground. Indeed, in 1870 Sumner had his *Roberts* brief republished and circulated throughout the country as part of his campaign for a stronger civil rights law.[32] In his 1873 revision of Joseph Story's *Commentaries on the Constitution*, moreover, Cooley, explicitly citing Sumner's *Roberts* brief, lent his weighty authority to the proposition that it was doubtful whether under the Equal Protection Clause 'any distinction whatever, either in right or in privilege, which has color or race for its sole basis, can either be established in the law or enforced where it has been previously established'.[33]

Liberal state judges, such as Cooley, Kansan Daniel Valentine in the *Tinnon* case, and Iowan Chester Cole in the *Clark* case, were careful to follow the standard judicial rule of tying an opinion to the least grand contention, of citing a state law or precedent if possible, moving to a state constitutional provision

only if necessary, and avoiding federal questions if they could.[34] Racist judges, such as William T. Wallace of California in *Ward* or the egregious Samuel H. Buskirk of Indiana in *Cory*, on the other hand, reached out far beyond the necessities of each case to set precedents on the broadest possible basis. Similarly, US Supreme Court Justice Nathan Clifford, no Radical Republican, but, instead, the last Buchanan appointee, ranged well beyond the case at hand in *Hall* v. *DeCuir*. In an opinion signed by no other justice on the Supreme Court, and the only one in that forum before *Plessy* to sanction school segregation even indirectly, Clifford attempted to establish his pre-war racist biases as part of the Constitution.[35]

Whatever its merit with respect to the shadowy intentions of a few 'moderate' Republicans in the 39th Congress, Berger's argument runs aground if extended to nineteenth-century court cases, which surely have some probative value on the question of how segregation was legally viewed in that era. To sustain it requires us to overlook the reactionary judges' underhand tactics and to dismiss the opinions of the racially liberal judges because they formally adhered to recognized judicial conventions; to take our evidence of the Radicals' gloss on the Fourteenth Amendment primarily from their Bourbon opponents; to ignore the similarity of arguments based on state grounds to those based on national grounds; and to disconnect court cases from state legislative actions – a disjuncture which reflects neither the understanding of nineteenth-century men and women nor a proper theory of law.

Whatever the true meaning of the Fourteenth Amendment, as long as blacks and their lawyers could read into those general, seemingly uncomplicated phrases their own notions of equal rights, they would continue to file cases, would continue to hope for the fulfilment of those apparent promises. Legal historians have perhaps insufficiently stressed the degree to which making a short, simple document the basis of judicial review has encouraged litigation. Moreover, even if they lost or if their

victories turned pyrrhic, blacks could often enjoy a generation or more of *de jure* integration made possible by their court successes, turn defeats into focuses for agitation for new integration laws or for voluntary integration by school boards, as they did in at least five states, or barter their legal guarantees of integration (in the cases in which it was affirmed) to get better segregated schools and more control over them.[36]

The relative failure of blacks to outlaw school segregation solely on Fourteenth Amendment grounds, and their striking success rate when they could rely on state contentions, is laden with irony. It was in just those states and at just those times in which the judges were most likely to be sympathetic to their cause that the blacks could most easily secure favourable attention from school boards and state legislatures.[37] Once the law was on their side, the precedents – if court challenges were even necessary – tended to be narrow, and any sweeping principles the opinions enunciated could be dismissed or ignored as *dicta* or as irrelevant to federal Fourteenth Amendment questions by later lawyers, judges, and scholars.[38] Where the state constitutions or laws authorized discrimination, on the other hand, and where blacks most needed friendly jurists who were willing to brave public opinion by overturning segregation on federal constitutional or natural-law grounds, opponents of discrimination were most likely to encounter judicial hostility, and the resulting precedents were usually concerned with the broadest issues.

To state the point more abstractly, the decentralized structure of American government and its formal separation of executive, legislative, and judicial powers suggests a federalist corollary to the old adage that the good is the enemy of the best, or, to put it another way, that piecemeal reform often undercuts wider change.[39] Nowhere is this reflection better illustrated than in the case of New York state, where the blacks were defeated in all six cases that they brought. When they lost *Williams* v. *Troy* at the local level in 1863, Troy's black and white racial liberals decided to press the state senate to pass an integration amend-

ment to the education code, rather than to appeal the case to a higher court. By the time that it became clear that the amendment, although backed by the Republican Education Committee chairman, Andrew D. White, could not command a committee majority, the court appeal had been abandoned. When nearly a decade later, Albany blacks failed to persuade a local judge to order school integration, they revived the Trojan tactic, this time successfully, as the state passed a civil rights statute that seemed to guarantee that blacks could not be excluded from common schools in their districts. Simultaneous pressure on the Republican-majority school board produced a local victory in Albany two weeks before the act passed the legislature. Armed with the new law, blacks pressed successfully for the end of racial exclusion in Manhattan, Poughkeepsie, and other places, but failed to convince the Democratic majority on the school board in Brooklyn. A black minister in Brooklyn, whose child had previously been allowed to attend a school in common with whites, therefore sued, but lost when a local Democratic judge misconstrued the new civil rights law as requiring only that blacks could not be denied an education altogether, which had been guaranteed by the pre-1873 state law. The suit died ironically, when, instead of appealing, the Revd. William F. Johnson approached a more liberal trustee, who, under the decentralized rules of the Brooklyn board, authorized the child's admission to the common school in his area.

When agitation for more general school integration resumed in Brooklyn in 1881, blacks brought another suit, failed again in a local court, all three of whose judges were Democrats, and this time carried the case to the state's highest court. Yet their defeat there at the hands of body's Democratic majority – two Republican judges heatedly dissented, contending that the Fourteenth Amendment as well as the 1873 New York state law mandated integration – led to a local victory.[40] For in Brooklyn, as had been the case a decade before in Buffalo, the Republicans took over the local government in a campaign based on the

corruption and 'bossism' of the Democratic incumbents, but then proceeded to act on their racially liberal principles and order an end to the policy of usually excluding blacks from the district schools. This blunted any possible drive that might have been inspired by the Brooklynites for a new statewide law to counteract the *King* decision. No such law was passed until, in the aftermath of the 1900 *Cisco* decision from Queens, again the product of a Democratic majority on the Court of Appeals, the Republican legislature, pressed by Governor Theodore Roosevelt, finally amended the state law to remove any possible doubt that it guaranteed school integration. Black and liberal white tenacity, Democratic intransigence, the close relationships between judicial and legislative actions, the failures of success and the ultimate success that stemmed from those failures – all these combined in the complex series of events in New York, but all would be missed by observers concerned only with the abstract principles embodied in printed court opinions.[49]

The patterns revealed in tables 6 and 7 make the partisanship of judges and lawyers clear. Whatever interests, beliefs, inheritances, or unconscious motives moved them to become Republicans and Democrats, large majorities of legal professionals on both sides of the bench accepted and decided black rights cases in accord with those affiliations. Mythic justice may be blind, but legal idealists who picture judges as 'the vestal virgins of the Constituion', in Alpheus Thomas Mason's phrase, are no more correct, if these cases are any guide, than legal cynics who cast lawyers as mere 'hired guns' who will represent any paying client.[42] There were at least 603 judges and lawyers connected with the 82 cases, and through newspapers, local histories, books of biographical sketches, and the like, I have been able, so far, to identify the partisan allegiances of 406, or 67.3 per cent of them.[43] The first two panels of Table 6 show the percentages who opposed racial discrimination (the actual numbers of persons in each category are in panels C and D) among Republican and Democratic lawyers and judges for cases

originating in the north and in the south.

Northern judges and lawyers were indistinguishably partisan, nearly two-thirds of the Republicans and less than one-third of the Democrats taking the side of the blacks.[44] Southern Republican lawyers were even more sympathetic to the blacks than their Yankee counterparts were. Only one of the fifteen defected to the racists, and there was only one northerner in this group. Republican judges in cases from the south were less stalwart, but most of these men were in fact northern US Supreme Court judges who concurred in the *Cumming* decision. The racism of southern white Republicans, on this evidence, has been exaggerated. Southern Democrats, especially the judges, were predictably on the side of bigotry, the only finding worthy of remark being the four southern Democratic lawyers who took black cases.

Table 7 proves that these patterns were highly unlikely to have been produced by chance, and that, compared with the overwhelming importance of party, behavioural differences between southerners and non-southerners or lawyers and judges were usually small or non-existent.[45] To sum up the conclusions from these tables, civil rights in the nineteenth century was a highly partisan issue, a familiar fact whose implications legal historians disregard at their peril.

Table 8 represents an attempt to throw some light on the social conditions that facilitated or hindered the filing of these suits. Although 80 per cent of the nation's blacks lived in rural areas in 1890, only slightly more than half of the cases originated in counties under 50 per cent urban, according to the standard census definition, and about 40 per cent came from rather densely populated areas. It was safer to challenge racism from the comparative anonymity of a large or middle-sized city. Despite the fact that such cases represented a large expense, usually gathered a few dollars at a time in fund-raising meetings at black churches, more than half of the cases originated in counties which contained fewer than 2,000 blacks of all ages.[46] In such areas, the

black population was usually widely scattered, and their assignment to black schools consolidated over two or more geographical school districts meant either keeping the children at home or subjecting them to walks that were insulting as well as arduous in the many cases in which they had to pass several white schools on the way. Where at least some blacks were geographically dispersed, as they were throughout the north and in much of the hill country south in the nineteenth century, a policy of strict segregation was tantamount to total exclusion from the district schools, and often exclusion from any school at all, and blacks repeatedly and sometimes successfully equated segregation and exclusion in northern and even southern court cases.[47] Furthermore, black schools in small towns and rural districts often had white or inferior and transient black teachers, rather than the proud corps of comparatively well-educated and often quite devoted black teachers who held important social roles in the black communities in such cities as Cincinnati and Philadelphia. The greater inconvenience and lesser stake in segregation encouraged smaller black communities to try to force integration.

And if the blacks had more to gain in these places, racist whites had less to lose. It was one thing to integrate the schools or equalize expenditures in an area that was a fifth or more Afro-American. It was no doubt less traumatic for whites, at least after the first few days, to blend one black face into a group of 20 or more white ones. Blacks in areas fairly densely populated by whites, but not by blacks, had less to fear in reprisals and more to hope for in compliance. They were therefore more likely to sue than were blacks in communities with different demographic structures.

Having established the broad outlines of the litigation, let us now focus more closely on several of the most significant post-Civil War cases. One of the signal black triumphs in court preceded the ratification of the Fourteenth Amendment. Alexander Clark, the most prominent of Iowa's 1,000 blacks, wanted his daughter

Susan to go to grammar school.[48] Refusing the Muscatine school board's offer to add a special grammar class for her at the existing black primary school, which she had previously attended, Clark, on 10 September 1867, tried to register her at the 'white' school in his neighbourhood, which had a regular grammar programme, and, after she was refused admission, successfully petitioned the local Republican judge for a mandamus directing the school board to admit her. Waiving the school inequality argument, Clark's lawyers, who included the Republican state attorney-general, acting in his private capacity, agreed with the school board's to rest the case at the appellate stage solely on the issue of whether segregation was within the school board's discretion.

The opinion by Judge Chester Cole, a former Douglas Democrat who turned Republican during the Civil War, began by contradicting one of Shaw's major premisses in *Roberts*.[49] 'In view of the principle of equal rights to all, upon which our government is founded, it would seem necessary, in order to justify a denial of such equality of right to any one, that some express sovereign authority for such denial should be shown.'[50] Equality was the rule, in other words, inequality the exception, and any such exception at least required an explicit statutory basis. Reviewing the succession of legislative and constitutional acts on racial regulations in schools, Cole discovered a progression from exclusion before the adoption of the 1857 constitution, to segregation by legislative act in 1858, to no mention of segregation or integration at all in the laws of 1860 or thereafter. Together with a constitutional provision directing the governing body to 'provide for the education of all the youths of the State, through a system of common schools', this progression, according to the judge, amounted to an unspoken mandate for integration by the state's lawmakers.[51] The separation of ethnic groups was, moreover, contrary to 'the spirit of our laws' and would lead to 'a constant strife, if not a war of races'.[52] Employing the phrase which Charles Sumner popularized in his *Roberts*

argument, Cole concluded by declaring all Iowa youths 'equal before the law'.[53]

Neither Cole, writing for a three-to-one majority, nor George C. Wright, who declared in dissent that school segregation was 'reasonable' and in accord with 'the principle of equal rights', cited *Roberts* or any other cases in the crucial parts of their opinions, nor did they bother to justify their opposing views of the meaning of equality by involved argument or even by citing the readily available printed views of the framers of the state's 1857 constitution, which in fact supported Cole's gloss.[54]

*Roberts*, reasonableness, distance, and unequal school facilities were likewise at issue in a Detroit integration case decided in May 1869, but, as they partially had in Iowa, the judges' opinions in Michigan turned on statutory construction, and not on the recently ratified Fourteenth Amendment. Responding to a court battle over integration in the town of Jackson, the Michigan legislature in 1867 had amended the state's general school law by guaranteeing that 'all residents of any district shall have an equal right to attend any school therein . . .'[56] Since Detroit, where 19 per cent of the state's blacks lived, operated its schools under a special legislative charter, and since the 1869 legislature's revision of that charter had not specifically applied the 1867 general law's amendment to the Detroit schools, the school board's lawyers and dissenting Michigan Supreme Court judge James V. Campbell, a former Detroit school board member, contended that the city could continue its twenty-eight-year-old policy of segregation.[57]

In an opinion joined by two colleagues whose ante-bellum anti-slavery activism paralleled his own, Michigan Chief Justice Thomas M. Cooley shredded Campbell's argument.[58] Taking judicial notice of both the events which precipitated passage of the 1867 law and of the fact that only a few Michigan districts segregated black children, Cooley announced that if the general law were construed as Campbell desired, it would apply only where it was unneeded, only to schools which were voluntarily

integrated, leaving the districts where Michigan blacks were most thickly settled free to continue 'what the legislature evidently regard as an unjust discrimination . . .'[59] Under this construction, all the other arguments were irrelevant, and Cooley who, as I have shown above, would surely have ruled school segregation contrary to the Fourteenth Amendment at this time, ordered the mandamus to issue without commenting on the larger question.

In striking contrast, the state supreme courts in Ohio, Nevada, California, and Indiana sustained clear state school segregation statutes against Fourteenth Amendment challenges in the early 1870s. Like Justice Shaw, the judges in these cases seldom tarried long in explaining just why separate was constitutionally equal. In Ohio, an all-Republican court brushed aside distance and exclusion contentions (Garnes's children were barred from the only school in the district where he lived), found that the black and white schools offered 'substantially equal advantages', and blithely announced, citing only ante-bellum Ohio cases, that segregation was merely a matter of classification, similar to distinctions by sex or grade, which could be left to school board discretion since it did not work any 'substantial inequality of school privileges'.[60]

Similarly, Nevada Judge B. C. Whitman, who ordered Ormsby county to cease excluding from its schools the 1 per cent of its citizens who were black, proclaimed without further discussion or even clarification that segregation was opposed to 'the spirit' of the Fourteenth Amendment, but not its 'letter'.[61] In California, Kentucky-born Chief Justice William T. Wallace, a member of the pro-Southern 'chivalry' faction of the California Democratic party in the 1850s, first adjudged that Mary Frances Ward was insufficiently advanced in her studies to be admitted to the white grammar school to which she had applied, but instead of stopping there, went on to declare that even if she had been properly qualified, the Equal Protection Clause would not have required her admission. Quoting at length from

Shaw's *Roberts* opinion, and equating the Massachusetts constitution's oracular egalitarian clauses with the Fourteenth Amendment's, Wallace merely substituted ante-bellum authority for reason.[62]

Like Iowa's, which had copied it, Indiana's constitution required the state legislature to 'provide by law for a general and uniform system of common schools . . . equally open to all . . .' And in another clause that was both more specific and more openly an invitation to judicial supervision than the Massachusetts provisions that Justice Shaw had shoved aside in *Roberts*, the Indiana constitution declared that 'The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'[63] Nevertheless, this border north state had excluded all blacks from the schools until 1869, when it authorized localities to set up segregated schools or, if there were too few blacks in an area, to use the money for the blacks' education in some other, undefined manner.[64] Since a rural Marion County district had provided no schooling for his children or grandchildren, Carey Carter tried to get them admitted to the 'white' school, but when a local Democratic school trustee literally stood in the schoolhouse door to prohibit their entry, Carter sued and won in the county court.[65]

The Fourteenth Amendment provided no difficult obstacle for Chief Justice Samuel H. Buskirk and his four-to-one Democratic majority.[66] In an 1871 opinion, quoted respectfully in *Cory* v. *Carter*, declaring the state's anti-racial-intermarriage law valid, Buskirk had ruled the 1866 US Civil Rights law unconstitutional, remarked that the Fourteenth Amendment's 'inhibitions against the states doing certain things have no force or effect', and finished with a peroration on 'corruption of blood and a mixture of races'.[67]

In *Cory*, despite the fact that neither the local court opinion nor the brief for Carter had challenged segregation, resting the case rather on the fact that his progeny were totally excluded

from the only school in the district, Buskirk utterly ignored the exclusion and seized the chance to buttress racial separation in an opinion denounced by the leading Republican newspaper in the state as 'a monstrous decision . . . the first fruits of the Democratic victory [in the 1874 elections] in Indiana . . . [a relic of] the dark ages'.[68] After virtually nullifying the Fourteenth Amendment, thereby leaving to the states all protection of minority rights, the former seven-term legislator placed sole control of state policy in the General Assembly. 'Equally open to all' meant subject to any classification that the legislature or a school board might decide to impose. Courts had no power to enforce the state constitution's privileges or immunities clause. And the 1869 law seemed, the judge pronounced, if anything more unfair to whites than blacks, for it did not require the school boards to devote funds to white education in areas where there were too few white children to form a school, areas which Buskirk must have known did not exist in Indiana.[69] For Buskirk, adjudication was only a continuation of stump politics by other means. An effort to appeal *Cory* to the US Supreme Court was abandoned, as were similar attempts in two other school integration cases in 1878 and 1882, perhaps because of a lack of funds.[70]

*Cory*, perhaps the most constitutionally extreme post-bellum court decision against black rights, contrasts most strongly with *Allen*, an 1881 decision by a local Democratic judge in Pennsylvania. Referring only to scattered passages from US Supreme Court opinions and completely ignoring opposing rulings in other states, Judge Pearson Church, a former president of the Meadville school board, contended that even if that town's black schools had been graded, as the white were, and even if the average black had had to walk the same distance as his white peers to get to school, instead of having to walk farther, the blacks' rights would still have been constitutionally violated.[71] The privileges and immunities of citizens of the US included 'life, liberty, and property', and the right 'to pursue and obtain happiness and safety',

and, Church went on, 'education is property'. Patently contradicting the experience of his own and other states, Church blandly asserted that 'it has never been for a moment supposed' that equal access to hotels, public conveyances, and places of entertainment could be satisfied by providing similar but racially distinct accommodations; the same reasoning applied to schools.[72] Although neither party had argued the question, Church also ruled segregation contrary to the Thirteenth Amendment as a 'badge of servitude'. He concluded by damning his hometown's segregation policy as one of 'petty tyranny and studied insult', involving 'the very personification of caste', a practice out of step not only with those of most other districts in the state, but with what he called the 'great revolution' in public opinion on racial matters which had taken place in the US since the ante-bellum period.[73] Because the Pennsylvania legislature just a month later changed the law which allowed school segregation, Church's decision was never appealed. It therefore represented less an important precedent than a straw in a brief but strong anti-racist wind.[74]

Some of the US Supreme Court's language in the 1880 jury selection cases fanned that wind, and raised hopes that the highest court would look favourably on black rights.[75] In the leading case, *Strauder* v. *West Virginia*, Republican Justice William Strong glossed the first section of the Fourteenth Amendment by saying:

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

discriminations which are steps towards reducing them to the condition of a subject race.[76]

Furthermore, in the 1883 *Civil Rights Cases*, the Supreme Court carefully limited its decision to outlawing Congress' right under the Fourteenth Amendment to pass laws regulating non-state-sanctioned contact between individuals. The Court might have held, without departing from its *Civil Rights* logic, that the Fourteenth Amendment prohibited state-mandated segregation.[77]

The liberal wave crested at the state supreme court level in the 1881 *Tinnon* case. Judge Daniel M. Valentine first raised doubts, citing *Strauder*, that school segregation was in accord with the Fourteenth Amendment, but then assumed 'for the purposes of this case', that a state legislature could legalize it. For the Kansas assembly had repealed its act authorizing school boards in such 'second-class' cities as Ottawa to segregate their schools, while leaving administrators in larger cities with the express power to do so. In response to the school board's attorney's heavy stress on *Roberts*, which would have dictated a contrary result if he had followed it, Valentine spurned Shaw's decision as outmoded ante-bellum authority, and went on to announce that 'The tendency of the times is, and has been for several years, to abolish all distinctions on account of race, or color, or previous condition of servitude, and to make all persons absolutely equal before the law . . . Is it not better', he went on, 'for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other?' Adopting Sumner's radically individualistic definition of reasonableness, the Republican Valentine declared that 'no good reason can be given' for treating individual children differently because of colour.[78].

Between the poles of *Cory* and *Garnes*, on the one hand, and *Allen* and *Tinnon*, on the other, stood North Carolina-born Republican federal judge John Baxter's charge to the jury in the 1882 Ohio case of *US* v. *Buntin*. Since there were only a few

blacks in the sub-district of Clermont County in which he lived, Jacob H. Vines was allowed to send his children to the jurisdiction's only school, a 'white' school. In 1879, however, the trustees hired a new teacher, John Buntin, who refused to allow blacks into his classroom. Despite the trustees' admonishments, Buntin remained firm in his bigotry, and Vines, facing a choice between having his children walk ten miles each day or abandoning their education altogether, brought suit in federal court for $20,000 damages. After a civil jury fined Buntin $50, a fine which Judge Baxter believed should have been much higher, Cincinnati US District Attorney Channing Richards, Jr., instituted a criminal proceeding against Buntin for violating Vines's civil rights.[79]

The forgotten Baxter's career bears a striking resemblance to that of John Marshall Harlan, the much more famous author of the *Cumming* decision. Both were born in the upper South, Baxter in North Carolina, Harlan in Kentucky. Both were minor slave-holders, prominent Whigs, and leaders of their states' Unionist forces. While Harlan served in the Yankee army, Baxter, who had moved to Knoxville, Tennessee in 1857, followed a shifting course, betraying the Union cause by November, 1861, when he promised Jefferson Davis in person that he could 'tranquilize' East Tennessee if he were given the Confederate government's 'confidence', then running for the Confederate Congress in 1862, then, beaten because of his previous denunciation of secession, drifting back into the Unionist ranks. Both Harlan and Baxter opposed the Emancipation Proclamation and the Thirteenth and Fourteenth Amendments, and both backed McClellan for President in 1864 because of their opposition to emancipation. Both became very successful and wealthy lawyers after the War. Both tried to organize post-bellum third parties, and after these parties failed, both turned to the Republicans. Both were appointed to judgeships by Hayes in 1877, and both were opposed in their quest for national offices by home-state Republicans who doubted their dedication to black rights. Their family backgrounds differed markedly, however. Whereas

Harlan's American ancestors predated the Revolution and included a seventeenth-century colonial governor, Baxter's family arrived much later, and was much less distinguished. Harlan's father, a Congressman, state legislator, Secretary of State and Attorney-General in Kentucky, as well as a slave-holder who reportedly fathered a child by a black woman and apparently raised him in a privileged position at home, could afford to send his white son to Centre College and Transylvania Law School. Baxter's father held no office, and John Baxter was a poorly educated man whose 'language and pronunciation', in the words of a friend, 'were faulty'.[80]

Baxter reached his conclusion on the question of whether the Fourteenth Amendment required integration in the same way most other judges did: he meditated over it. As a newspaper reported his comments in a similar case eight months later, he 'had come to the conclusion, after much deliberation, that the [state's segregation] statute was constitutional, yet he did not desire to be understood as saying that he approved of the law which recognized separate schools, because he believed it would be far better policy for the State to remove such irritating differences'.[81] Perhaps it was his belief in the policy, if not the constitutional necessity, of school integration which compelled the former slave-holder to apply strictly the conventional maxim that the schools for each race had to be 'substantially equal' if they were to pass legal muster. Thus, he instructed the jury to find against Buntin if the segregated black school was located at 'an unreasonable and oppressive distance' from Vines's house; if Vines was thus 'placed at a material disadvantage with [*sic*] his white neighbour'; or if the school did not offer Vines 'substantially the same facilities and educational advantages that were offered in the school established for white children'. The remedy, previously accepted by the school board, but not carried out by Buntin, was that Vines's children were entitled to admission to the common school, for otherwise, the Fourteenth Amendment would offer blacks no protection from discrimination.[82]

If Baxter's instruction promised blacks less than full equality, it nevertheless had far-reaching implications for many of the nation's Negroes.[83] Here was no deference to the legislative or school board will, no unexamined acceptance of the authorities' ritualized assertions that black and white schools really were equal, no unwillingness to have courts intervene to protect black constitutional rights. In areas where the black population was not concentrated, segregated schools were either less conveniently located or smaller than and inferior to those of white children.[84] In many places in the deep South, the schools for blacks were nearby, but increasingly poorer than those for whites in the 1880s and 1890s. Had *Buntin* been adopted by the Supreme Court and had it been strictly construed, blacks throughout the country except in the large cities of the North, where few of them resided in the late nineteenth century, would have had a potent weapon for the enforcement of integration or at least meticulously equalized, if segregated, public facilities.

By the 1890s the Supreme Court faced a wide range of lower court precedents on racial discrimination in schools, many ruling segregation unlawful (although only the obscure *Allen* decision flatly held it contrary to the Fourteenth Amendment), nearly all upholding the principle that the courts had the power to intervene to protect black children's rights, and several, particularly *Buntin* and its offspring, reading the equal facilities and equal treatment requirement quite strictly. In the 1880 and 1898 editions of his *General Principles of Constitutional Law*, Thomas M. Cooley summed up the somewhat unsettled state of the law at the time by saying that the Fourteenth Amendment limited the states' discretion in providing education, 'though it *seems* to be permissable to require colored persons to attend separate schools, provided those schools are equal in advantages and the same measure of privilege and opportunity is afforded in each'.[85] Even in *Plessy* Justice Brown was forced to admit that school segregation practices had not been 'uniformly' upheld by the

courts, and he carefully refrained from citing such adverse decisions as *Clark, Tinnon*, and *Workman*, the latter handed down while Brown was a young lawyer and Republican party activist in Detroit.[86] Since Justice Brown made reasonableness the test of constitutionality under the Fourteenth Amendment, *Clark* and *Tinnon* were particularly in point, for, contrary to *Roberts*, they held segregation by the independent act of a school board unreasonable because it was contrary to 'the spirit of our laws'.[87]

Never a very precedent-bound judge, John Marshall Harlan did not discuss particular school segregation decisions in his famous *Plessy* dissent. He contented himself, instead, with critizing Brown for his reliance on opinions which pre-dated the passage of the Fourteenth Amendment or reflected public views in the immediate post-war era when, Harlan thought, racism was more pervasive than it was in 1896.[88] In this instance Justice Harlan rejected reasonableness as a measure of legality, saying it amounted merely to a test of whether a state's action comported with judges' views of 'sound public policy'.[89] But he wavered in *Plessy* between an effect test and an intent test. While Harlan believed that the constitution did not 'permit any public authority to know the race of those entitled to be protected in the enjoyment of such [civil] rights', which would seem to invalidate any law or practice which distinguished, directly or indirectly, between people of different races, he also emphasized that Jim Crow laws were 'conceived in hostility to, and enacted for the purpose of humiliating, citizens, of the United States of a particular race'. How to prove intent, Harlan gave no clue, merely asserting that 'all will admit' the discriminatory purpose of Jim Crow laws, that 'No one would be so wanting in candor as to assert that they were not designed to discriminate against blacks'. Justice Brown, of course, was.[90].

Three years later in *Cumming*, Justice Harlan abandoned any notion of an effect test and exhibited a disingenuousness which fully matched Justice Brown's breezy assurance in *Plessy* that

Jim Crow car laws did not discriminate against blacks. The Richmond county, Georgia, school board in 1897 had cut off funds for the state's only black public high school, directing the money instead to black elementary education, while continuing to subsidize two white high schools. Speaking for an undivided court, Harlan approved this exclusion of blacks from the privilege of attending a public high school, a privilege whites continued to enjoy, because the school board did not act, in Harlan's words, in 'bad faith' or with 'any desire or purpose . . . to discriminate against any of the colored school children of the county on account of their race' or out of a 'hostility to the colored population because of their race'. Accepting the board's contention, which had been strenously denounced by the representatives of the blacks throughout the episode, that there were in effect two racially distinct school funds and that therefore any appropriations to a black high school had to come at the expense of black elementary education, but no funds could be transferred from white to black schools, Harlan pronounced the school board's action 'in the interest of the greater number of colored children'.[91] In other words, he casually retreated from the 'color blind' position that he had taken in *Plessy*, allowed the board to structure the issue, and then found its action reasonable, a word that he had equated in *Plessy* with a judge's view of sound public policy. This was just the sort of judicial legislating for which Harlan so often condemned his fellow justices.

A comparison of the factual contexts of *Roberts, Buntin*, and *Cumming* demonstrates just how retrograde Harlan's decision was. In *Roberts*, the segregated black and white schools were allegedly equivalent in physical plant, teacher quality, and grade offerings. In *Buntin*, the Vines children were ordered admitted to the white school because of a mere quantitative difference in educational opportunities; that is, they had to walk farther to get to school than white children did. In addition, Judge Baxter set up integration as a remedy for any substantial educational inequalities whatsoever between blacks and whites. Harlan, by

contrast, gave his judicial blessing to a qualitative inequality – the board provided high schools for whites, but none for blacks – and erected a test of intent which no careful school board could fail, at least as long as it encountered a judge as credulous as Harlan was in *Cumming*.[92]

Looking at the nineteenth-century cases as a whole, one might derive from the judges' opinions four tests for a violation of equal treatment – colour-blindness, separate but unequal treatment, biased process, and malice.[93] The colour-blindness test enunciated by Sumner in his *Roberts* brief and followed by Judge Valentine in *Tinnon*, Judge Church in *Allen*, and Justice Harlan in his *Plessy* dissent, would have absolutely barred any distinction based on colour, regardless of any reasons that a legislature or school board could adduce or invent for a racial classification. The rights of an individual were not, according to this substantive equal protection criterion, to be balanced against any purported interests of the state in social order or in giving blacks or whites an education tailored to the alleged average characteristics of each group. The second test, unequal treatment, accepted the notion that racial groups might be separated, but insisted, at least in principle, that the effects of this classification should not bear more heavily on blacks than on whites. For grouping by race to be allowable, physical facilities, teacher quality, and the convenience of schools to the students had to be at least approximately equal. This standard, with vastly different definitions of 'substantially equal', to be sure, underlay decisions as diverse as *Roberts, Buntin*, and even *Garnes*. If the process through which the legislature's or school board's decision was arrived at excluded blacks or prohibited them from influencing it, then courts might consider the policy mechanisms so tainted as to render any outcome at best suspect, and at worst illegal. Such a rule might underly the reference to a 'good faith' in Brown's opinion in *Plessy* and Harlan's in *Cumming* and explain why the lawyers for the Richmond County school board were so careful to emphasize that they had given the

blacks a hearing on the issue of closing Ware High School.[94]

Harlan's racial hostility or malice test was both the hardest for blacks to meet and the most subject to judicial caprice. If the blacks had to prove by direct evidence that the state had adopted a policy purely out of racial enmity, then any school board could defend itself by treading softly and inventing another motive for its action. Despite the fact that judges could be expected to vary widely in the degree of scepticism with which they approached an official body's explanation, *Cumming* in effect set the bound of suspicion very low indeed. For if Harlan, the blacks' chief defender on the Supreme Court, accepted the Augusta board's transparent tale, if an effect as gross as withdrawing support from the only black public high school, while continuing it for two white high schools did not undermine faith in the board's lack of racially biased intent, what precedented justification would other judges have for raising the standard?[95]

The path of the law on racial discrimination in the nineteenth century was long and full of byways and switchbacks, but taking it was by no means an entirely unrewarding journey for black Americans. They won many cases, and used both victories and defeats to pressure northern school boards and legislatures to allow or require school integration. The struggle for equal rights by blacks and their white allies was unceasing and its chronological contours do not fit easily into the various vessels of received wisdom about race relations in the United States. Legal history that focuses entirely on abstract legal doctrines and segregates the history of litigation from that of other forms of political activity, or treats some judges' opinions, at least if expressed long ago, as writing that we are bound to respect, impedes, rather than promotes understanding.[96] In the nineteenth, as in the twentieth century, radicals and racists were agreed that courts were but one among several forums in which to conduct co-ordinated campaigns to achieve their ends. Lawyers were apparently not so devoid of ideals as is often charged, and judges did not strip off their politics when they donned their

robes. The relative scarcity of judicial opinions equating the Equal Protection Clause with integration should not be interpreted as meaning that judges thought that it did not bar segregation, for in the most racially liberal areas at the most liberal times, the constitutionality question did not arise, and progressive judges, unlike racist ones, were too honourable to insert it irrelevantly. In the post-war era, *Roberts* was as often ignored or disputed as followed, and though Shaw's standard of reasonableness survived, as least through *Plessy*, one judge's common sense was often another's absurdity. The tragedy was that the road finally led to Harlan's dead end.

# NOTES

1. *Cumming* v. *School Board of Richmond County, Georgia*, 175 US 528. For a fuller discussion of the case, see J. Morgan Kousser, 'Separate But *Not* Equal: The Supreme Court's First Decision on Racial Discrimination in Schools', *Journal of Southern History*, 46 (1980), 17–44.
2. *Plessy* v. *Ferguson*, 163 US 537 (1896). On *Roberts*, 5 Cush. 198 (1849), see Leonard W. Levy and Douglas L. Jones, *Jim Crow in Boston: The Origin of the Separate but Equal Doctrine* (New York: De Capo Press, 1974). Alfred H. Kelly claimed that *Plessy* 'merely gave sanction to a long-established tradition that had been generally accepted for a generation'. See his 'The Congressional Controversy over School Segregation', *American Historical Review*, 44 (1959), 563. Levy and Harlan R. Phillips, 'The *Roberts* Case: Source of the "Separate But Equal" Doctrine', ibid. 56 (1951), 517–18 consider *Roberts*'s influence 'immeasurable'.
3. William Gillette, *Retreat from Reconstruction, 1869–1879* (Baton Rouge and London: Louisiana State University Press, 1979).
4. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977), 245.
5. Although it is sometimes claimed, e.g. by Levy and Jones, *Jim Crow in Boston*, 167, that Sumner was the first to use the phrase in American law, it had been employed by another Brahmin Boston abolitionist, Ellis Gray Loring, in testimony in favour of an 1842 bill to abolish Jim Crow railroads in Massachusetts. See *Liberator*, 4 Mar. 1842. Sumner was almost certainly familar with Loring's testimony, as was Sumner's co-counsel in *Roberts*, Robert Morris, Jr., who was reading law in Loring's office in 1842.
6. Levy and Jones, *Jim Crow in Boston*, 165–216 reprints Sumner's argument. Sumner's interpretation seems close to Ronald Dworkin's 'right to equal treatment', in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 227.
7. Shaw's position in this case, which he did not follow in others, amounted to this: while the courts could not measure legislation against the state constitution, judges could, in the common law tradition, overturn laws or practices on the basis of their unguided notions of reasonableness and equity. Further, legislative silence on a topic meant not that regulation by lesser bodies was prohibited, but that it was not constrained. See Francis H. Fox, 'Discrimination and Antidiscrimination in Massachusetts Law',

44 *B.U.L.R.* 52–3 (1964). The racist basis of Shaw's opinion, for which he has been roundly, but even so, insufficiently criticized, becomes clearer when *Roberts* is compared with *Fisher* v. *McGirr*, 1 Gray 1 (1854), *Jones* v. *Robins*, 8 Gray 329 (1857), and *Commonwealth* v. *Aves*, 18 Pickering 209 (1836). In *Fisher*, Shaw threw out the state's prohibition law for being 'inconsistent with the principles of justice . . . and contrary to the letter and spirit of the Declaration of Rights . . .' because it provided for no trial on the question of whether or not seized liquor was intended for sale. Cf. G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: OUP, 1976). 59. In *Jones*, he ruled that indictment by information, rather than by grand jury, was inconsistent with the Declaration's 'law of the land' clause. In dissent, Justice Pliny Merrick showed conclusively that Shaw had misrepresented sources, and by implication charged him with doing so in order to use a vague clause to overrule a law that he merely disagreed with. Since slavery had long since been dead in Massachusetts, Shaw could safely rule in *Med's Case (Aves)* that the first article of the Declaration had 'abolished' it – i.e. that a legislative act establishing slavery in Massachusetts would be held unconstitutional by his court.

8. Two years before Benjamin Roberts tried to enter his daughter in a common school, abolitionists had sought to get the legislature to outlaw school segregation explicitly. One of the five members of the legislative committee that diluted Wendall Phillips's bill for that purpose was Peleg Chandler, later, as Boston City Solicitor, the lawyer for the School Committee in *Roberts*. State school superintendent Horace Mann believed that even the rewritten law made school segregation illegal, and that Shaw's opinion was therefore factually incorrect, for the legislature had banned it. See *Liberator*, 8 Apr. 1853. As is well known, the black and white abolitionists, led in this instance by Roberts and William C. Nell, used Shaw's opinion as a springboard from which to agitate for a legislative anti-segregation act, and they succeeded in 1855. Thus, from the outset, both the segregationist and integrationist camps recognized the interrelationships between legislative and court action. On Chandler, see Arthur Owen White, 'Blacks and Education in Antebellum Massachusetts: Strategies for Social Mobility' (unpub. Ed.D. thesis, SUNY Buffalo, 1971), 234; on the black campaign, see, e.g., *Liberator*, 8 Feb., 26 Apr., 7, 21 June, 16 Aug., 1850; 4 Apr., 1851; 26 Jan., 9 Feb., 30 Mar., 1855. The view that the Garrisonian abolitionists were so anti-institutionalist that they refused to employ legislative and electoral means would never survive even a casual reading of the *Liberator*.
9. Shaw, who lived within easy walking distance of the segregated 'colored

school', continued active in school matters, his name heading a petition in 1845, for instance, against the abolition of single-sex schools. See White, 'Blacks and Education', 307.

10. *Liberator*, 28 Aug., 1846.

11. Shaw's opinion is reprinted in Levy and Jones, *Jim Crow in Boston*, 217–32. The 'Coleman Report' is *Equality of Educational Opportunity*, 2 vols. (Washington, DC: Government Printing Office, 1966). A convenient introduction to the controversy is Frederick Mosteller and Daniel P. Moynihan, *On Equality of Educational Opportunity* (New York: Vintage Books, 1972).

12. In 1873, Thomas M. Cooley, perhaps puckishly, cited Shaw's grandiose gloss on equal rights, but agreed with Sumner's argument on segregated schools, in his edition of Joseph Story's *Commentaries on the Constitution of the United States*, 4th ed. (Boston: Little, Brown and Co., 1873), I, 676–7. The Thirteenth Amendment had been sufficient to guarantee equality, the anti-slavery Cooley stated: 'Unquestionably every person – all now being freemen – is entitled to the equal protection of the laws without any such express declaration [as the 14th Amendment].' The Equal Protection Clause 'is a formal declaration of the great principle that has been justly said to pervade and animate the whole spirit of our constitution of government, that all are equal before the law . . .' (citing Shaw's opinion in *Roberts*).

13. A subcommittee of the Grammar School Committee concluded before the Smith school was repaired that 'other schools [which had been] abandoned by the city were palaces in comparison' with it. Quoted in George A. Levesque, 'Black Boston: Negro Life in Garrison's Boston, 1800–1860' (unpub. Ph.D. diss., SUNY Binghampton, 1976), 201, n. 16.

14. Shaw, who owned thousands of acres of land in Kentucky, waited a dozen years on the bench before declaring a single law unconstitutional, and then voided the Massachusetts 'personal liberty law', in the *Latimer* case, as contrary to the federal fugitive slave law. The first judge to write a full opinion sustaining the more drastic 1850 fugitive slave law, in the *Sims* case, Shaw stayed loyal to his 'cotton Whig' principles by voting for the Constitutional Union party in 1860. See Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw: The Evolution of American Law, 1830–1860* (Cambridge, Mass.: Harvard University Press, 1957), 17, 82, 91, 98.

15. Compare the relevant Massachusetts provisions, given in Levy and Jones, *Jim Crow in Boston*, XXXV, n. 29, to section one of the Fourteenth Amend-

ment, or to the equal rights or common school clauses of even the Indiana constitution of 1851.

MASSACHUSETTS DECLARATION OF RIGHTS

Art. I: 'All men are born free and equal, and have certain natural, essential and unalienable rights, among which may be reckoned the rights of enjoying and defending their lives and liberties.'

Art. IV: 'No man, nor corporation, or association of men, have any other title to obtain advantages or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public.'

FOURTEENTH AMENDMENT

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

INDIANA CONSTITUTION OF 1851

Art. I, sect. 23: 'The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'

Art. VIII, sect. 1. '. . . it shall be the duty of the General Assembly to . . . provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all'.

16. Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with special reference to the Development of certain phases of American Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1930), 179–80, castigated the reasonableness test for the unconstitutionality of economic and social regulations as impossibly vague: '[W]ho knows what will appear reasonable to the judicial mind?'

17. The question of the 'influence' of a case is a very thorny one. Even unpublished cases may cause the integration of a school system (for example *McCullom* in table 1), or result directly (*Kentucky* v. *Ellis*) or indirectly (*Gazaway*) in state legislation favourable to blacks. Published opinions may be disregarded by later judges – see the discussion below of the lack of reference to *Clark, Workman*, and *Tinnon* by Justice Brown in *Plessy*. Judges may also ignore selected portions of opinions – for example, the delphic pronouncement in *Stoutmeyer* that school segregation

was opposed to 'the spirit' of the Fourteenth Amendment, or the nullification of that amendment in *Cory*. Thus, selecting cases for their 'influence in molding the course of legal change', as Jonathan Lurie does in 'The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberties Cases: A Preliminary Assessment', *American Journal of Legal History*, 28 (1984), 298, is not so simple as it seems.

18. I was conservative in counting the number of cases. For instance, the *Wood* case in Detroit was one of 40 filed that year in an effort to force the school board to comply with the spirit of the earlier *Workman* decision. The *Bibb* case went through 7 jury trials and 5 state supreme court appeals over 11 years. *Cisco* was one of 18 filed in Jamaica and Queens, New York from 1895 to 1899, but seems to have been the only one to have been tried. See Carleton Mabee, *Black Education in New York State: From Colonial to Modern Times* (Syracuse, NY: Syracuse University Press, 1979), 156–7. In each instance, I have counted these as only one case.
19. Franklin, *Racial Equality in America* (Chicago: University of Chicago Press, 1976), 60–2, 72.
20. Rabinowitz, *Race Relations in the Urban South, 1865–1890* (Urbana, Ill.: University of Ill. Press, 1980), especially pp. 329–39.
21. For this conventional view, see, e.g., John Hope Franklin, *From Freedom to Slavery*, 4th ed. (New York: Vintage Books, 1974), 327–8; Leslie H. Fishel, Jr., 'The Negro in Northern Politics, 1870–1900', *MVHR*, 42 (1955), 466–7, and his 'Repercussions of Reconstruction: The Northern Negro, 1870–1883', *Civil War History*, 14 (1968), 325–45; Gillette *Retreat from Reconstruction*, 365–6, 434; William S. McFeely, *Grant, A Biography* (New York: W. W. Norton and Co., 1981), 374, 439; but cf. the more careful view of August Meier, *Negro Thought in America, 1880–1915* (Ann Arbor, Michigan: University of Michigan Press, 1964), 20. Even Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (New York: Harper and Row, 1982), 439, contend that 'racial equality remained on [Republican leaders'] agendas through the early seventies' only, and they title a later chapter 'The 1870s and 1880s: Eras, Not Decades, Removed from the 1860s'.
22. Woodward, *The Strange Career of Jim Crow*, 3rd rev. ed. (New York: OUP, 1974). For a further discussion of the 'Jim Crow thesis' and its critics, see Kousser and James M. McPherson, 'Introduction', in Kousser and McPherson, *Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward* (New York: OUP, 1982), xxv–xxvii.
23. It should be noted that some of these victories were severely undercut, while others were eventually disregarded, though never directly overruled.

After a dozen heartbreaking trials and appeals stretching over eleven years, in addition to a black school boycott which lasted at least four years, for instance, blacks in Alton, Illinois finally won the right to attend integrated schools in 1908, but then failed to exercise that right, apparently because extreme racist local Democratic judges, whose outrageous rulings had been repeatedly slapped down by the state supreme court, refused to apply the law to any children except the named plaintiffs – even to Scott Bibb's other children! Unable to get the class action aspects of the case applied, the black community in Alton, faced with the prospect of long and expensive suits for every single black schoolchild, abandoned the attempt to integrate. Alton schools below the high school level were finally integrated only in 1958. See W. T. Norton, *Centennial History of Madison County, Illinois, and Its People, 1812 to 1912* (Chicago and New York: The Lewis Publishing Co., 1912), 301–4; *Alton Evening Telegraph*, 19 Dec. 1901, 23–30 Apr., 21, 25 May, 14–29 Sept. 1908; James O. Monroe, Jr., 'Created Equal? The Complete Lincoln-Douglas Debates of 1858', 34 NYU LR 807–16. In Quincy, Illinois, the *Longress* decision was largely evaded through gerrymandered attendance zones, a discriminatory inter-district transfer scheme that allowed whites free transfers out of the 'black' school district, but admitted few blacks to 'white' schools even when they lived in 'white' districts, the comparatively unsophisticated tactic of anti-black violence, and blatant and cynical circumvention of the state supreme court's decisions and any notion of judicial fairness by the local and circuit court judges. See *People* v. *McFall; Quincy Daily Whig*, 22 Jan., 2 Feb. 1882; *Springfield (Ill.) Record*, 13 Nov. 1897. In New Jersey, too, segregated schools contravened state law and explicit court decisions. None the less, they flourished in the southern part of the state with high-level official connivance during the 1920s. See Vishnu V. Oak and Eleanor H. Oak, 'The Illegal Status of Separate Education in New Jersey', *School and Society*, 47 no. 1221 (21 May 1938), 671–3; Meyer Weinberg, *A Chance to Learn: The History of Race and Education in the United States* (Cambridge, England: CUP, 1977), 75; Bruce Ira Goldstein, 'The Negro in New Jersey, A History of Discrimination' (unpublished senior honors thesis, Rutgers University, 1964), 52–4. The situation was similar in some Ohio communities after the passage of the 1887 school integration law. See, e.g., Frederick Alphonso McGinnis, *The Education of Negroes in Ohio* (Wilberforce, Ohio: Curless Printing Co., 1962), 47, 65–70.

24. There were many cases of separationist–integrationist splits within the black community, of course, but they occurred from the beginning, in the events surrounding *Roberts*, the integrationists always represented the dominant tendency in every instance where there is enough information

to judge, and I can discern no trend in the mix of black strategies over time. The cycle theory is enunciated in Meier, *Negro Thought*.

25. US Bureau of the Census, *Negro Population in the United States, 1790–1915* (Washington: GPO, 1918), table 24, 220.

26. 'Caste legislation', wrote Judge Milton Sutliff, one of the founders of the American Antislavery Society, 'is inconsistent with the theory and spirit of a free and popular government like ours, asserting in its bill of rights the equality of all men'. *Van Camp* v. *Logan*, 9 Oh. St. 416 (1859). Racial identity was also at issue in *Plessy*, his lawyer, Albion Tourgee, having arranged the test case to involve a very light-skinned person so that he could claim a property right in his reputation as a white man. Tourgee seems to have believed that the Court would be more likely to protect property than civil rights, and he doubtless wished to demonstrate the absurdity, the unreasonableness, of having a train conductor make such fine distinctions on weighty matters. See the briefs for the plaintiff in *Plessy*, National Archives file. Note that if the US Supreme Court had been as liberal as the Ohio Supreme Court was before 1859, *Plessy* would probably have gone the other way.

27. Even so conservative a senator as Timothy Howe pointed out during floor debates on the Fourteenth Amendment that segregated tax systems would be outlawed by it. See Alfred H. Kelly, 'The Fourteenth Amendment Reconsidered: The Segregation Question', 54 Mich. LR 1049, 1083 (1956).

28. The eleven states were Massachusetts (1855), Iowa (provided no authorization for segregation after 1860), Connecticut (1868), Michigan (1867, 1871), New York (1873, 1900), Illinois (1874), Kansas (except for 'first class' cities, 1876), California (1880), Pennsylvania (1881), New Jersey (1881), and Ohio (1887). Perhaps the most extreme statement of this view is Raoul Berger's: 'The key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents rather than by abolitionist ideology.' *Government by Judiciary*, 10. Berger assumes, incorrectly, I think, that racism had a clear, single meaning, identically understood by all whites; that it, and not, for instance, unionism, economic or political self-interest, devotion to democratic ideals, antipathy to other white groups, or any other motive or complex of motives, always weighed heaviest in voters' and politicians' decision calculi on racially related issues; and that the degree and nature of personal and societal racism did not change over time, so that assessments of northern racism in the 1830s are good evidence

for the character and extent of northern racism in 1867, and that, for any individual, once a racist, always a racist. Because none of these assumptions will bear close scrutiny, Berger's book is fundamentally flawed, even apart from numerous other frailties.

29. On Justice Department actions from the 1930s through the 1960s, see, e.g., Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue: The Depression Decade* (New York: OUP, 1978), 235–6, 241–3; Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York: Columbia University Press, 1983), 91–101, 135–6, 146–7, 154–6. On the Reagan administration's early record on civil rights, see Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* (Washington, DC, 1982).

30. Berger, *Government by Judiciary*, 117–33. Rejecting Berger's view that generally stated constitutional provisions should be interpreted to mean no more than their framers explicitly intended, many legal commentators on his reactionary book have either commended his treatment of historical evidence or ignored it as irrelevant. Exceptions that attack Berger's flagrantly distorted history include Walter F. Murphy, 'Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?' 87 Yale Law Journal 1752–71 (1978); Stanley I. Kutler, 'Raoul Berger's Fourteenth Amendment: A History or Ahistorical?' 6 Hastings Constitutional Law Quarterly 511–26 (1979); Aviam Soifer, 'Protecting Civil Rights: A Critique of Raoul Berger's History', 54 *NYULR* 651 (1979); Michael Kent Curtis, 'The Bill of Rights as a Limitation on State Authority: A Reply to Prof. Berger', 16 Wake Forest LR 45–102 (1980); Curtis, 'The Fourteenth Amendment and the Bill of Rights', 14 Conn. LR 237–306 (1982). Berger has reshuffled his notes to produce 'replies' to each of these critiques, but as they add nothing to the debate, the student may ignore them.

31. On the stature of Cooley and Dillon, see Clyde E. Jacobs, *Law Writers and the Courts*, reprint ed. (New York: Da Capo Press, 1973), 22. As a Kansas Supreme Court judge, Dillon concurred with Valentine in *Tinnon*, rejecting David J. Brewer's dissenting view that segregation was a reasonable regulation under the Fourteenth Amendment.

32. White, 'Blacks and Education', 316–17.

33. Cooley, ed., Story, *Commentaries*, 676–7.

34. Similarly, Judge Richard Fletcher of Massachusetts, who, before being named to the bench, had written a long statement expressing his belief that school segregation violated the Massachusetts Declaration of Rights,

apparently silently recused himself in *Roberts*, allowing Shaw to present a seemingly united front. His earlier opinion is in Charles Slack, 'Report Relative to Abolition of Colored Schools', in Original Papers, Acts and Resolves Passed by the General Court of Massachusetts (1855), ch. 256, p. 8, in Massachusetts State Archives, Boston.

35. *Hall* v. *DeCuir*, 95 US 485, 504–6.

36. The five states were Massachusetts and New York, discussed above, and California, Ohio, and Pennsylvania. On California, see Francis N. Lortie, *San Francisco's Black Community, 1870–1890: Dilemmas in the Struggle for Equality* (San Francisco: R. and E. Associates, 1973), 14–15; Charles Wollenburg, *All Deliberate Speed; Segregation and Race Exclusion in California Schools* (Berkleley: University of California Press, 1976), 8–26; Irving G. Hendrick, *The Education of Non-Whites in California* (San Francisco, R. and E. Associates, 1977), 20–78; A. Odell Thurman, *The Negro in California Before 1890* (San Francisco: R. and E. Associates, 1973), 55–9. On Ohio, see McGinnis, *Education of Negroes in Ohio*, 60–2; Thomas Paul Kessen, 'Segregation in Cincinnati Public Education: The Nineteenth Century Black Experience' (unpub. Ed. D. thesis, University of Cincinnati, 1973), 120–1, 130–45; David A. Gerber, *Black Ohio and The Color Line, 1860–1915* (Urbana: University of Illinois Press, 1976), 236–43, 450–3. On Pennsylvania, see Frank B. Evans, *Pennsylvania Politics, 1872–1877: A Study in Political Leadership* (Harrisburg: The Pennsylvania Historical and Museum Commission, 1966), 125–6; Ira V. Brown, 'Pennsylvania and The Rights of The Negro, 1865–1887', *Pennsylvania History*, 28 (Jan. 1961), 45–57.

37. Detroit blacks were not immediately allowed into the schools, for the racist Democratic majority on the school board first stalled, then claimed that they excluded blacks not because of race, but because they had too few seats available, then allowed black children to enter the common schools, but put them in segregated classrooms. The blacks responded with forty court suits, which had to be tried before a local jury since the reasons for exclusion were unclear on their face. Adverse and prejudicial rulings by a local Democratic judge cost blacks a deserved victory in the key local case. None the less, by successfully pressuring the 1871 Michigan legislature to pass a further amendment specifically banning classroom segregation, the blacks succeeded in ending segregation in 1871. On these matters see *Detroit Advertiser and Tribune*, 5, 7, 12, 13, 20 Oct.; 18, 20 Dec. 1869; *Detroit Free Press*, 6, 13 Oct. 1869; *Detroit Post* 5, 7, 13, 19, 29 Oct. 1869; 2, 10, 17, 20, 24, 25 Jan.; 14 Mar.; 4 Sept. 1871; Reams and Wilson, *Segregation and The Fourteenth Amendment*, 287.

38. These arguments also undermine the conclusions of Jonathan Lurie, whose analysis of twenty-three post-1860 state religion and racial discrimination opinions deals with some of the cases listed in table 1. Judges frequently ignored the Fourteenth Amendment, Lurie contends, and 'almost a generation after ratification of the Fourteenth Amendment there was no legal consensus that it had altered the basic relationship between a state citizen and the state or local government in respect to civil liberties'. Lurie, 'Fourteenth Amendment', 312. Because the natural law/reasonableness/arbitrariness standards were firmly established before 1868, and because they did not change fundamentally until after 1938 (if then), such conclusions, while not wholly incorrect, prove much less than Lurie evidently believes.

39. In some instances, the converse may be true: the failure of the best produces attempts to effectuate the good. Thus, the agitation for a national school integration statute no doubt helped to inspire black leaders to bring suit in *Ward* and *Cory*, and the state legislatures of New York and Illinois and the state senate in Pennsylvania to pass anti-exclusion from schools bills in 1873–4. On Pennsylvania, see, e.g., *Harrisburg Patriot*, 6 May 1874. A similar bill failed in California because of Democratic opposition, and the Pennsylvania bill was never brought to a vote in the House.

40. Compare the Illinois and New York laws, the one ruled by the Republican-majority Illinois Supreme Court to ban segregation against black wishes, the other ruled by the Democratic-majority New York Supreme Court to allow it:

NEW YORK (1873 laws, p. 303)

'No citizen of the State shall by reason of race, color, or previous condition of servitude be excepted or excluded from full and equal enjoyment of the accommodations furnished by innkeepers, by common carriers, whether on land or water, by licensed owners, managers or lessees of theaters or other places of amusement, by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, and by cemetary associations.'

ILLINOIS (Rev. Stat., 1874, ch. 122, sect. 100)

All school officers 'are prohibited from excluding, directly or indirectly, any such child from such schools on account of the color of such child'.

The realization that before the rise of rigid ghettoes, exclusion and absolute segregation were, outside the Deep South at least, largely equivalent – facts of which both judges and politicians were well

aware – throws a different and subtler light on both court cases and Congressional debates. Cf., e.g., Stephen J. Riegel, 'The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865–1896', *American Journal of Legal History*, 28 (1984), 35–6; Alfred Avins, 'De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875', 38 Miss LJ 179, 186, 217, 232–3 (1967).

41. James M. Smith, 'The "Separate But Equal" Doctrine: An Abolitionist Discusses Racial Segregation and Educational Policy During the Civil War', *Journal of Negro History*, 41 (1956), 138–47; Carleton Mabee, *Black Education in New York State: From Colonial to Modern Times* (Syracuse, NY: Syracuse University Press, 1979), 70–82, 158, 183–8, 280–3; Arthur O. White, 'The Black Movement Against Jim Crow Education in Buffalo, New York, 1800–1900', *Phylon*, 30 (1969), 384–93; David M. Ment, 'Racial Segregation in the Public Schools of New England and New York, 1840–1940' (unpub. Ph.D. thesis: Columbia University, 1975), 77–80, 132–99, 212–15, 283; Rose J. Jackson, 'The Black Educational Experience in a Northern City: Albany, New York, 1830–1870' (unpub. Ed.D.; thesis, Northwestern University, 1976), 51–72, 173, 207–21; William H. Johnson, *Autobiography of Dr. William Henry Johnson* (Albany: The Argus Co., 1900), 17–19, 78–80, 92–3, 178–88.

Partisan differences over black suffrage are highlighted in Phyllis F. Field, 'Republicans and Black Suffrage in New York State: The Grassroots Response', *Civil War History* 21 (1975), 141–7.

Once a civil rights bill made it to the floor of both Assembly and Senate in New York, it became much less controversial. Thus, the 1873 bill passed the Assembly 90–11 (79R, 11D in favour, 1R, 10D opposed), and the Senate, 23–3 (22R, 1D in favour, 3D opposed), and the 1900 bill passed the legislature with only 5 Democrats recorded in opposition. See 1873 *Assembly Journal*, 615–16; 1873 *Senate Journal*, 507; 1900 *Assembly Journal*, 3023–4, 3195–6; 1900 *Senate Journal*, 1464–5; *San Francisco Pacific Appeal*, 3 May 1873.

'Colored' schools with black teachers often persisted for years, generally because of a desire to keep those teachers employed, after local resolutions or state laws of local application prohibited barring blacks who applied to common schools in their districts. See, e.g., *New York Globe* (later called *Freeman* and *Age*) 20, 27 Jan., 17 Feb., 22 Dec. 1883, 5 Jan., 5, 19, 26 Apr., 3 May, 21 June, 13 Sept. 1884, 14, 21 Nov. 1885, 15 Oct. 1887, 15 Sept. 1888, 26 Jan., 14 Sept. 1889; Seth M. Scheiner, *Negro Mecca: A History of the Negro in New York City, 1865–1920* (New York: NYU Press, 1965), 161, 175–9; Harold X. Connolly, *A Ghetto Grows in Brooklyn* (New York:

NYU Press, 1977), 27–9; Buffalo Supt. of Schools *Report, 1872* (Buffalo: Buffalo Printing Co., 1873), 111–12.

On politics and the considerations of integration by the school boards in Albany, Buffalo, and Brooklyn, see, in addition to the above: Albany Board of Education *Report, 1872* (Albany: The Argus, 1872), 71–83; *Albany Evening Journal*, 26 Oct. 1872, 29 Jan, 2 Apr. 1873; *Buffalo Commercial Advertiser*, 7 Feb., 26 Mar. 1872; Robert J. Swan, 'A Synoptic History of Black Public Schools in Brooklyn', in Charlene Claye Van Derzee, ed., *The Black Contribution to the Development of Brooklyn* (Brooklyn: The New Muse Community Museum of Brooklyn, 1977), 65–7; *Brooklyn Daily Eagle*, 7 May, 3 Sept., 8 Oct. 1873, 25 Sept. 1875, 1, 4, 18 Sept., 22, 24 Dec. 1881, 10, 11 Jan. 1882, 12 Dec. 1883; *Brooklyn Daily Times*, 7 May, 6 Aug., 3 Sept., 8 Oct., 3 Dec. 1873, 12 Dec. 1883; *Brooklyn Daily Union* (later *Union-Argus*), 6 Aug., 8 Oct. 1873, 11 Oct., 14 Nov., 12 Dec. 1883; Brooklyn Board of Education *Proceedings* (1873) 92–3, 158–9, 168–70, 180, 190–1, 201–4, 234–6; (1874) 137–8; (1875) 146, 188–90, 200–1; (1883) 681–5.

42. Alpheus Thomas Mason, William M. Beaney, and Donald Grier Stephenson, Jr., *American Constitutional Law: Introductory Essays and Selected Cases*, 7th ed. (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1983), 234.

43. Partisan labels were assigned only on positive evidence. Thus, I did not consider appointment to a court by a governor or president of known affiliation a sure guide, for from time to time Republicans appointed Democratic judges, and vice versa. Furthermore, if a person was known to have switched parties, such as the lawyers George Hoadly (*Eastern*), John M. Palmer (*Longress, Bibb*), and Rezin DeBolt (*Lehew*), I tried to find information on his affiliation at the time of the case. Lawyers or judges who sat in more than one case counted more than once, since I took the important unit here to be cases, not lawyers. In some instances, the same person served as a lawyer in one case and a judge in another. He is counted in each category. Generally, a law firm, not an individual lawyer, would be listed as representing each side. Sometimes, newspaper or other evidence indicated which partner actually made the oral argument or signed the brief. I decided, however, to list all members of firms in every case, because other firm members may well have contributed to the preparation of the cases. At times, judges who lived in the north sat on southern cases, and vice versa. To minimize confusion, I assigned them to cases according to the region where the case began. None of these coding decisions affected many people, and reversing them would change no conclusion in the paper.

44. Only five of the lawyers (Robert Morris, Jr., in *Roberts* and *Pindall*, Graham Deuwell in *Gazaway*, William S. Newberry in *Gazaway* and *Tolbert*, C. L. Maxwell in *McCullom*, and J. R. Clifford in *Martin*) and none of the judges were identifiably black, doubtless largely the result of past discrimination in common school and legal education, especially in an era when most attorneys read law privately, rather than in a law school. Constitutional litigation was also highly abstract, far from the more practical and quotidian legal work that those whose clients must usually have been poor were accustomed to. Since the number of constitutional cases that any single lawyer could expect to handle was small, the fairly minimal fees that could be expected in each case did not compensate attorneys with little leisure time to become experts in such litigation.

45. It cost about $1,500 to carry *Cumming* through the US Supreme Court, even though George F. Edmunds donated his services for the Supreme Court brief and argument. The fund to carry *Plessy* through the US Supreme Court amounted to at least $2,800. *Cleveland Gazette*, 20 Feb. 1892.

46. A Chi-square test for categorical data (e.g. lawyers vs. judges, Republicans vs. Democrats) compares the observed number in each cell of a table with that which would be expected if there were no relationship between the variables. Suppose, for instance, that there were 10 Republican and 10 Democratic judges, and that in each case, 7 of the judges decided in favour of the blacks in school cases. Then the computed Chi-square value would be zero, because there would be no relationship between the variables 'party' and 'decision'. But how different would the proportions of judges from each party voting on the black side have to be before we could be fairly sure that those distinctions were not produced by chance? The Chi-square distribution is the conventional statistician's benchmark here, and a large Chi-square value and a correspondingly low significance level indicates that it is unlikely that the observed relation was due to random factors. In table seven, for instance, the first Chi-square value, 60.7, would occur less than once in a hundred times if there were no relation between 'party' and 'decision'. In fact, Chi-square tests can be used as the basis for much more powerful techniques. See Kousser, Gary W. Cox, and David W. Galenson, 'Log-Linear Analysis of Contingency Tables: An Introduction for Historians', *Historical Methods*, 15 (1982), 152–69.

47. The point was raised in all the Illinois cases where briefs are available, as well as in *Cory* (Indiana), *Johnson* and *King* (New York), *Vines* and *Buntin* (Ohio), *Lehew* (Missouri), and *Martin* (West Virginia). A related and very widespread compromise in the north was to allow individual blacks a free choice between going to common, integrated schools, or all-black

ones. This protected black teachers' jobs, for example, in Manhattan and Brooklyn, NY, and it allayed white fears that 'their' schools would suddenly be inundated with a large number of black children. In any case, the practice showed that segregation and integration often coexisted in the same school system, that the stages were by no means as separate as the Rabinowitz thesis, if applied to the north, would seem to imply. For early offers of such a compromise, see *Liberator*, 21 July 1846, and Charles Theodore Russell, *Report of the Minority of the Committee* (Boston: J. H. Eastburn, 1849), 12–13. Despite its staunch efforts to relegate blacks to single race schools, the Boston school committee in 1849 did allow the children of at least one man, who lived across the Charles River from the Smith School, to enter the local common school. See *Boston Grammar School Report, 1849* (Boston: J. H. Eastburn, 1849), 28.

48. Information on Clark appears in John Ely Briggs, 'The Inalienable Right of Education', *The Palimpsest*, 8 (May, 1927), 183; and Leona Nelson Bergemann, 'The Negro in Iowa', in *Studies in Iowa History* (Iowa City: The State Historical Society of Iowa, 1969, reprint of 1948 article), 50–3. The facts of the case are taken from the opinion, *Clark* v. *The Board of Directors*, 24 Iowa 266.

49. Although it seems likely that the briefs discussed *Roberts*, then the leading case on the subject, neither they nor any records of *Clark* appear to have survived. Biographical information on Cole and the three other Republican judges on the court is from *The Bench and Bar of Iowa* (Chicago and New York: American Biographical Publishing Co., 1901), 68–70, 322–3, 366–7; and Frederick F. Faville, *Justices of the Supreme Court of Iowa (1838 to 1945)* (Des Moines: State of Iowa, 1945), not paginated.

50. 24 Iowa at 269.

51. In his 1864 and 1866 reports, the state superintendent of schools had interpreted the same set of legislative acts as leaving the decision as to whether to segregate or not up to the local school boards. See Bernard D. Reams, Jr., and Paul E. Wilson, *Segregation and The Fourteenth Amendment in The States* (Buffalo: William S. Hein and Co., Inc., 1975), 174–5.

52. 1857 Iowa constitution, Art. 9, sec. 12; 24 Iowa at 276.

53. 24 Iowa at 277.

54. Wright's opinion is in 24 Iowa 277–81. Besides buttressing Cole's reading of the legislative history, the convention debates indicate how little fear Republicans showed of the race issue in a state that was very shortly to reject black suffrage overwhelmingly in a referendum. On the morning of 27 February 1857, A. H. Marvin of Monticello, a 49-year-old, New

York-born Republican farmer who had attended integrated schools in his native state, sought to amend a section of the education article by requiring that the schools be 'equally open to all'. Despite the fact that this phrase had been lifted from the 1851 Indiana constitution, which had been framed by ultra-racist Democrats who had voted to deny blacks all civil rights and ban their subsequent immigration into the state, George Gillaspy, one of the leaders of the fourteen Democrats in the thirty-five member Iowa convention, immediately attacked Marvin's argument as requiring integrated schools. Although three of the seven Republicans who were among the ten delegates who spoke on the amendment averred that the phrase meant only that blacks could not be totally excluded from the schools, leaving to the legislature whether to mandate statewide segregation or integration or local option, Marvin and four other Republicans agreed with the Democrats that the phrase made integrated schools a necessity whatever the legislature did. As J. C. Hall, whom the Democrats had nominated for President of the convention, put it, under this clause a black 'could compel, by a writ of mandamus, the teacher to receive' his children, 'and the courts would compel teachers to receive them'. Although the convention rejected Marvin's amendment, that same afternoon it passed another, quoted above in the text of this paper, which Marvin and several other delegates agreed had the same effect, but which for some reason seemed more satisfactory to a swing group of 11 Republicans and one Democrat. The argument on the clause's meaning, in other words, was over whether it by itself required integration, and a majority of the delegates who commented on the subject thought it did; no delegate stated that under the clause, which was similar to provisions in most state constitutions at the time, segregation would be the law without specific legislative authorization. All this information is from W. Blair Lord, reporter, *The Debates of the Constitutional Convention of the State of Iowa, Assembled at Iowa City, Monday, January 19, 1857* (Davenport: Luse, Lane and Co., 1857), 4–7, 825–37. On race relations in Iowa, see Robert R. Dykstra, 'Iowa: "Bright Radical Star," ' in James C. Mohr, ed., *Radical Republicans in the North: State Politics During Reconstruction* (Baltimore: Johns Hopkins University Press, 1976), 167–93; Dykstra, 'The Issue Squarely Met: Toward an Explanation of Iowans' Racial Attitudes, 1865–1868', *The Annals of Iowa*, 47 (1984), 430–50, and references cited in those articles.

55. The briefs are summarized in the court's opinion, *Joseph Workman* v. *The Board of Education of Detroit*, 18 Michigan 400, 402–8; and there are fragmentary records in the Michigan Records Center, 3405 N. Logan Street, Lansing, case files 1222, 1324, 1325, 1326, 1327.

56. 18 Michigan at 409, 412.

57. 18 Michigan at 414, 419. On Campbell, see the trenchant sketch by Charles A. Kent, 'James Valentine Campbell', 5 *Mich. L. R.* (1907), reprint in Michigan Historical Collection, Bentley Library, University of Michigan. Kent notes that Campbell 'had no subtle theories nor much refined abstruse reasoning. In all his opinions, he appears to have had chiefly in view the effect of the decision on what he thought the merits of the case before him'. Other information on Campbell appears in Henry Billings Brown, *The Character and Services of James Valentine Campbell* (Detroit: n.p., 1890); *Detroit Advertiser & Tribune*, 13 Feb. 1871, p. 3; Clarence M. Burton, *The City of Detroit, Michigan, 1701–1922* (Detroit and Chicago: The S. J. Clarke Publishing Co., 1922, 5 vols.), II, 1158.

58. On Cooley, see Lewis George Vander Velde, 'Thomas McIntyre Cooley', *I. C. C. Practitioners' Journal*, 15 (Sept. 1948), 857–80; Virginia June Ringchrist Ehrlicher, 'Thomas McIntyre Cooley: A Calendar of His Papers, 1846–1898', (unpub. Ph.D. thesis, University of Michigan, 1974). Alan Jones, 'Thomas M. Cooley and the Michigan Supreme Court, 1865–1885', *American Journal of Legal History*10 (1966), 97–121; Philip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Chicago: Univ. of Chicago Press, 1975), 264–72; Peter F. Walker, *Moral Choices: Memory, Desire, and Imagination in Nineteenth Century American Abolitionism* (Baton Rouge, La.: La. State Univ. Press, 1978), 343–7; Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law; Constitutional Development, 1835–1875* (New York: Harper and Row, 1982), 354–5. All three are sketched in Lewis G. Vander Velde, 'The Michigan Supreme Court Defines Negro Rights, 1866–69', *Michigan Alumnus Quarterly Review*, 63 (19 Aug. 1957), 279–90.

59. 18 Michigan at 412–13. On the integration of other schools in Michigan before the passage of the 1867 law, see Marie Duesenberg, 'A History of Negroes in Battle Creek' (Battle Creek: Willard Library, 1952, mimeo.), 15; Roosevelt Samuel Ruffin, *Black Presence in Saginaw, Michigan: 1855–1900* (n.p., 1978), 29; George K. Hesslink, *Black Neighbors: Negroes in a Northern Rural Community* (Indianapolis: Bobbs-Merrill Co., 1968), 56–62.

60. 21 Ohio State 198, 202–12.

61. 7 Nevada 342, 346. Concurring with Whitman, Judge J. F. Lewis remarked that 'the legislature has no more right to designate a class by the color of the skin, than by the color of the hair', and that a racial classification was 'utterly unnecessary and unjust', but went on to assert that segregation was legal. Ibid. 348–55.

62. 48 California 36, 41–57. One judge concurred on the narrow ground that Ward was not in the proper grade, while a Republican judge expressed no opinion on the case. Ibid., 57. On Wallace, see Oscar T. Schuck, editor, *History of the Bench and Bar of California* (Los Angeles: The Commercial Printing House, 1901), 404–5.

63. 1851 Constitution, Art. 8, sect. 1, and Art. 1, sect. 23 quoted in 48 Indiana 327 at 334.

64. Quoted in 48 Indiana 327 at 332. Unlike other states, Indiana did not designate a minimum number above which districts were required to establish black schools or give communities the option of integration.

65. On the trustee's action (with its echo of Gov. George Wallace's 1962 performance), see *Indianapolis Journal*, 29 Jan. 1874. Exclusion was too much even for one of the most bitterly partisan and racist judges who ever sat on the Indiana Supreme Court, Samuel E. Perkins, who was then serving a term as an Indiana district judge in Marion County. On Perkins, see Emma Lou Thornbrough, 'Judge Perkins, The Indiana Supreme Court, and The Civil War', *Indiana Magazine of History*, 60 (1964), 79–96; Jacob Piatt Dunn, *Indiana and Indianans*, 5 vols. (Chicago and New York: The American Historical Society, Inc., 1919), III, 1241; Leander J. Monks, ed., *Courts and Lawyers of Indiana*, 3 vols. (Indianapolis: Federal Publishing Co., 1916), I, 206–7, 248–56; W. W. Thornton, 'The Supreme Court of Indiana', *The Green Bag*, IV (1892), 254–5.

66. The court's only Republican, Andrew L. Osborn, a temporary appointee, concurred in the judgment but generally dissented from Buskirk's opinion without writing one of his own (48 Indiana at 366). It is interesting to note that the blacks were represented by a Republican law firm which contained the party's 1872 gubernatorial nominee and its 1876 candidate for state attorney-general, while the school board attorneys were leading Indianapolis Democrats. See Charles W. Taylor, *The Bench and Bar of Indiana* (Indianapolis: Bench and Bar Publishing Co., 1895), 252–3, 315–22, 513–14; no author, *A Biographical History of Eminent and Self-Made Men of the State of Indiana*, 2 vols. (Cincinnati: Western Biographical Pub. Co., 1880), I, dist. 6, 14–15, dist 7., 48–63; no author, *Pictorial and Biographical Memoirs of Indianapolis and Marion County, Indiana* (Chicago: Goodspeed Brothers, 1893), 72–3; *The Union Title News*, 6 (Oct. 1950), 1–2; B. R. Sulgrove, *History of Indianapolis and Marion County* (Philadelphia: L. H. Everts and Co., 1884), 180–1, 214c–214d; Monks, *Courts and Lawyers of Indiana*, I, 267.

67. *State* v. *Gibson*, 36 Indiana 389, 402–4 (1871).

68. Briefs are summarized at length in *Indianapolis Journal*, 26–7 Feb. 1874, and the opinion by the 2-1 Republican local court in ibid., 7 Apr. 1874. The editorial denunciation of Buskirk's opinion is in ibid., 26 Nov. 1874, which also reprinted critical editorials from other newspapers and added several of its own in the succeeding month. The Democratic-leaning *Indianapolis Sentinel* was much more friendly to the opinion, but also reproduced several critical editorials from other papers during the same period.

69. 48 Indiana 327, 358–66. On Buskirk and the court's other members, see Thornton, 'Supreme Court of Indiana', 262–5; Monks, *Courts and Lawyers of Indiana*, 253–9. In some areas of the state in the 1870s, blacks attended integrated schools, in most areas, segregated schools, and in a few, no school was provided at all. Some school boards which had been allowing blacks to attend white schools expelled them after *Cory*. In 1877 a Republican legislature required boards which had not established segregated schools to admit blacks to white schools and mandated integration at the high school level, thus nullifying Buskirk's refusal to ban exclusion, though not his unwillingness to discountenance segregation altogether. See Emma Lou Thornbrough, *The Negro in Indiana Before 1900: A Study of a Minority* (Indianapolis: Indiana Historical Bureau, 1957), 325–42.

Three Louisiana cases, filed in the wake of the Democratic 'redemption' of the New Orleans schools from fairly widespread integration, amounted to a judicial fast shuffle. In *Bertonneau*, federal judge William B. Woods stated without elaboration that the Fourteenth Amendment did not require school integration and denied that the federal court could enforce the 1868 state constitution's guarantee of integration. In *Trevigne*, the local court judge ruled that Trevigne had no grievance, since the schools were closed and the segregation policy had been authorized, but not yet put into practice; by the time the state supreme court got around to issuing a ruling, state chief justice De Blanc decided that it was too late to grant the requested injunction against segregating the schools, since by the time his court heard the case, segregation was a *fait accompli*. The Louisiana Supreme Court also delayed *Dellande*, which had been appealed from a November 1878 local court decision, until after the 1879 state constitutional convention had been able to meet and repeal the integrationist provision in the previous constitution. In May 1881 Justice Poche announced that repeal made the case, which rested solely on the state constitution, since *Bertonneau* had stripped away the Fourteenth Amendment contention, moot. Further, even if the case had been live, the court would not have issued the mandamus, for the 1868 constitution, the justice claimed in a blatant misreading, did not guarantee integration, but re-

quired school boards to set up segregated black schools. In light of the quality of the reasoning, it is evident why the Louisiana Supreme Court chose not to publish either *Trevigne* or *Dellande*.

70. Indiana blacks first attempted to get the US Attorney General to take over the case, and US Senator Oliver P. Morton (R, Ind.) introduced a Senate resolution to that effect, but it was apparently never acted on by Congress or the Grant Administration. The decision was so obviously erroneous that Carter's lawyer produced an elaborate brief arguing for a rehearing, which Buskirk brushed off in a one-sentence opinion. These two efforts may have distracted Carter's backers – most of the money for the case seems to have been raised in Indianapolis – and so reduced their funds that they could not carry it to the US Supreme Court, as they had publically stated that they intended to do. See *Indianapolis Journal*, 9, 12, 15, 16, 23, Dec. 1874; *Indianapolis News*, 21 Dec. 1874. The other two cases in which appeals to the highest court were planned were *Bertonneau* and *Gazaway*. That the latter was definitely abandoned for financial reasons is pointed out in *Cleveland Gazette*, 17 Jan., 21 Feb. 1884, 23 Jan. 1886; *Springfield (Ohio) Republic*, 2 Mar. 1887.

71. Including Pennsylvania. See *Brown* v. *Williamson*.

72. See *The West Chester and Philadelphia Railroad Co.* v. *Miles*, 55 Pa. 209 (1867). The Pennsylvania legislature passed a public accommodations integration law before the state supreme court decision in *West Chester*, but though it took note of the law, the court rested its decision on the state of the law at the time suit was brought, and delivered a sweeping approval of separate but equal which then became a precedent in other states.

73. 10 *Weekly Notes of Cases* (Pennsylvania) 156–60 (1881). The Republican *Meadville Crawford County Journal*, 13 May 1881, predicted 'a great celebrity' for Church's opinion and foresaw that it would be upheld on appeal by the state and national supreme courts. On Church, see A. D. Harlan, *Pennsylvania Constitutional Convention, 1872 and 1873, Its Members and Officers and the Result of Their Labors* (Philadelphia: Inquirer Book and Job Print, 1873), 44; no author, *The Biographical Encyclopedia of Pennsylvania in the Nineteenth Century* (Philadelphia: Galaxy Publishing Co., 1874), 109; Samuel P. Bates, *Our County and Its People: A Historical and Memorial Record of Crawford County, Pennsylvania* (n.p.: W. A. Fergusson and Co., 1899), 1876.

74. Brown, 'Pennsylvania and the Rights of the Negro, 1865–1887', *Pennsylvania History*, 28 (Jan. 1961), 55–6.

75. *Strauder* v. *West Virginia*, 100 US 303; *Ex Parte Virginia*, 100 US 339; and *Ex Parte Siebold*, 100 US 371. For an example of anti-racist optimism on

legal trends, see, e.g., *Louisville Commercial*, 12 Dec. 1881. On Strong, see Stanley I. Kutler, 'William Strong', in Leon Friedman and Fred L. Israel, *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions* (New York: Chelsea House, 1969), II, 1153–61. On the background of this fascinating case, see Stephen Cresswell, 'The Case of Taylor Strauder', *West Virginia History*, 44 (1983), 193–211.

76. 100 US 303, 307–8, emphasis supplied. Note that Harlan included this passage in his dissent in *Plessy*, 16 Sup. Ct. 1138, 1145. For a prediction that the Court would interpret the Fourteenth Amendment as requiring school integration, see D. S. Spear, 'The Law of Extradition', *The Independent*, 11 May 1882, quoted in plaintiff's brief in *King*, p. 28.

77. *The Civil Rights Cases*, 109 US 3 (1883). See the gloss on *The Civil Rights Cases* in Albion Tourgee, 'Brief for Plaintiff in Error', 24, in the National Archives file on *Plessy*. I am thankful to Otto H. Olsen for sending me a copy of this file. In response to that decision, eighteen northern states passed laws at least formally guaranteeing equal access to public accommodations for blacks, another indication of the decline since the 1860s of the controversiality of black rights' issues. See Franklin Johnson, *The Development of State Legislation Concerning the Free Negro* (New York: Arbor Press, 1918), 31. The passage of these laws probably undermined President Chester Arthur's call for a new national law to replace the 1875 statute. See *New York Weekly Tribune*, 5 Dec. 1883, p. 10.

78. 26 Kans. 1, 18–23 (1881). On Valentine, see 3 Kans. L. J. 353 (1886); Henry Inman, 'The Supreme Court of Kansas', *The Green Bag*, 4 (1892), 338. The curious dissent at pp. 23–4 by future US Supreme Court justice David J. Brewer, the only dissenting opinion rendered among 130 cases in volume 26 of the *Kansas Reports*, admitted that 'classification by color may be unreasonable', but declared that in this instance, courts should defer to legislative power and school board authority. Since, as a US Supreme Court justice, Brewer was a most forceful advocate of judicial supremacy, ever willing to interpose the contract and due process clauses as bulwarks against legislative interference with property rights, this invocation of judicial self-restraint is difficult to credit at face value. That one of Brewer's first opinions on the US Supreme Court, *Louisville, New Orleans, and Texas Railway* v. *Mississippi*, 133 US 587 (1890) switched off the track of *Hall* v. *DeCuir* to uphold Mississippi's Jim Crow railroad car law as not interfering with interstate commerce, provides some insight into Brewer's racial values. On Brewer, see Arnold M. Paul, 'David J. Brewer', in Friedman and Israel, *Justices of the Supreme Court*, II, 1515–34.

79. *Batavia Clermont Sun*, 4 May 1881; *Cincinnati Daily Enquirer*, 29 Apr. 1881. When Vines attempted to register his children Buntin told a school board member who was present that he 'was not teaching darkies. For that he could not posibly [*sic*] Stand [*sic*] the odor as hot as the weather was.' Records of Case no. 2981, 1880 term, and no. 1557, Feb. 1882 term, US Circuit Court, Southern District of Ohio, in Federal Records Center, Chicago. Baxter dismissed the charges against the district and township trustees because, even though they defeated a motion to fire Buntin and hire someone who would teach blacks, they had instructed him to accept Vines's children.

80. The facts on Baxter are from *Cincinnati Daily Commercial*, 21, 24 Jan., 28 Feb. 1881; *Diary of Thomas Bragg, January 3, 1861 to May 15, 1862*, in Southern Historical Collection, University of North Carolina Library, entries of November 28–9, 1861; John Preston Arthur, *Western North Carolina: A History (From 1730 to 1913)* (Raleigh: Edwards and Broughton, 1914), 368–9, 397; John H. Wheeler, *Reminiscences and Memoirs of North Carolina and Eminent North Carolinians* (Columbus, Ohio: Columbus Printing Works, 1884), 410; Clarence W. Griffin, *History of Old Tryon and Rutherford Counties, North Carolina, 1730–1936* (Asheville, North Carolina: The Miller Printing Co., 1937), 88, 228, 243, 253, 302, 318–19, 346–7, 377; John W. Moore, *History of North Carolina* (Raleigh: Alfred Williams and Co., 1880), II, 95; Oliver P. Temple, *Notable Men of Tennessee From 1833 to 1875* (New York: The Cosmopolitan Press, 1912), 66–74; Charles A. Kent, *Memoir of Henry Billings Brown* (New York: Duffield and Co., 1915), 26. Those on Harlan are from Lewis Isaac Maddocks, 'Justice John Marshall Harlan: Defender of Individual Rights', (unpublished Ph.D. thesis, Ohio State University, 1959), 2–47; Henry J. Abraham, 'John Marshall Harlan: The Justice and the Man', 46 *Kentucky L. J.* 448–74 (1958); Alan F. Westin, 'The First Justice Harlan: A Self-Portrait from His Private Papers', ibid. 321–66; David G. Farrelly, 'Harlan's Formative Period: The Years Before the War', ibid. 367–406; Alan F. Westin, 'John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner', 66 *Yale L. J.* 637–710 (1957).

Born in Virginia and brought to live at James Harlan's house when he was 8 years old, the very light-skinned, blue-eyed 'Colonel' Robert Harlan was allowed to migrate to California, while still a 'slave', and he amassed a fortune during the gold rush, which he invested in Cincinnati real estate and Kentucky horseflesh. Since John Marshall remained very active in politics and patronage matters while on the bench, and since Robert held numerous patronage posts, was twice a delegate to Republican

national conventions, and was one of the first midwestern blacks nominated for a state legislature, it is difficult to believe that the two had no contact after 1870, and interesting to speculate on the direct or indirect effect that Robert may have had on his half-brother's attitudes on race relations. Robert's lineage was no secret. 'Colonel Harlan, on the paternal side, is a son of one of the best Kentucky families', the *Cincinnati Daily Gazette*, 15 Oct. 1881, commented casually in an editorial. For other facts on Robert Harlan, see *Cleveland Gazette*, 30 Jan., 1 May 1886, 17 Sept. 1887; *Washington People's Advocate*, 10 Jan., 7 Aug. 1880; and Paul McStallworth, 'Robert Harlan', in Rayford W. Logan and Michael R., Winston, eds., *Dictionary of American Negro Biography* (New York: W. W. Norton and Co., 1982), 287–8.

81. *Springfield* (Ohio) *Daily Republic*, 4 Nov. 1882. Harlan's metamorphosis from a pro-slavery stance to that of the blacks' leading judicial protector has often been noted, for instance, in Westin, 'Transformation of a Southerner'. Baxter, who in addition to his liberal school segregation decisions ordered a Kentucky jury to fine a town marshall who, after breaking up an interracial altercation, had shot a fleeing black man in the back, apparently went through a similar change. For the incident, see *Owensboro Messenger*, 25 Oct. 1882.

82. The jury hung and was dismissed, and the case was apparently not retried. *Buntin* in effect overruled *Garnes* on the question of whether excluding a person from the school or schools in his district was constitutional. Consequently, the gloss on the case in Riegel, 'Persistent Career of Jim Crow', 29, is misleading.

83. Having lived in the North Carolina and Tennessee mountains all his life, Baxter must have known that his instruction would have compelled widespread school integration in those areas, if blacks there filed cases similar to *Buntin*. He was, in effect, ordering the integration of the area of his birth and residence. Unfortunately, blacks in those or similar areas brought no suits at the time, so far as I know.

84. In a Springfield, Ohio case decided eight months after *Buntin*, the school board attorneys went into considerable detail to prove to Judge Baxter that some white children had to walk even further than the black plaintiff's. *Springfield Daily Republic*, 4 Nov. 1882.

85. Italics supplied. Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown and Co., 1880), 230–1, and the 1898 edition of the same book, 255. Similarly, see Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power*

*of the States of the American Union*, 4th edn. (Boston: Little Brown, & Co., 1878), 490 n., and the 1883 and 1890 editions, 483–4 n., 481–2 n., where the wording is unchanged. A writer for the prestigious *American Law Register* in 1891 believed that Shaw's dictum in *Roberts* that law cannot change prejudice that not been followed in cases after 1868, which had been decided 'upon entirely different grounds . . .' D. H. Pingrey, 'A Legal View of Racial Discrimination', 30 *Am. L. Reg.* (n. s.) 69–105 (1891).

86. 16 Sup. Ct. 1138, 1141. Interestingly enough, Brown barely missed direct involvement in *Workman* and its sequels. Appointed to the local court bench in early 1868, Brown as the Republican nominee for that judgeship, lost a November 1868 election to his partisan opponent in securely Democratic Detroit. When the Detroit school board refused to register blacks or put them into racially separate classrooms, and then denied that it was engaging in deliberate discrimination, claiming that there were too few seats in the schools for all the children to be accommodated, the state Supreme Court, which had original jurisdiction in mandamus cases, sent the lead case (*Wood*) back to Wayne County for a trial on the facts. So far as I have been able to tell, Brown did not express any opinions on school segregation at this time. Since GOP leaders in Detroit at the time were pretty solidly integrationist, it is quite possible that Brown would not have issued the series of procedural rulings, adverse to the blacks and decisive in the case, that his judicial successor did. On Brown, see the pungent sketch by Charles A. Kent, *Memoir of Henry Billings Brown* (New York: Duffield and Co., 1915).

87. 16 Sup. Ct. 1138–43. Brown argued that if segregation in schools, which he called the 'most common instance' of legal racial separation, was legitimate, then, by analogy, so was a state-imposed policy of Jim Crow on railroad cars. As indications of what constituted a definition of reasonable action under the Fourteenth Amendment, Brown cited not only court decisions, but laws. He was as careful not to mention any statutes mandating integration, which might have been taken as evidence that many thought segregation unreasonable, as he was not to discuss court cases striking down segregation practices, but at the same time, he did not deny the existence of such laws and decisions, and his statements were precise, if rather obviously disingenuous.

88. 16 Sup. Ct. 1138, 1148. Harlan obviously meant to include *Roberts* here, but he did not say so specifically.

89. Ibid., at 1143.

90. Ibid., at 1146.

91. Ibid., at 1145–8.

92. Cf. White, *American Judicial Tradition*, 140. Ibid. 129–45, and especially 393 n. 20, is the most accessible tertiary version of the conventional defence of Harlan's opinion in *Cumming*.

93. The growth of equal protection law in the twentieth century has, of course, multiplied the tests, subtle distinctions, and sophistication of the arguments. (Law professors have to write *something*.) For an introduction, see Lawrence H. Tribe, *The Constitutional Protection of Individual Rights: Limits on Governmental Authority* (New York: Foundation Press, 1978), 991–1136.

94. That there were no blacks on the 25-member Richmond County school board apparently was not thought important as a token of bad faith, for it was never mentioned in the briefs or opinions at any stage of the lawsuit. The 'good faith' phrase also had overtones of racial hostility, and the second and third tests in the text undoubtedly overlapped in the judges' minds.

95. Rightly heralded for his forceful, eloquent dissents in *The Civil Rights Cases, Plessy, Berea College* v. *Kentucky* (211 US 45 (1908)), and many civil liberties cases, Harlan was less staunch in protecting black political rights and in disregarding minor technicalities in order to safeguard blacks' civil liberties against community prejudice than is sometimes recognized. Although he dissented (along with Brewer and Brown!) in *Giles* v. *Harris* (189 US 475 (1903)), the Alabama disfranchisement case, he joined his brethren in refusing to outlaw schemes to undermine the Fifteenth Amendment in cases from South Carolina, Mississippi, and Virginia. See *Mills* v. *Green*, 159 US 651 (1895), *Williams* v. *Mississippi*, 170 US 213 (1898), *Jones* v. *Montague*, 194 US 147 (1904), and *Selden* v. *Montague*, 194 US 153 (1904). In a series of 13 cases involving the exclusion of blacks from juries, Harlan, as Westin noted, stuck with the majority in every case, often writing the opinion, and usually refusing to overthrow convictions by all-white juries. Perhaps the most outrageous, in modern eyes, was *Wood* v. *Brush*, 11 S. Ct. 738 (1891). See Westin, 'Transformation of a Southerner', 686.

96. In this, as in many other respects, the wise advice of Howard Jay Graham and James Willard Hurst has not been followed. See Graham, *Everyman's Constitution* (New York: W. W. Norton and Co., 1968), 247; Hurst, 'Old and New Dimensions in American Legal History', *American Journal of Legal History*, 23 (1979), 1–20.

# APPENDIX: TABLES 1–8

*Table 1: Alphabetical Listing of Cases on Racial Discrimination in Schools, 1834–1903**

1. *Allen* v. *Davis*, 10 WNC 156 (1881).
2. *Baas (or Bass)* v. *Jackson Township, Pickaway County, Ohio (Cleveland Gazette*, 7 June 1884).
3. *Bertonneau* v. *Board of Education of New Orleans*, 3 Fed. Case No. 1361 (1878).
4. *Bibb* v. *Alton*, 54 NE 421 (1899), 193 Ill. 309 (1901), 209 Ill. 461 (1904), 221 Ill. 275 (1906), 233 Ill. 542 (1908).
5. *Brown* v. *Williamson*, 30 Legal Intelligencer 406 (1873).
6. *Chase* v. *Stephenson*, 71 Ill. 383 (1874).
7. *Cisco* v. *School Board*, 161 NY 598 (1900).
8. *Clark* v. *Board of Directors*, 24 Iowa 266 (1868).
9. *Claybrook* v. *Owensboro*, 16 Fed. Rep. 297 (1883); 23 Fed. 634 (1884).
10. *College Hill* v. *Hunter*, 2 Cir. Ct. 557 (1887); 16 N.E. 373 (1888).
11. *Commonwealth* v. *West Chester*, 4 Pa. Dist. Reports 314 (1895).
12. *Cory* v. *Carter*, 48 Ind. 327 (1874).
13. *Cumming* v. *Richmond Co.*, 103 Ga. 641, 175 US 528 (1899).
14. *Dallas* v. *Fosdick*, 40 How. Pr. 249 (1869).
15. *Daniel* v. *South Topeka*, 4 Kans. Law Journal 329 (1887), lower court.
16. *Davenport* v. *Cloverport*, 72 Fed. Rep. 689 (1896).
17. *Dawson* v. *Lee, Lee* v. *Hill*, 83 Ky. 49 (1885).
18. *Dellande* v. *New Orleans*, 33 La. 1469 (1881) and unpub. op., case no. 7500, in La. Sup. Ct. Archives.
19. *Dietz* v. *Easton*, 13 Abb. (NS) 159 (1872).
20. *Dove* v. *Keokuk, Iowa*, 41 Iowa 689 (1875).
21. *Eakins* v. *Eakins*, 20 SW 285 (1892).
22. *Eastern and Western School District* v. *Cincinnati*, 19 Oh. 178 (1850).
23. *Garnes* v. *McCann*, 21 Oh. State 198 (1871).
24. *Gazaway* v. *White* (CCSD Ohio, 1882, case no. 3200).
25. *Gibson* v. *Oxford, Ohio*, 16 NE 373 (1888).
26. *Graham* v. *Clermont County, Ohio*, US Commissioner, Cincinnati, 1873, reported in *San Francisco Pacific Appeal*, 29 June 1873.
27. *Gregory* v. *Washington, D.C.* (local court, reported in *Washington People's Advocate*, 17 Dec. 1881).
28. *Harper* v. *Wickes* (local court, Orleans parish, La., 1877, reported in *New Orleans Daily Picayune*, 11 Nov. 1887).
29. *Jackson* v. *Felicity, Ohio* (reported in *Cleveland Gazette*, 12 Jan. 1889).

30. *Johnson* v. *Welch* (Supreme Court, Kings County, NY, 1875, reported in *Brooklyn Times*, 13 Sept. 1875).
31. *Jones* v. *McProud*, 64 Pac. 602 (1901) (Kansas Sup. Ct.).
32. *Kaine* v. *Manaway*, 101 Pa. 490 (1882).
33. *Kentucky* v. *Ellis* (CC Ky. (1882), reported in *Louisville Daily Commercial*, 11 Apr. 1882).
34. *King* v. *Gallagher*, 93 NY 438 (1883).
35. *Knox* v. *Independence, Kansas*, 45 Kans. 154 (1891).
36. *Lane* v. *Baker*, 12 Ohio 238 (1843).
37. *Lehew* v. *Brummell*, 103 Mo. 546 (1890).
38. *Lewis* v. *Cincinnati*, 1 Weekly Law Bulletin 139 (1876).
39. *Lewis* v. *Henley*, 2 Ind. 332 (1850).
40. *Longress* v. *Quincy, Ill.*, 101 Ill. 308 (1882).
41. *McCullom* v. *Xenia, Ohio* (local court, reported in *Cleveland Gazette*, 5 Dec. 1887).
42. *Maddox* v. *Neal*, 45 Ark. 121 (1885).
43. *Marshall* v. *Donovan*, 73 Ky. 681 (1874).
44. *Martin* v. *Paw Paw, W. Va.* 26 SE 348 (1896).
45. *Mitchell* v. *Gray*, 93 Ind. 303 (1884).
46. *Nelson* v. *Springfield, Ohio* (local court, reported in *Springfield, Ohio Daily Republic*, 4 Oct. 1886).
47. *Ottawa, Kans.* v. *Tinnon*, 26 Kans. 1 (1881).
48. *Norman* v. *Boaz, Watson* v. *Boaz*, 4 SW 316 (1887).
49. *Oliver* v. *Grubb*, 85 Ind. 213 (1882).
50. *Peair* v. *Upper Alton, Ill.*, 127 Ill. 613 (1889).
51. *People* v. *McFall*, 26 Ill. App. 319 (1888).
52. *Pierce* v. *Burlington, New Jersey*, 46 NJL 76 (1884).
53. *Pindall* v. *Boston* (local court, reported in *Liberator*, 10 Nov. 1854).
54. *Polke* v. *Harper* 5 Ind. 241 (1854).
55. *Porter* v. *Kingfisher Co., Okla.*, 51 Pac. 741 (1898).
56. *Puitt* v. *Gaston County, N.C.*, 94 NC 709 (1884).
57. *Reid* v. *Eatonton, Ga.*, 80 Ga. 758 (1888).
58. *Reynolds* v. *Topeka, Kans.*, 72 Pac. 274 (1903).
59. *Riggisbee* v. *Durham, N.C.*, 94 NC 800 (1896), *Markham* v. *Durham*, 2 SE 40 (1887).
60. *Ringgold* v. *New Richmond, Ind.* (state circuit ct., reported in *Cleveland Gazette*, 6 Apr. 1889).
61. *Roberts* v. *Boston*, 5 Cush. 198 (1849).
62. *Scott* v. *Cox* (CCSD, Ohio, 1881, reported in *Cincinatti Daily Gazette*, 22 Oct. 1881).
63. *Smith* v. *Keokuk, Iowa*, 40 Iowa 518 (1875).
64. *Somerset, Ky.* v. *Trustees of Col. School District*, 35 SW 549 (1896).
65. *Stewart* v. *Southard*, 17 Oh. 402 (1848).
66. *Stoutmeyer* v. *Duffy*, 7 Nev. 342 (1872).
67. *Taylor* v. *Centralia, Ill.* (local ct., reported in *Alton Sentinel-Democrat*, 7 Oct. 1897).

68. *Tolbert and Willis* v. *Yellow Springs, Ohio* (local ct., reported in *Springfield Daily Republic*, 21 Dec. 1887).
69. *Townsend* v. *Richmond, Ind.* (local ct., reported in *Cincinnati Commercial*, 19 Jan. 1881).
70. *Trevigne* v. *New Orleans* (Case No. 6832, unreported, in La. Sup. Ct. Archives, 1879).
71. *U. S.* v. *Buntin*, 10 Fed. 730 (1882).
72. *Van Camp* v. *Logan, Ohio*, 9 Oh. St. 406 (1858–9).
73. *Van Hendricks* v. *Woodstown, N.J.*, discussed in 3 NJLJ 168 (1880).
74. *Vines* v. *Cruse* (CCSD, Ohio, 1881, reported in *Cincinnati Commercial*, 27 Nov. 1880).
75. *Ward* v. *Flood*, 48 Cal. 36 (1874).
76. *Williams* v. *School District No. 6, Hamilton Co., Ohio*, Wright's Reports 578 (1834), (Ohio Supreme Court).
77. *Williams* v. *Troy, N.Y.* (local court, 1863, discussed in Mabee, *Black Education in New York*, 194).
78. *Wood* v. *Detroit* (local court, reported in *Detroit Advertiser and Tribune*, 20 Dec. 1869).
79. *Workman* v. *Detroit*, 18 Mich. 400 (1869).
80. *Wysinger* v. *Crookshank*, 82 Cal. 588 (1890).
81. – – v. *Lockwood, Ohio* (local court, reported in *Cleveland Gazette*, 21 Nov. 1891).
82. – – v. *Dublin, Ind.* (local court, reported in *Indianapolis News*, 26 Jan. 1874).

* 'State ex rel.', 'Commonwealth ex rel.' 'Board of Education', and similar locations have been dropped wherever possible in order to standardize the form of the citations and emphasize the names of the plaintiffs and defendants.

*Table 2. The Breakdown of the Reconstruction Synthesis: Time Patterns and Track Record for All Known Nineteenth-Century School Racial Discrimination Cases*

| | Winner | | |
|---|---|---|---|
| Period | Black | Anti-Black | Unknown |
| 1830–9 | 1 | 0 | 0 |
| 1840–9 | 2 | 0 | 0 |
| 1850–9 | 2 | 4 | 0 |
| 1860–9 | 2 | 3 | 1 |
| 1870–9 | 6 | 10 | 2 |
| 1880–9 | 23 | 8 | 3 |
| 1890–1903 | 5 | 9 | 2 |
| Total | 41 | 34 | 7 |

*Table 3. The Pattern of Cases by States, Winners, and Black Percentages*

| State | Winner | | | % Black* |
|---|---|---|---|---|
| | Black | Anti-Black | Unknown | |
| Arkansas | 1 | 0 | 0 | 27 |
| California | 1 | 1 | 0 | 1 |
| D.C. | 0 | 0 | 1 | 34 |
| Georgia | 0 | 2 | 0 | 47 |
| Illinois | 4 | 1 | 1 | 2 |
| Indiana | 3 | 3 | 1 | 2 |
| Iowa | 3 | 0 | 0 | 1 |
| Kansas | 3 | 1 | 1 | 4 |
| Kentucky | 3 | 5 | 0 | 17 |
| Louisiana | 0 | 3 | 1 | 52 |
| Massachusetts | 0 | 2 | 0 | 1 |
| Michigan | 1 | 1 | 0 | 1 |
| Missouri | 0 | 1 | 0 | 6 |
| Nevada | 1 | 0 | 0 | 1 |
| New York | 0 | 6 | 0 | 1 |
| New Jersey | 1 | 1 | 0 | 3 |
| North Carolina | 2 | 0 | 0 | 35 |
| Ohio | 14 | 5 | 2 | 3 |
| Oklahoma | 1 | 0 | 0 | 7 |
| Pennsylvania | 3 | 1 | 0 | 2 |
| West Virginia | 0 | 1 | 0 | 5 |
| Total States = 21 | | | | |

* At nearest US census to cases.

*Table 4. The Pattern of Cases by Regions, Outcomes, and Percent of Total US Black Population in Region*

| Region | Winners | | | percentage of Cases | percentage of US Blacks in region 1880 |
|---|---|---|---|---|---|
| | Black | Anti-Black | Unknown | | |
| South | 6 | 11 | 2 | 23 | 90 |
| N. England | 0 | 2 | 0 | 2 | 2 |
| Mid-Atlantic | 4 | 8 | 0 | 15 | 3 |
| Midwest | 28 | 12 | 5 | 55 | 5 |
| West | 3 | 1 | 0 | 5 | 0 |

*Table 5. Plaintiffs, Issues, Contentions, Court Levels, and Winners.*

| | Winner | | |
|---|---|---|---|
| | Black | Anti-Black | Unknown |
| | Panel A: Plaintiffs | | |
| Black | 35 | 30 | 7 |
| White | 6 | 4 | 0 |
| | Panel B: Issues | | |
| Integration | 30 | 25 | 6 |
| Sep. but Eq. | 4 | 1 | 0 |
| Racial Identity | 2 | 2 | 0 |
| Sep. Tax | 5 | 6 | 0 |
| Unknown | 0 | 0 | 1 |
| | Panel C: Court Level* | | |
| Local | 20 | 36 | 6 |
| State Intermediate | 1 | 3 | 0 |
| State Highest | 28 | 20 | 0 |
| Federal Dist. or Chancellor | 5 | 4 | 1 |
| Federal Supreme | 0 | 1 | 0 |
| | Panel D: Basis of Contention | | |
| US Constitution | 9 | 24 | 2 |
| State Constitution | 12 | 3 | 0 |
| State Law | 20 | 5 | 2 |
| Unknown | 0 | 2 | 3 |

* number exceeds 82, because a decision is counted more than once if it is appealed from one level to another

*Table 6. Hired Guns and Vestal Virgins? Partisan Affiliations of Lawyers and Judges for Each Side in School Racial Discrimination Cases*

| Status | Party | | | |
|---|---|---|---|---|
| | Rep. | Dem. | Unknown | Total |
| | Panel A: Percentage for Blacks, Northern Cases | | | |
| Lawyers | 63 | 30 | 46 | 49 |
| Judges | 66 | 31 | 69 | 57 |
| Lawyers and Judges | 65 | 30 | 55 | 53 |
| | Panel B: Percentage for Blacks, Southern Cases | | | |
| Lawyers | 93 | 25 | 46 | 51 |
| Judges | 30 | 17 | 33 | 22 |
| Lawyers and Judges | 68 | 19 | 42 | 36 |
| | Panel C: Numbers For and Against Blacks, Northern Cases | | | |
| Lawyers | 57/33* | 13/31 | 39/48 | 109/112 |
| Judges | 75/38 | 22/51 | 40/18 | 137/105 |
| Lawyers and Judges | 132/71 | 35/80 | 79/66 | 246/217 |
| | Panel D: Numbers For and Against Blacks, Southern Cases | | | |
| Lawyers | 14/1 | 4/12 | 17/20 | 35/33 |
| Judges | 3/7 | 8/39 | 5/20 | 16/56 |
| Lawyers and Judges | 17/8 | 12/51 | 22/30 | 51/89 |

* e.g., 57 Northern Republican lawyers for blacks, 33 against.

*Table 7. Chi-Square Significance Tests for Party, Status, and Region*

| Description of Subtable | Chi-Square Value | Significance Level |
|---|---|---|
| Panel A; Importance of Party | | |
| both statuses, both regions | 60.7 | <.01 |
| both statuses, both regions (U)* | 61.1 | <.01. |
| both statuses, north | 35.2 | <.01 |
| both statuses, north (U) | 35.4 | <.01 |
| both statuses, south | 19.4 | <.01 |
| both statuses, south (U) | 19.8 | <.01 |
| lawyers, both regions | 23.7 | <.01 |
| lawyers, both regions (U) | 25.5 | <.01 |
| lawyers, north | 13.5 | <.01 |
| lawyers, north (U) | 14.7 | <.01 |
| lawyers, south | 14.8 | <.01 |
| lawyers, south (U) | 15.5 | <.01 |
| judges, both regions | 35.1 | <.01 |
| judges, both regions (U) | 41.1 | <.01 |
| judges, north | 21.9 | <.01 |
| judges, north (U) | 27.0 | <.01 |
| judges, south | 0.9 | n.s.** |
| judges, south (U) | 2.2 | n.s. |
| Panel B: Importance of Status (Lawyers or Judges) | | |
| both parties, both regions (U) | 0.1 | n.s. |
| both parties, both regions | 2.8 | n.s. |
| both parties, north (U) | 2.5 | n.s. |
| both parties, north | 0.1 | n.s. |
| both parties, south (U) | 12.9 | <.01 |
| both parties, south | 13.7 | <.01 |
| Republicans, both regions | 0.4 | n.s. |
| Republicans, north | 0.2 | n.s. |
| Republicans, south | 11.1 | <.01 |
| Democrats, both regions | 0.2 | n.s. |
| Democrats, north | 0.0 | n.s. |
| Democrats, south | 0.5 | n.s. |
| Panel C: Importance of Region | | |
| both statuses, both parties | 10.6 | <.01 |
| both statuses, both parties (U) | 12.0 | <.01 |
| lawyers, both parties | 0.3 | n.s. |
| lawyers, both parties (U) | 0.1 | n.s. |
| judges, both parties | 19.7 | <.01 |
| judges, both parties (U) | 26.3 | <.01 |
| lawyers, Republican | 5.3 | <.05 |
| lawyers, Democratic | 0.1 | n.s. |
| judges, Republican | 5.2 | <.05 |
| judges, Democratic | 2.9 | n.s. |

* (U) indicates that persons whose party affiliations are unknown were included.

** n.s. = not statistically significant at 0.05 level.

*Table 8. Some Demographic Traits of the Communities that Produced Cases*

| Number of Cases | |
|---|---|
| **Panel A: County Population** | |
| >50,000 | 35 |
| 20,000 – 49,999 | 29 |
| 10,000 – 19,999 | 12 |
| <10,000 | 6 |
| **Panel B: Percentage Urban of County Population** | |
| <10 | 18 |
| 10 – 19 | 4 |
| 20 – 29 | 5 |
| 30 – 39 | 12 |
| 40 – 49 | 6 |
| 50 – 59 | 7 |
| 60 – 69 | 5 |
| 70 – 79 | 4 |
| 80 – 89 | 5 |
| 90 + | 16 |
| **Panel C: Absolute Number of Blacks in Population** | |
| >10,000 | 10 |
| 5000 – 9999 | 7 |
| 2000 – 4999 | 22 |
| 1500 – 1999 | 12 |
| 1000 – 1499 | 10 |
| 500 – 999 | 9 |
| <500 | 12 |
| **Panel D: Percentage of Blacks in Population** | |
| <3 | 26 |
| 3 – 5 | 29 |
| 6 – 10 | 6 |
| 11 – 19 | 9 |
| 20 – 49 | 11 |
| >50 | 1 |