

# LEGAL THEORY

## "THE SUPREMACY OF EQUAL RIGHTS": THE STRUGGLE AGAINST RACIAL DISCRIMINATION IN ANTEBELLUM MASSACHUSETTS AND THE FOUNDATIONS OF THE FOURTEENTH AMENDMENT

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*Resolved, That believing as we do, that special legislation, regulated by complexion or any physical differences, is anti-Republican and anti-Christian, we shall ever be found using our best exertions for the supremacy of equal rights.*<sup>1</sup>

—Resolution introduced by William C. Nell, adopted by a meeting of blacks at the Belknap Street Independent Baptist Church, Aug. 27, 1849.

### COLD OPENING: WINTER 1855

December 17, 1855, was a time for Boston abolitionists, black and white, to rejoice. "It was one of those rare days in the history of a hard

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Several friends have given me very helpful comments or advice: Les Benedict, Mary Berry, Dan Lowenstein, William Nelson, John Phillip Reid, Doug Rivers, Mark Tushnet, and Bill Wiecek. Their cooperation does not necessarily imply agreement with what I did not change in the paper. I also thank a number of people for alerting me to relevant sources: for R. Madsen's unpublished paper regarding segregation in the Albany, New York, public schools, Jack Reynolds; see *supra* note 259; for leads and materials regarding the Nantucket effort to integrate schools, Pat Church, clerk of the Nantucket Superior Court, Amy Jenness, a reporter for the *Cape Cod Times*, Isabel Kaldenbach-Montmayor, and Barbara Linebaugh White; see *supra* notes 96-105.

<sup>1</sup> Printed in The (Boston) Liberator, Sept. 7, 1849, at 143, col. 1. Citations below to page numbers in *The Liberator* appear as both continuous-page and issue-page citations.

struggle," Wendall Phillips remarked, "when there was something palpable to rejoice at. Men were always asking—What has the anti-slavery agitation done? He was glad that they had this answer to make now—It has opened the schools!"<sup>2</sup>

Phillips, a Boston Brahmin lawyer, premier abolitionist orator, and quintessential American agitator, was present at a celebration at the black Southac Street Church honoring William Cooper Nell, a reticent but tenacious Garrisonian<sup>3</sup> who was one of the country's first black federal officeholders and its first black historian. Phillips paid tribute to Nell as the ideal behind-the-scenes reformer: "These causes are apt to sink, where everybody's business is nobody's business. They were none of them [at the meeting] willing to give the cheerless, disheartening toil, the unremitting industry, the hope against hope, which he has given. If he had not been the nucleus, there would have been no cause . . . ."<sup>4</sup>

Breaking the tone of high seriousness and solemn praise, Phillips added that "[h]e was glad this reform had been carried for another reason. He was tired of having Mr. Nell coming to him with his petitions."<sup>5</sup> Although the struggle for school reform had started fifteen years earlier when Nell, Phillips, William Lloyd Garrison, and two other white abolitionists signed a petition to the Boston Grammar School Committee praying for school integration, the struggle, like other reform movements, was not entirely continuous. The Garrisonians were not as responsible for the victory as they seemed to maintain. Garrison was as

<sup>2</sup> The Liberator, Dec. 28, 1855, at 207, col. 2.

<sup>3</sup> The "Garrisonians" were part of a loosely organized group that took its name from that of William Lloyd Garrison, a white abolitionist leader in Boston. Garrison's newspaper, *The Liberator*, published in Boston from 1831 to 1865, was generally considered the most uncompromising of American antislavery publications. At first a member of the American Colonization Society, which advocated the return of free blacks to Africa, Garrison became one of its harshest critics after converting to "immediatism," which called for immediate emancipation of enslaved blacks. In 1832, Garrison founded the New England Anti-Slavery Society, as the first immediatist society in the United States, and in 1833 he helped organize the American Anti-Slavery Society. See generally W. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WILLIAM LLOYD GARRISON (1963); J. THOMAS, THE LIBERATOR: WILLIAM LLOYD GARRISON (1963); R. NYE, WILLIAM LLOYD GARRISON AND HUMANITARIAN REFORMERS (1955); W. GARRISON & F. GARRISON, WILLIAM LLOYD GARRISON, 1805-1879: THE STORY OF HIS LIFE TOLD BY HIS CHILDREN (4 vols., 1885-89).

<sup>4</sup> The Liberator, Dec. 28, 1855, at 207, col. 2. On Nell, see San Francisco Elevator, Aug. 23, 1867, at 3, col. 2; Washington New National Era and Citizen, June 4, 1874, at 2, col. 4; Boston Commonwealth, quoted in San Francisco Elevator, June 27, 1874, at 3, col. 1; G. Forbes, William Cooper Nell, Ms. Am. 282 (18) (unpublished manuscript available in Boston Public Library, Rare Book and Manuscript Room); Smith, *William Cooper Nell: Crusading Black Abolitionist*, 55 J. NEGRO HIST. 182 (1970); Horton, *Generations of Protest: Black Families and Social Reform in Antebellum Boston*, 49 NEW ENG. Q. 242, 249-51 (1976). Nell graduated from the Smith School and was associated with Garrison as an apprentice on *The Liberator* in the 1830s. On Phillips as the classic agitator, see R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 135-61 (1949). Phillips anticipated Olson's enunciation of the "free rider principle" by more than a century. See M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

<sup>5</sup> The Liberator, Dec. 28, 1855, at 207, col. 2.

shocked as the state's dominant Whig Establishment when the Know-Nothing party, extensively infiltrated in Massachusetts by political anti-slavery men, suddenly swept the Whigs and Democrats from control of the city and state governments. This political victory created an overwhelming majority of racial egalitarians among the members of the 1855 General Court, as the state legislature was called. Thus, when Nell "came up with his huge budget of papers,"<sup>6</sup> the chairman of the education committee of the lower house, the former Free Soiler and future Republican Charles W. Slack of Boston, only had to "put the manifold testimony he [Nell] brought into the shape of a 'Report,' and present it to the House."<sup>7</sup> In a dozen years previous, similarly stringent bills never emerged from committee. The 1855 bill, banning any official from excluding a child from any school because of race or color, passed the house on a voice vote with only about half a dozen "nays."<sup>8</sup> It apparently passed the senate without dissent.<sup>9</sup> Garrison saw the triumph over racial segregation in the Boston primary schools as a harbinger: "[It was] . . . the beginning of the end—the prophecy of the ultimate extinction of complexional caste throughout the land."<sup>10</sup> Yet, Garrison's prophecy was only partially fulfilled in the nineteenth century, and it has not been fully realized 130 years later.

## II. THE MODERN SIGNIFICANCE OF THE ANTEBELLUM STRUGGLE FOR EQUAL RIGHTS

Why should lawyers and legal scholars today care about what happened in America's first well-documented struggle over racial segregation? First, in the revival of constitutional theorizing during the 1970s and 1980s, and in the increasingly bitter debate over the proper role of the courts in the American system of government, the topic of the intent of the framers, particularly that of the framers of the fourteenth amend-

<sup>6</sup> *Id.*

<sup>7</sup> Boston Evening Transcript, Apr. 11, 1885, at 4, col. 1. Slack did not exaggerate about the way his report was put together. The handwritten draft in the Massachusetts State Archives is replete with pasted-in segments of printed documents from the earlier years of the campaign, which Nell probably supplied. On Slack, who was a member of the liberal "Bird Club" and editor of its mouthpiece, *The Boston Commonwealth*, see Bean, *Puritan Versus Celt, 1850-1860*, 7 NEW ENG. Q. 70, 78 (1934); and D. BAUM, *THE CIVIL WAR PARTY SYSTEM: THE CASE OF MASSACHUSETTS, 1848-1876*, at 56, 136-37, 166, 172 (1983).

<sup>8</sup> For discussion on the debate and passage of the bill in the Massachusetts house, see Boston Daily Advertiser, Apr. 4, 1855, at 2, col. 5; Boston Daily Atlas, Apr. 4, 1855, at 2, col. 1; Boston Post, Apr. 4, 1855, at 4, col. 2.

<sup>9</sup> For discussion of the passage of the bill in the Massachusetts senate, see 2 H. WILSON, *HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* 640 (reprint ed. 1969) (1872); D. MENT, *Racial Segregation in the Public Schools of New England and New York, 1840-1940*, at 75 (1975) (unpublished doctoral dissertation, Columbia University) (citing Massachusetts Senate Journal 597, 612, 626, 699 (1855)).

<sup>10</sup> *The Liberator*, Dec. 28, 1855, at 207, col. 2.

ment, has been a central issue.<sup>11</sup> Some scholars, notably Raoul Berger in his 1977 book *Government by Judiciary*, have insisted that the intent of the framers is the only proper basis for judicial decisions and have read that of the founding sons of 1866 very narrowly.<sup>12</sup> Others, such as Paul Brest,<sup>13</sup> Ronald Dworkin,<sup>14</sup> Michael J. Perry,<sup>15</sup> and Mark V. Tushnet,<sup>16</sup> at least partially accept Berger's interpretation of the motives of the Reconstructionists, but reject the notion of a constitution shackled to nineteenth-century ideas.<sup>17</sup> Former Attorney General Edwin Meese III's

<sup>11</sup> For a somewhat more theoretical treatment of issues of intent, see Kousser, *Expert Witnesses, Rational Choice, and the Search for Intent*, 5 CONST. COMMENTARY 349 (Summer 1988). Of course, the Civil Rights Act of 1866 was enacted pursuant to Congress' enforcement powers under the thirteenth amendment, as the 1866 act was passed before the fourteenth amendment. Nonetheless, in the Civil Rights Act of 1870 Congress reenacted portions of the 1866 Act, including the provision at issue in *Patterson v. McLean Credit Union*, 108 S. Ct. 1419 (1988). For discussion of *Patterson*, see *infra* note 19. Thus, the Court's decision to rehear *Patterson* implicates both Reconstruction amendments. This Article is concerned mainly with the "intent" of section one of the fourteenth amendment, which states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>12</sup> R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). "[I]ntellectual honesty demands," Berger writes, "that the 'original understanding' be honored across the board—unless we are prepared to accept judicial revision where it satisfies our predilections, as is the current fashion." *Id.* at 411 (emphasis in original). Any other rationale, he continues, "perilously resembles the subordination of 'law' to the attainment of ends desired by a ruling power which was the hallmark of Hitlerism and Stalinism." *Id.* at 412. As for the scope of the amendment, he contends that "No trace of an intention by the Fourteenth Amendment to encroach on State control—for example, of suffrage and segregation—is to be found in the records of the 39th Congress." *Id.* at 18. For opposing, and, to me, more convincing views, see M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (1985); Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOR. L. REV. 45 (1980); Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1973).

<sup>13</sup> Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205 (1980).

<sup>14</sup> R. DWORKIN, LAW'S EMPIRE 360-62 (1986); Dworkin, *The Bork Nomination*, 34 N.Y. REV. BOOKS, Aug. 18, 1987, at 3; Dworkin, *Reagan's Justice*, 31 N.Y. REV. BOOKS, Nov. 8, 1984, at 27.

<sup>15</sup> M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 1, 62 (1982); Perry, *Book Review*, 78 COLUM. L. REV. 685 (1978).

<sup>16</sup> Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800-01 (1983).

<sup>17</sup> Other notable recent treatments of the issue include P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 25-26 (1982); Belz, *The Civil War Amendments To The Constitution: The Relevance Of Original Intent*, 5 CONST. COMMENTARY 115 (1988); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?* 73 CALIF. L. REV. 1484 (1985); Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1

widely-noted 1985 speech to the American Bar Association, public responses to it by Justices William J. Brennan, Jr., and John Paul Stevens, and the 1987 Senate Judiciary Committee hearings on the Supreme Court nomination of Robert H. Bork moved the controversy concerning the weight that judges should attach to the shapers' intent from law reviews to more popular forums.<sup>18</sup> The intent of the Reconstruction amendments became a further subject of controversy when, in a startling ruling in *Patterson v. McLean Credit Union*<sup>19</sup> in April 1988, a five-person conservative majority on the Supreme Court ordered a rehearing to determine whether the Civil Rights Acts of 1866 and 1870, and by inference the thirteenth and fourteenth amendments, were originally intended to ban private discrimination.<sup>20</sup> History has rarely seemed more relevant

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CONST. COMMENTARY 235 (1984); Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1981-82); O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U.L. REV. 19, 31-32 (1979); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 COLUM. L. REV. 1029, 1041-62 (1977). Robert Bork and Earl Maltz argue that the outcome in *Brown v. Board of Education*, 347 U.S. 483 (1954), can be made consistent with a belief in original intent as the prime basis for judicial decisionmaking and a judgment that the framers of the fourteenth amendment did not mean to outlaw segregation, by contending that the Supreme Court in 1954 could have concluded on the basis of experience that segregation would never be administered equally. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14-15 (1971); Maltz, *Some New Thoughts on An Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811, 849-50 (1983). The flaw in this clever twist is that only the disingenuous have ever claimed that segregation could be equal. As I point out below, Ellis Gray Loring exposed this fallacy as long ago as 1842. See *infra* notes 77-78 and accompanying text.

<sup>18</sup> Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 SO. TEX. L.J. 455 (1986) (originally delivered as an address to the American Bar Association, July 9, 1985); Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 SO. TEX. L.J. 433 (1986) (originally delivered as an address at Georgetown University, Oct. 12, 1985); Stevens, *The Supreme Court of the United States: Reflections After a Summer Recess*, 27 SO. TEX. L.J. 447 (1986) (originally delivered as an address to the Federal Bar Association, Oct. 23, 1985).

<sup>19</sup> 108 S.Ct. 1419 (1988). The decision to rehear *Patterson* has generated scholarship in various law reviews. See, e.g., Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. (1988) (forthcoming); Estridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. (1988) (FORTHCOMING); FARBER, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. (1988) (forthcoming); Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. (1989) (forthcoming); Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. (1989) (forthcoming); Sullivan, *Historical Reconstruction, Reconstructing History, and the Proper Scope of Section 1981*, 98 YALE L.J. (1989) (forthcoming).

<sup>20</sup> In its reconsideration, the Supreme Court will no doubt wish to replace Justice White's slipshod history in *Runyon v. McCrary*, 427 U.S. 160 (1976), with better documented and opposing views. See, e.g., H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW—CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 402-06, 464 (1982). In *Runyon*, Justice White begins by characterizing the Supreme Court opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883), as having been decided "almost contemporaneously with the passage of the statute [i.e., the Civil Rights Act of 1866]." *Runyon*, 427 U.S. at 192. Yet, ideologically the Court in 1883 was millennia away from the Reconstruction Congresses which passed the Civil Rights Acts of 1866 and 1870. These Congresses should be the true focus on any inquiry into the *framers'* intent.

to a current public policy debate.

Yet, the most readily available sources on the purposes of those who wrote and voted on the Reconstruction amendments yield only ambiguous conclusions. As Chief Justice Earl Warren noted in *Brown v. Board of Education* in 1954,<sup>21</sup> and as many historians and lawyers have remarked since, the debates on the floor of Congress regarding section one of the fourteenth amendment cast only a dim light on such a crucial question as whether the framers intended to outlaw school segregation.<sup>22</sup> Virtually all commentators, including Raoul Berger, who have offered the most lengthy treatment of the intent of the framers of the amendment, therefore have turned to sources outside of the *Congressional Globe*, as the *Congressional Record* was then called. Berger contends that major fourteenth amendment decisions—from *Strauder v. Virginia* in 1879<sup>23</sup> through *Brown v. Board of Education*,<sup>24</sup> *Baker v. Carr*,<sup>25</sup> and *Griswold v. Connecticut*,<sup>26</sup> and all their relatives—were wrongly decided. Fundamental to this argument are two assertions: first, that northern white public opinion was so deeply, uniformly, and unchangeably racist that the framers must have been infected by it or at least so frightened by the potential reaction of the electorate that they could not take racially liberal actions; and, second, that the abolitionists were only a fringe group espousing doctrines so extreme that they could not have affected the framers' intent. As Berger puts it, "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

<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 489-90 (1954). The literature on the subject begins with Frank & Munro, *The Original Understanding of 'Equal Protection of the Laws.'* 50 COLUM. L. REV. 131, 140-41, 148-49 (1950). Because resources regarding the intent of the framers of the Reconstruction amendments are limited, many scholars have turned to the ideology of the antislavery movement for information about the climate of opinion that may have influenced them. See J. TEN-BROEK, EQUAL UNDER LAW: THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (rev. ed. 1965); H. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOUTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1968); W. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977). This Article supplements their pathbreaking work with more direct evidence on some of the specific conceptions held by important Reconstructionists and their allies. For a similar discussion, see Finkleman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986).

<sup>23</sup> See R. BERGER, *supra* note 12, at 412 n.6 ("If effect be given to the framers' intention, the decision in *Strauder v. Virginia* [100 U.S. 303 (1879)], that Negroes must be permitted to serve as jurors, was wrongly decided.").

<sup>24</sup> See *id.* at 117-133 (discussing cases dealing with segregated schools, particularly *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

<sup>25</sup> See *id.* at 69-98 (discussing cases dealing with legislative reapportionment, particularly *Baker v. Carr*, 439 U.S. 186 (1962)).

<sup>26</sup> See *id.* at 387-96 (discussing the "natural law" tradition in Supreme Court cases, particularly in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

abolitionist ideology."<sup>27</sup>

The conflict over legal racial discrimination in antebellum Massachusetts, which was broadcast by the abolitionist press and the prestigious Boston daily newspapers and attracted attention across the country, casts doubt on Berger's assertions about northern public opinion and the connection between antislavery "radicals" and mainstream politics.<sup>28</sup> The issues of segregation in public accommodations and schools and the right to marry persons of other races were faced openly in Massachusetts in the 1840s and 1850s. In each case, abolitionist contentions that natural law and state constitutional provisions guaranteed integration and prohibited antimiscegenation laws eventually prevailed. While Massachusetts was not a "typical" northern state, the struggle for racial integration there paralleled similar events across the nation in the middle and late nineteenth century, as I shall show in the larger work of which this Article is a part.<sup>29</sup> Several of the leaders of the integration struggle in Massachusetts during the 1840s and 1850s went on to play prominent roles in the national struggle for racial equality in the 1860s and 1870s, and they, at least, earnestly believed that natural law and the fourteenth amendment required integration.

The arguments, identities, and tactics of proponents and opponents of racial discrimination should seem startlingly familiar to a late twentieth-century audience. First, nearly all the arguments employed in post-World War II battles over school integration were made in the pre-Civil War period. The issue was not so far from public concern a century

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<sup>27</sup> R. BERGER, *supra* note 12 at 10; see also *id.* at 10-16, 56-57, 91, 118, 161, 407.

<sup>28</sup> For example, as mainstream a politician as future United States Senator and Vice President Henry Wilson devoted eight front-page columns of his Free Soil party paper, the *Boston Emancipator and Republican*, to reprinting the plaintiff's brief in *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), a major segregation case handed down in Boston before schools there were integrated. See *Boston Emancipator and Republican*, Dec. 13, 1849, at 1, col. 1. For discussion of the *Roberts* decision, see *infra* note 31 and accompanying text; *infra* notes 138-40 and accompanying text.

Wilson's newspaper predicted that school segregation "will be long [a] matter of debate in this and other States, and the comprehensive view of Mr. Sumner [the plaintiff's attorney] will long be a treasure-house for other laborers to draw from." Sumner's brief received widespread recognition. After receiving acclaim for his argument from antislavery activists around the country, Sumner reprinted the brief for wider distribution, fittingly employing the black plaintiff Benjamin Roberts, a printer, for the job. *Brief of Charles Sumner, Roberts v. Boston*, 59 Mass. (5 CUSH.) 198 (1849) (pamphlet available in Boston Public Library).

<sup>29</sup> Parts of my larger project on nineteenth-century legal decisions and legislative actions on racial discrimination in public schools are already in print. See J.M. KOUSSE, DEAD END: THE DEVELOPMENT OF LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS IN NINETEENTH-CENTURY AMERICA (1986) (hereinafter J.M. KOUSSE, DEAD END); Kousser, *Separate But Not Equal: The First Supreme Court Case on Racial Discrimination in Education*, 46 J. S. HIST. 17 (1980); Kousser, *Making Separate Equal: The Integration of Black and White School Funds in Kentucky*, 10 J. INTERDISCIPLINARY HIST. 399 (1979); see also Kousser, *Before Plessy, Before Brown: The Development of the Law of Racial Integration in Louisiana and Kansas*, in TOWARDS A USABLE PAST: AN EXAMINATION OF THE ORIGINS AND IMPLICATIONS OF STATE PROTECTIONS OF LIBERTY (S. Gotlieb & P. Finkleman eds.) (forthcoming).

before *Brown* as is sometimes believed.<sup>30</sup> The enunciation of many now familiar positions at the beginning of the controversy shows that these contentions are not a function of more recent conditions, such as the growth of large urban ghettos, but that they were raised even when the number and percentage of black students proposed to be integrated were quite small. Second, the most effective opponents of integration in Massachusetts were not, as is often assumed, lower class whites, but members of the partisan and socioeconomic elite. Third, although Raoul Berger and others treat the framing of the fourteenth amendment as a fight among white people over black people's rights, in Massachusetts, blacks were fully involved protagonists in the integration struggle. As in more recent times, blacks in Boston as well as whites divided on the issues, and, then as now, segregationist whites exploited divisions in the Afro-American community for their own purposes. Fourth, the contest involved the entire political arena, not just the courts of law. Previous published accounts of the battle have concentrated largely on the 1849 *Roberts* case and therefore have misconstrued crucial elements of the story.<sup>31</sup> In a broad sense, the analysis presented here demonstrates that legal history, walled off in a separate ghetto—apart from electoral, legislative, and administrative history—is as intellectually unviable as is political history that ignores courts and lawyers. Until legal history is reintegrated into political and social history, we will not be able to understand history as it really happened. Finally, the problem of changing white racial attitudes in America persists, its history is too often misunderstood, and any light that can be thrown on it may inform the continuing struggle for a society in which all people are equal before the law.

<sup>30</sup> See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Court in *Brown* noted that "[i]n approaching the problem, we cannot turn the clock back to 1868 when the Amendment was adopted.

... We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492-93; see also Kauper, *Segregation in Public Education, The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1132 (1954). Kauper discussed briefs presented to the Supreme Court in *Brown* regarding historical intent, concluding "the appeal to history was inconclusive. . . . both because the understanding of the Congress, the states, and the framers of the Fourteenth Amendment could not be authoritatively determined, and because the status of public education at the time of the adoption of the Fourteenth Amendment furnished little occasion for considering the Amendment's impact on segregation in education." *Id.* at 1148-49 (citations omitted).

<sup>31</sup> See *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), reprinted in *JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE* 217-31 (L. Levy & D. Jones eds. 1974) [hereinafter referred to as *JIM CROW*]. *Jim Crow* reprints most of the pamphlet literature relating to the Boston struggle, but it ignores parallel events in Nantucket and movements to end other forms of racial discrimination, does not deal intensively with the political context, and is largely devoid of systematic analysis of social and ideological factors. See also Baltimore & Williams, *The State Constitutional Roots of the "Separate But Equal" Doctrine: Roberts v. City of Boston*, 17 RUTGERS L.J. 537 (1986) (covering the same terrain less intensively).

### III. THE STRUGGLE TO ABOLISH RACIAL DISCRIMINATION IN ANTEBELLUM MASSACHUSETTS

#### A. *Black Education in Boston Before 1833*

Blacks were not uniformly excluded from Massachusetts schools in the eighteenth century, and no law ever specifically banned them from the Commonwealth's educational institutions. Yet informal bars existed, and black children who entered the public schools in the years after the Revolution apparently were regularly harassed.<sup>32</sup> In 1800, therefore, a group of blacks led by Primus ("Prince") Hall petitioned the Boston Town Meeting for public money to set up a school for black children.<sup>33</sup> When the members of the Meeting refused, on the grounds that the schools were already open to all children and that a separate school for the few blacks that they expected to attend would be too expensive, Hall raised money privately from a number of wealthy whites and began a "subscription" school, requiring tuition payments, in his own home. Taught by white instructors, this private school persisted off and on, sometimes requiring tuition and sometimes providing free education, until 1806 or 1808, when public authorities appropriated 200 dollars a year to a successor school housed in the basement of the newly completed African Baptist Church.<sup>34</sup> Rent from the school room, provided either by tuition payments or philanthropical donations, subsidized the black community's first religious institution. From 1806 to 1831, the school especially benefited the church's minister, Thomas Paul, whose wife and two daughters were salaried assistants in the school and whose son Thomas Jr. received a free education there.<sup>35</sup> From 1808 to 1824, the school also provided the chief employment opportunity in the city for

<sup>32</sup> D. Jacobs, *A History of the Boston Negro From the Revolution to the Civil War* 35 (1968) (unpublished doctoral dissertation, Boston University).

<sup>33</sup> According to D. Jacobs, Hall petitioned the Massachusetts legislature for a separate school in 1787, the petition reading, in part, "our children . . . now receive no benefit from the free schools in the town of Boston . . ." D. Jacobs, *supra* note 32, at 35 (quoting H. APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 19 (1951)). The Boston School Committee's 1849 Grammar School Report, which contains a sketch of black schools in the city, does not mention the 1787 petition and states that until 1810 or 1812, blacks "were privileged to attend indiscriminately all the public schools in the town; a right which, very generally, was little availed of." Boston School Committee, *Grammar School Report* 18 (1849); see also JIM CROW, *supra* note 31, at 17-20.

<sup>34</sup> See JIM CROW, *supra* note 31, at 18-19 (School Committee Report of Aug. 1849, discussing origins of black school). The fund drive to establish the church raised money from both blacks and whites, including Wendell Phillips' father, Lt. Gov. John Phillips, and aimed from the beginning to include a schoolroom. See D. Child, *Report [to the Boston School Committee] on African Schools* (1833), quoted in G. Levesque, *Black Boston: Negro Life in Garrison's Boston, 1800-1869*, at 495-96 (1976) (unpublished doctoral dissertation, SUNY Binghamton) [hereinafter G. Levesque, *Black Boston*]. The 1849 majority report of the Grammar School Committee stated that public authorities may have begun appropriating money to the school only in 1812. JIM CROW, *supra* note 31, at 145.

<sup>35</sup> For discussion of the Paul family's role in the Boston black community, see *infra* note 259 and accompanying text.

ther black Boston professionals, as it was taught by a succession of five black schoolmasters.<sup>36</sup> After 1815, a bequest by the white merchant Abiel Smith defrayed the school's costs entirely. In subsequent years, the School Committee also established one or two small primary schools for black children aged 4 to 7 or 8.<sup>37</sup>

### B. Abolitionist Political Agitators

Abolitionists took up the cause of education for Boston blacks in the 1830s, and their course of action provides a striking refutation of the charges of contemporary critics and modern historians that the Garrisonians were racially biased, indifferent to the welfare of northern free blacks, or anti-institutionalist.<sup>38</sup> Ralph Waldo Emerson put the first charge most memorably: "The Ultra-Abolitionists . . . make it a point to love Negroes at a distance, and to hate them when they come too near."<sup>39</sup> Although more qualified, the statements of such contemporary historians as William and Jane Pease have echoed the spiteful Transcendentalist's attack. Garrisonians, the Peases concluded, "displayed a social distaste for and an underlying distrust of the individual Negroes they encountered . . . a marked race prejudice."<sup>40</sup> In his psychohistory of abolitionism, Lawrence J. Friedman charged that "covert racial antipathies," a patronizing "missionary mentality," and a "need" to perpetuate paternalistic "dependency relationship" with blacks caused white abolitionists to ignore the cultivated qualities of Nell and other middle-class

<sup>36</sup> White, *The Black Leadership Class and Education in Antebellum Boston*, 42 J. NEGRO EDUC. 34, 510-11 (1973). A white man served for three years during the period.

<sup>37</sup> JIM CROW, *supra* note 31, at 17-20.

<sup>38</sup> "Anti-institutionalist" is a term of art, referring to some commentators' indictment of the American abolitionists as people who refused to work through established institutions like mainstream churches, political bodies and social clubs. See, e.g., S. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 254-57 (3d ed. 1979).

<sup>39</sup> See G. Davis, *Massachusetts Blacks and the Quest for Education, 1838 to 1860*, at 151 (1977) (unpublished doctoral dissertation, University of Massachusetts).

<sup>40</sup> Pease & Pease, *Boston Garrisonians and the Problem of Frederick Douglass*, 2 CAN. J. HIST. 30 (1967). Garrison's disagreement with Douglass over political action, nonviolence, separate black organizations, and Douglass' newspaper was bitter, but so were many internecine struggles among white abolitionists. See *The Liberator*, Jan. 27, 1854, at 13, col. 3. It is difficult to see any special animosity in this quarrel that requires explanation. Furthermore, the Peases seem to assume implicitly that the black abolitionists William C. Nell, Charles Lenox Remond, and Robert Purvis, who attacked Douglass and were savagely denounced by him in return, were merely following Garrison's lead. It appears as likely to me that Garrison was following theirs, especially in the case of Nell, who was the publisher of Douglass' *North Star* in Rochester from its first issue in December 1847 until June 30, 1848, but later returned to Boston. Despite his longtime leadership in the school integration fight, Nell also taught in the segregated black school in Rochester. See Ruchkin, *The Abolition of 'Colored Schools' in Rochester, New York, 1832-1856*, 51 N.Y. HIST. 377, 382 (1970). Considerable evidence exists, some presented below, against the Boston School Committee assertion that blacks were mere puppets of white abolitionists in the school integration struggle. By analogy, this evidence weighs against similar assertions about Douglass. For the committee's assertions, see Boston School Committee, *Boston Grammar School Report*, 1849, at 66-67 (1849).

blacks and to deny them equal and independent status in the crusade.<sup>41</sup> Stanley K. Schultz's indictment of Boston school reformers in *The Culture Factory* attempts to cast doubt on the white Garrisonians' role in the school integration controversy, referring to them as the "alleged friends of the Blacks," and remarking that "[d]espite the participants' humanitarian rhetoric, the whole affair smacked of opportunistic paternalism."<sup>42</sup> In *Slavery: A Problem in American Institutional and Intellectual Life*, Stanley Elkins charged that the abolitionists felt no "vested interest" in any institution, tended toward "erratic, emotional, compulsive, and abstract" thought, and were motivated largely by personal guilt, and therefore demanded only "a total solution" to evil.<sup>43</sup> Or, as Thomas D. Morris put it, the Garrisonians "rejected political action in any traditional sense."<sup>44</sup>

In the first issue of *The Liberator*, Garrison had assured blacks that "the struggle for equal rights in the North constituted a leading object of

<sup>41</sup> L. FRIEDMAN, *GREGARIOUS SAINTS: SELF AND COMMUNITY IN AMERICAN ABOLITIONISM, 1830-1870*, at 167-73 (1982); see generally *id.* at ch. 6 ("The Chord of Prejudice"). Friedman recognizes that white abolitionists fought for black civil rights but claims that they did not admit blacks to their "intimacy circles" and that after 1830 there was a "diminishing flow of empathy" for blacks from whites who favored immediate abolition. *Id.* at 186. The stress on intimacy groups seems to me wrongheaded in an analysis of a public crusade. Since most evidence of day-to-day interactions is unlikely to have survived, the existing data on the extent, frequency, and quality of such behavior is undoubtedly underestimated or unknown. The measurement of "flows of empathy" between large numbers of people is impossible and the concept is so vague as to be meaningless.

<sup>42</sup> S. SCHULTZ, *THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860*, at 184-87, 158 (1973). Schultz's "leftist" castigation of integrationism as a mask for "social control," a theme central to his book and one that echoes conservative criticisms from 1840 to the present, is essentially empty. Representatives of every group want to structure "the social composition of American life along lines attractive" to them. That is, they would like their own preferences to prevail. Racists on the Boston School Committees sought to use government to preserve segregation; radicals, to dismantle it. If speaking for a majority of blacks makes one group the friend of the blacks, then, as I shall show below, the black and white abolitionists were the friends of blacks. For a treatment of anti-racist actions in the public and private life of abolitionist leader Wendell Phillips, see J. STEWART, *WENDELL PHILLIPS: LIBERTY'S HERO* 100-09 (1986). Stewart is also excellent in documenting Phillips's profound concerns with politics.

<sup>43</sup> S. ELKINS, *supra* note 38, at 254-57. Elkins is not a trustworthy guide to abolitionist thought. His views about the effect of slavery on blacks have been convincingly refuted. See J. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 226-31 (1973). On the other hand, Elkins' misrepresentations of the abolitionists have attracted less attention, meriting only one chapter in *The Debate Over "Slavery": Stanley Elkins and His Critics*. See Kraditor, *A Note on Elkins and the Abolitionists*, in *THE DEBATE OVER "SLAVERY": STANLEY ELKINS AND HIS CRITICS* 87 (A. Lane ed. 1971). Elkins' footnotes indicate that he read no primary sources not available in book form. His thesis on the abolitionists would never have survived even a casual perusal of *The Liberator*. Yet even as careful a scholar as James M. McPherson, who recognizes that the Garrisonians' shifts between moral suasion and pro-government policies were tactical, calls the Garrisonians "antigovernment before the war." J. MCPHERSON, *THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP* 34 (1975).

<sup>44</sup> T. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, at 72 (1974).

Abolitionism."<sup>45</sup> Two years later, in 1833, the New England Anti-Slavery Society established a committee "to endeavor to get colored children into the public [white] schools, to improve the existing schools for colored children and to build up others."<sup>46</sup> In the same year, the Garrisonians Lydia Maria Child and her husband David Lee Child used her talents as a writer and his position on the Boston Grammar School Committee to call for improvements in black education.<sup>47</sup> After Thomas Paul died in 1831,<sup>48</sup> the authority he had exercised over the black school passed entirely to the all-white School Committee, whose members were appalled by its condition.<sup>49</sup> Although David Child strongly implied that he preferred integration, his report as chairman of an 1833 subcommittee of the School Committee recommended only a new school building. "The situation of the room is low and confined," he observed. "It is hot and stifled in summer and cold in winter."<sup>50</sup> His wife went further, condemning as incompetent the white teacher, William Bascom, who had held the post for nearly a decade, and recommending the substitution of a black teacher instead. "Under the domain of existing prejudices, it is difficult to find a white man, well-qualified to teach such a school, who feels the interest he ought to feel, in these Pariahs of our republic."<sup>51</sup> Black leaders, perhaps acting in conjunction with their white allies, charged Bascom with neglect of the black school and with making improper advances to female pupils.<sup>52</sup>

The School Committee responded by investigating Bascom, although he was exonerated. Nonetheless, the School Committee removed Bascom and erected a new building, naming it for Abiel Smith. Bascom's replacement, at a salary for the first time equivalent to that of teachers in the common schools, was Abner Forbes, a white Williams College graduate and experienced teacher who was also, Garrison announced, "an uncompromising abolitionist and one of the managers of

<sup>45</sup> *The Liberator*, Jan. 1, 1831, at 1, col. 1, *quoted in* G. Davis, *supra* note 39, at 141.

<sup>46</sup> *The Liberator*, Apr. 14, 1851, *quoted in* A. White, Blacks and Education in Antebellum Massachusetts: Strategies for Social Mobility 191 (1971) (unpublished Ed.D. thesis, SUNY, Buffalo) [hereinafter A. White, Blacks and Education].

<sup>47</sup> For discussion of the Childs' activities regarding the black school, including David Child's work on the school committee in 1833, see S. SCHULTZ, *supra* note 42, at 180-82.

<sup>48</sup> Mitchell, *The Paul Family*, 63 SOC. FOR THE PRESERVATION OF NEW ENGLAND ANTIQUITIES 75 (1973) (chronicling Paul family in Boston). In light of his son's later role in the integration controversy, see *infra* notes 258-60 and accompanying text, it is instructive to note that Paul Sr. must have hired a white teacher, William Bascom, in 1824, when the previous teacher, John Russwurm, left to become a student at Bowdoin College.

<sup>49</sup> See S. SCHULTZ, *supra* note 42, at 168-69, for discussion of the poor conditions in the black school.

<sup>50</sup> D. Child, Report [to the Boston School Committee on African Schools], *quoted in* G. Levesque, Black Boston, *supra* note 34, at 496.

<sup>51</sup> L. Child, An Appeal in Favor of That Class of Americans Called Africans, *quoted in* S. SCHULTZ, *supra* note 42, at 180-82.

<sup>52</sup> G. Davis, *supra* note 39, at 147-48.

the New England Anti-Slavery Society."<sup>53</sup> Attendance at the school leapt in ten weeks from twenty-five to eighty, even before the new building was completed in 1835.<sup>54</sup> Built at a cost of 20,000 dollars, a generous figure at the time, the school was located in ward 6, in which lived two-thirds of Boston's 2000 or so blacks, a group that in its entirety represented approximately two percent of the city's population.<sup>55</sup> At the dedication of the new building, the chairman of the School Committee declared that "[t]he prospects of the school are cheering. Everything connected with it seems to promise that it will long be a blessing to the colored inhabitants of the city."<sup>56</sup>

### *C. The Garrisonian Attack on Jim Crow Railroads and Anti-Miscegenation Laws*

The abolitionists' temporary acceptance of a much improved separate school for Boston blacks did not prevent them from first verbally protesting, and then campaigning actively against, other kinds of discrimination. Lessons learned in these struggles would later be applied to the fight against Jim Crow schools. Beginning in the mid-1830s, the abolitionists used massive petition drives to attract publicity, build membership, and tie the issue of southern slavery to that of civil liberties for northern whites.<sup>57</sup> In 1839 and 1840, they turned this tactic to the last vestige of the slave code in Massachusetts, the antimiscegenation law, bombarding the General Court in the latter year with petitions signed by nearly 9000 people.<sup>58</sup> In response, the 1841 state senate passed a bill, 17-13.<sup>59</sup> Yet despite an impassioned plea by the Nantucket abolitionist George Bradburn, who participated in the World Antislavery convention in London in 1840 and was chairman of the relevant house committee,<sup>60</sup> the state house defeated the measure, 134-127.<sup>61</sup>

Abolitionists had also condemned stagecoach, steamboat, and rail-

<sup>53</sup> *The Liberator*, Apr. 5, 1834, at 55, col. 5.

<sup>54</sup> G. Davis, *supra* note 39, at 156.

<sup>55</sup> See Levesque, *Before Integration: The Forgotten Years of Jim Crow Education in Boston*, J. NEGRO EDUC. 113, 120-21 (1979) [hereinafter Levesque, *Before Integration*]. D. Ment, *supra* note 9, at 21, gives the 1855 population figures by race and ward. Boston's population was about 5% black in 1800, 2% in 1840, and 1.3% in 1855.

<sup>56</sup> Address by William Minot, Dedication of the Smith School, Boston (1835) (pamphlet available in Boston Public Library).

<sup>57</sup> *The Liberator*, Mar. 12, 1841, at 43, col. 6.

<sup>58</sup> *Id.*, Mar. 5, 1841, at 38, col. 5.

<sup>59</sup> *Id.*, Mar. 12, 1841, at 43, col. 6.

<sup>60</sup> *Id.*, Mar. 5, 1841, at 38, col. 5; *id.*, Mar. 12, 1841, at 47, col. 4.

<sup>61</sup> *Id.*, Mar. 12, 1841, at 47, col. 2. D. Jacobs, *supra* note 32, at 163-75. Garrison denounced the anti-intermarriage law as early as 1832, claiming "it not only discredits the good sense of the Commonwealth, but is a direct invasion of our inalienable rights." *The Liberator*, Mar. 31, 1832, quoted in G. Levesque, *Black Boston*, *supra* note 34, at 146 n.63. That the marital relation was included in the list of natural rights by this shaper of abolitionist thought may have implications for modern interpretations of the fourteenth amendment, that embodiment of abolitionist natural rights theory.

road segregation during the 1830s.<sup>62</sup> But in 1841, a series of apparently unplanned incidents brought the issue to public attention. At different times during the year several black abolitionists—including Frederick Douglass, Charles Lenox Remond, William C. Nell, David Ruggles, and Mary Newhall Green, who was travelling with a small baby—were threatened or physically coerced into leaving the “white” cars of various Massachusetts railroads.<sup>63</sup> White friends travelling with Douglass and Remond to and from antislavery meetings also were prohibited from joining them in the “colored” cars.<sup>64</sup> In July, Ruggles unsuccessfully sued one railroad for assault and battery.<sup>65</sup> In November, a white dentist who was dragged from a train for protesting the expulsion of a black passenger brought similar charges.<sup>66</sup> In the latter case, sketches of the legal arguments for both sides survive.<sup>67</sup> The lawyer for the conductor asserted that private corporations had the right to impose “reasonable and proper” regulations based on “the established usage and the public sentiment of this community” and that even if the rule were “unreasonable,” the dentist and his friends had no right to “take the law into their own hands” by violating the private company’s policy.<sup>68</sup> In response, Samuel E. Sewall, the Liberty party candidate for governor in 1842 and the namesake and descendant of a leading colonial abolitionist who was Chief Justice of the highest Massachusetts court, contended that without specific legal sanction, the railroad had no authority to impose a rule based on the “arbitrary” criterion of race.<sup>69</sup> Boston Police Court Judge Simmons ruled against the dentist. Simmons’ reasons, if he gave any, have not been preserved.<sup>70</sup>

<sup>62</sup> On the motion of David Lee Child, the New England Anti-Slavery Society in 1834 resolved that its members boycott all racially discriminatory businesses. “We mean to destroy prejudice,” Child remarked, “and to give our colored brother all those rights and privileges which belong to him as a man.” According to Child, individual boycotting actions would show that “we practice as well as preach.” *The Liberator*, June 14, 1834, at 5, col. 3.

<sup>63</sup> See generally D. Jacobs, *supra* 32, at 179-90; Ruchames, *Jim Crow Railroads in Massachusetts*, 8 AM. Q. 61, 62-67 (1956). Mrs. Green’s husband and baby were injured in fracases with train employees. In this and other cases, segregation, which was never required by Massachusetts law but only by railroad company policy, was enforced inconsistently. Because Green had relatively light skin and was apparently sometimes mistaken for white, she had previously ridden in white cars on the same road without difficulty. Ruchames, *supra*, at 62-67.

<sup>64</sup> Ruchames, *supra* note 63, at 62-65.

<sup>65</sup> *Id.* at 63.

<sup>66</sup> *Id.* at 65-66.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 66.

<sup>69</sup> For some of Sewall’s abolitionist activities in the 1840s, see K. BRAUER, COTTON VERSUS CONSCIENCE: MASSACHUSETTS WHIG POLITICS AND SOUTHWESTERN EXPANSION, 1843-1848, at 90, 138-39 (1968). On the first Samuel Sewall, see D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 342-48 (1966).

<sup>70</sup> The abolitionists apparently did not appeal these adverse decisions. In the *Ruggles* case, Justice Henry A. Crapo of New Bedford ruled that legislative silence allowed the common carrier to formulate whatever discriminatory regulations it wished. It is interesting to note that in both the

Having lost in the lower courts on the issue of segregated railroads, the antislavery forces appealed to the legislature—both their tactic and their contentions foreshadowing the school struggle. Responding to a petition, headed by the name of Francis Jackson, a close collaborator of Garrison and one of the signers of the 1840 school petition in Boston, a joint special committee of the General Court unanimously recommended a law to prohibit railroad segregation.<sup>71</sup> That custom, the committee's report declared, was contrary to the first article of the Massachusetts Declaration of Rights, included in the state constitution, which stated that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights."<sup>72</sup> As common carriers licensed by the state, railroads had no right to make any "invidious distinction . . . in consequence of difference in opinion, sex,<sup>73</sup> color, sect, or other rightful and innocent peculiarity."<sup>74</sup> Such distinctions constituted an "insult" that was "manifestly opposed to the spirit of our institutions."<sup>75</sup> On some railroads, the committee noted, slaves were allowed to ride in the same cars as their owners, while free blacks were excluded from them. This practice was patently "unreasonable."<sup>76</sup>

*Ruggles and Mann* cases, the judges apparently assumed that their consideration of the claims for assault and battery also allowed them to consider the reasonableness of the railroads' regulations. Attorneys for the plaintiffs apparently did not argue that expulsion from the segregated white cars breached the railroads' implicit contract to provide transportation.

<sup>71</sup> The special committee report was published in *The Liberator*, Mar. 4, 1842, at 31, col. 4. The August 1841 state convention of the Massachusetts Anti-Slavery Society simply added the railroad desegregation effort to the ongoing campaign to repeal the anti-miscegenation law, producing blank petitions on *The Liberator's* press and distributing them through the society's local networks. Ruchames, *supra* note 63, at 68-74. For examples of petition blanks on these and other issues—for abolition of slavery in the District of Columbia, against admitting other slave states, and for diplomatic representation of Haiti, the only black-ruled country in the western hemisphere—see that "anti-institutionalist," "anti-political" newspaper, *The Liberator*, Dec. 23, 1842, at 202, col. 3.

<sup>72</sup> F. THORPE, 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1889 (1909).

<sup>73</sup> *The Liberator*, Mar. 4, 1842, at 21, col. 4. That the committee included sex as what modern legal scholars call a "suspect classification" indicates that at least some who struggled for a natural rights/equal protection view of fundamental law meant to ban sexual as well as racial discrimination from the beginning.

<sup>74</sup> *Id.* Regarding the railroads' obligation to accept passengers without making arbitrary distinctions, the committee stated a common law rule. As one commentator points out, the committee could have referred to a report by the senate's railway committee that in turn quoted an opinion by Justice Joseph Story of the Supreme Court of the United States: "The first and most general obligation on the part of common carriers," Story wrote, "is to carry passengers, whenever they offer themselves, and are ready to pay for their transportation. [Common carriers] are no more at liberty to refuse a passenger, if they have sufficient room and accommodation, than an innkeeper has a guest." G. Levesque, Black Boston, *supra* note 34, at 153 n.75 (quoting Report of the Committee on Railways and Canals . . . Relative to the Public Use of Railroads, Mass. Sen. Doc. No. 92 at 4-5 (Mar. 10, 1837)).

<sup>75</sup> *The Liberator*, Mar. 4, 1842, at 1, col. 4.

<sup>76</sup> *Id.*, Feb. 25, 1842, at 30, col. 3. For general remarks on this practice, see *id.*, Mar. 4, 1842, at 31, col. 3.

Three Garrisonians testified before the committee: Charles Lenox Remond, Wendell Phillips, and Ellis Gray Loring, an affluent Boston lawyer.<sup>77</sup> Loring's answer to defenses of segregation is so central to nineteenth century natural rights egalitarian theory and sounds so strikingly like some modern discussions of equal protection law that it deserves quoting at length:

Distinctions made between parties that are socially held to be unequal, are always an insult to the reputedly inferior party. If the peer's daughter be forbidden to marry the peasant's son, common sense tells us that the peasant is the insulted party, however plausibly it may be argued that the prohibition touches both alike. . . . But the majority, it is said, must regulate these things. Are all our rights, then, at the mercy of a majority? Our Constitution and our laws are framed mainly to protect the rights of the minority, and to say to the majority: Thus far shalt thou go, and no further. . . . You would not allow your property to be confiscated, because it was the taste of the majority to take it from you; if not, why are your other rights to be left at the mercy of every man's taste? Surely there are rights as valuable as money! . . . [T]he Constitution of Massachusetts has stated that all men are born free and equal, as the foundation on which all our laws and institutions are built. Not equally tall, or handsome, or dark or white complexioned; but equal in the eye of the law, which knows none of these distinctions. If there is a proposition well settled, it is this—all men here are *equal before the law*.<sup>78</sup>

Loring's themes—the “insult” interpretation of segregation, the cutting rejection of the disingenuous claim that separation was not anti-black in intent or effect, the equation of human and property rights, the

<sup>77</sup> Loring, a Boston Brahmin, was a founder of the New England Anti-Slavery Society and a strict Garrisonian from 1831 to 1845. However, he then resigned as an officer in the Massachusetts Anti-Slavery Society because he disagreed with the disunionist position that it adopted in 1844. See *Boston Post*, Jan. 25, 1845, at 2, col. 2. The disunionist position called on sincere society members to oppose the United States government because the country's very Constitution sanctioned slavery. It advocated that the Union should be purified, either by expelling southern slaveholding states or by secession of northern states that prohibited the practice. The strength of the disunionist position was solidified when James K. Polk was elected president in 1844, because his administration was willing to annex Texas, which slavery opponents rightly feared would expand slave territory in the United States. Although Loring resigned from the Massachusetts Anti-Slavery Society, he continued to cooperate with the Garrisonians on other matters, serving for example as co-counsel with Phillips and Robert Morris for blacks who sought school integration before the Boston Primary School Committee in 1846. See *Boston Post*, Mar. 4, 1846, at 2, col. 1. Apparently, the Garrisonians were more tolerant of deserters from their ranks than historians have sometimes charged. See, e.g., G. BARNES, THE ANTI-SLAVERY IMPULSE, 1830-1844, at 169-70 (1933). Loring was also a member of the Boston Vigilance Committee, hiding the famous fugitive slave Ellen Craft in his Brookline home in 1850. See D. Jacobs, *supra* note 32, at 274.

<sup>78</sup> *The Liberator*, Mar. 4, 1842, at 34, col. 5. (emphasis added). This is the first use of the phrase “equal before the law,” as far as I know, and predates Sumner's use of it in his brief in the *Roberts* case. It is hardly conceivable that Sumner was unaware of Loring's use of the phrase, because Sumner was a regular reader of *The Liberator* after 1835 and his co-counsel in *Roberts*, Robert Morris, read law in Loring's office. 3 E. PIERCE, MEMOIR AND LETTERS OF CHARLES SUMNER 40 (1893).

insistence that both natural law and constitutional law forbade discrimination—would be echoed again and again in the nineteenth and twentieth centuries.<sup>79</sup> The modern notion of equal protection emerged fully armed from Loring's brow in 1842, the product either of his own mind or of ideas common to the abolitionists. Remond and Phillips too stressed that equality of treatment in public accommodations was "a right, not a privilege." The action that they sought was thus not a change, but merely a declaration. "We ask not for the *writing* of law," Phillips stated. "We ask the Legislature to say *what is law.*"<sup>80</sup>

The legislature refused. The bill lost in the state senate in 1842 and in the house in 1843, without recorded votes. Nonetheless, the war was a success. By January 1844, all Massachusetts railroads had voluntarily abolished the Jim Crow cars and allowed blacks to enter the "white" cars freely.<sup>81</sup> No other incidents of railroad segregation were reported in the state during the antebellum period.

Voluntary action by private parties could not overturn the ban against racial intermarriage. Although the racially mixed marriage was the bugaboo of nineteenth-century racial arguments and although it is

<sup>79</sup> For recent statements on the stigmatic harm of racial segregation, see Fiss, *The Jurisprudence of Busing*, 39 LAW AND CONTEMP. PROBS. 194, 200, 206 (1975). For a judicial statement, see Brunson v. Board of Trustees of School Bd. No. 1, 429 F.2d 820, 826 (4th Cir. 1970).

<sup>80</sup> The Liberator, Feb. 25, 1842, at 4, col. 3; Ruchames, *supra* note 63, at 72 (quoting Phillips' testimony and citing The Liberator, Feb. 18, 1842, at 26). One commentator contends that "[t]he Garrisonians, with Wendell Phillips their chief spokesman, stressed the dichotomy between natural and positive law. They accepted the orthodox position that the law as it is and the law as it ought to be present two distinct spheres." R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 150-51 (1974); see also W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 240-48 (1977). While Cover's statement may have correctly described the Garrisonians' position regarding slavery and the U.S. Constitution, their stance in the integration controversy was at the least more complex and perhaps inconsistent with their 1844 view on the constitutionality of slavery. What they apparently meant was that when the Constitution was silent or upheld equality, statutory law must uphold equality as well. If there were no statutory law, absolute equality must be presumed. If a law or practice mandated segregation, it was invalid as against natural law or a general public policy in favor of equal treatment. Denouncing Chief Justice Shaw's 1842 decision in the *Latimer* case, which voided the Massachusetts "personal liberty law" as violative of federal fugitive slave laws and thus the U.S. Constitution, Garrison declared that "[w]ith us, the forms of law, legal precedents, and constitutional arrangements are nothing, in opposition to the claims of our common humanity, the instincts of eternal justice, and the commands of God." T. MORRIS, *supra* note 44, at 111. On the *Latimer* case, see *infra* note 215. Similarly, Phillips' arguments in favor of a personal liberty law for Massachusetts seem closer to the "higher law" position of Sumner or Salmon P. Chase than to the 1844 Garrisonian stance, when "No Union with Slaveholders" was adopted as the Anti-Slavery Society's official line. T. MORRIS, *supra* note 44, at 189. In stark contrast to the Garrisonians' wavering conceptions about the existing or proper legal framework was the 1843 statement by Peleg Chandler, lawyer for the Boston school board in *Roberts*, that "[a] judge has nothing to do with the moral character of laws which society chooses to make." Wiecek, *Latimer: Lawyers, Abolitionists, and the Problem of Unjust Laws*, in ANTISLAVERY RECONSIDERED: NEW PERSPECTIVES ON THE ABOLITIONISTS 219, 229 (L. Perry & M. Fellman eds. 1979).

<sup>81</sup> Ruchames, *supra* note 63, at 73-75; 1 H. WILSON, *supra* note 9, at 492-95.

the civil right least strongly supported by whites in the 1980s,<sup>82</sup> a repeal bill passed both houses in Massachusetts in 1842.<sup>83</sup> During the course of the debate, Charles Francis Adams, the son and grandson of presidents who was then beginning his own political career in the Massachusetts house of representatives, denounced the old law, as opposed to public morals, "for it promoted illicit connections" between blacks and whites who could not marry, and contrary to the state constitution's Declaration of Rights.<sup>84</sup> State Senator Washburn of Worcester condemned the old law for making an "arbitrary" and "invidious distinction" between citizens.<sup>85</sup>

#### D. The Peculiar Institutional Rules of Antebellum Massachusetts

The General Court's 1842 repeal of the anti-intermarriage law was even more astonishing,<sup>86</sup> since it occurred in the only legislative session during the 1840s and 1850s controlled by the Democrats,<sup>87</sup> the party least sympathetic to black rights in the nineteenth century. Because the ascendancy of Massachusetts Whigs was reinforced by the state's peculiar election rules, and because these rules both shaped and inhibited the crusade for black rights, they are explained below in some detail.

Massachusetts elected a governor, the legislature or General Court, and local officials annually in the 1840s and 1850s. In urban areas, aldermen and legislators ran in city-wide multimember districts. Every winner had to obtain a majority of votes cast. If no gubernatorial candidate obtained a majority of the votes cast, as occurred in eight of the twelve elections from 1842 to 1853, the election was thrown into the legislature.<sup>88</sup> If there was no majority winner in local and General Court elections, the voters went back to the polls again and again until majority winners emerged, and any number of candidates, often different from those in previous races, could run. For example, during 1844-45 in Boston, eight elections over ten weeks were required to elect a mayor. The Whigs desperately, and ultimately unsuccessfully, attempted to produce

<sup>82</sup> On white racial attitudes from the 1940s to the 1980s, see H. SCHUMAN, C. STEEH & L. BOBO, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS, at ch. 3 (1985) (concerning racial attitudes on subjects such as schooling, work, voting, and interracial marriage and finding only approximately 40% of whites support the right of racial intermarriage).

<sup>83</sup> The Liberator, Jan. 28, 1842, at 14, col. 2; Feb. 11, 1842, at 23, col. 4; Mar. 4, 1842, at 35, col. 3.

<sup>84</sup> G. Levesque, Black Boston, *supra* note 34, at 147.

<sup>85</sup> The Liberator, Feb. 25, 1842, at 30, col. 1.

<sup>86</sup> The bill actually passed both Massachusetts houses in 1840, but it was apparently amended in the senate and defeated when sent back to the house. Again in 1841, it passed the senate and failed in the house. In 1842, it passed without division in the senate and by "a decided majority" in the house. See 1 H. WILSON, *supra* note 9, at 489-92.

<sup>87</sup> *Id.* at 492.

<sup>88</sup> R. FORMISANO, THE TRANSFORMATION OF POLITICAL CULTURE: MASSACHUSETTS PARTIES, 1790S-1840S, at 329 (1983); R. MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM 38 (1966).

someone who could defeat the nativist frontrunner.<sup>89</sup> Furthermore, towns were not required to send representatives to the General Court, and the thrifty citizens of western Massachusetts, who were less reliably Whig than Bostonians, often refused to bear the expense of a three-month sojourn in the eastern metropolis.

The consequences of this strange electoral system were threefold. First, the Whigs generally controlled the legislature, buttressed by a solid fifty-three man delegation from Suffolk County, largely comprised of Boston, and therefore elected the governor. Second, because the legislature apparently deferred to local delegations on matters particularly affecting their towns, Boston integrationists needed a clear majority of Boston votes to push through a school desegregation law.<sup>90</sup> Since it was much more difficult to divide the Boston delegation by parties than would have been possible under a single-member-district system, and since the Whig establishment overwhelmingly supported segregation, gradual progress toward a school integration law was nearly impossible. Third, the majority-win system without two-candidate runoffs hurt Democrats as the second most popular party and encouraged multiple parties and coalitions. Voters who preferred an antislavery or a nativist alternative to both the Whigs and Democrats could cast ballots for that alternative, without fearing their votes would be "thrown away," because such votes counted for the opposition even when they were not cast for the largest opposition party.<sup>91</sup> Because repeat contests were at most only a year away, voters could reasonably believe that politicians would remember the lessons of each election and take steps to conciliate large and demonstrable blocs. For example, an antislavery voter could cast a Liberty or Free Soil ballot with some expectation that even if his candidate did not win this time, either he would succeed in a later election or the Whigs would move closer to an antislavery position in a subsequent election. In the terms of rational choice theory, this was a repeated game that strongly encouraged both "sincere voting" by the electorate and strategic behavior by the politicians.<sup>92</sup>

#### *E. Nantucket, Salem, and The First School Integration Case*

As one antidiscrimination campaign fed others, abolitionists at-

<sup>89</sup> Boston Evening Transcript, Dec. 10, 1844 to Feb. 22, 1845.

<sup>90</sup> Wendell Phillips, who testified and lobbied for integration bills before the Massachusetts legislature, recognized this legislative deference to local delegations regarding school integration in his 1855 speech at the Nell celebration. See *The Liberator*, Dec. 28, 1855, at 207, col. 2.

<sup>91</sup> Such calculations were recognized even by the "non-political" Garrisonians. See, e.g., *The Liberator*, (undated), quoted in *Boston Daily Atlas*, Dec. 4, 1843, at 2, col. 4. Partisan papers continually reminded voters of the consequences of their choices under this peculiar political institution. See, e.g., *Boston Daily Atlas*, Dec. 10, 1853, at 2, col. 1.

<sup>92</sup> For a convenient, elementary introduction to rational choice theory, see R. ABRAMS, FOUNDATIONS OF POLITICAL ANALYSIS: AN INTRODUCTION TO THE THEORY OF COLLECTIVE CHOICE (1980).

tacked school segregation, beginning at the local level. Although they sought to close the Smith School, the abolitionists kept a close watch on developments there. Nell reported that its 1841 public examination "passed off in a manner highly creditable to the pupils."<sup>93</sup> Nevertheless, in 1842 an anonymous correspondent reported considerable dissatisfaction among black parents at that year's exhibition.<sup>94</sup> In an 1845 ranking of performance on standard tests, Smith students placed lowest of students in all eighteen Boston grammar schools in every category, averaging less than five percent as many correct answers as students in the leading school and only twenty-five percent as many as those in the lowest scoring white school.<sup>95</sup>

The first blow against school segregation, however, was struck not in Boston, but on the island of Nantucket. Because of black maritime employment, Nantucket had the highest proportion of blacks among school-age children of any Massachusetts town—5.5 percent compared to 2.3 percent in Boston.<sup>96</sup> In February 1842, Nantucket blacks petitioned the town school committee to let their children enter the graded common schools on the island, rather than being confined to a single, ungraded segregated school because of "a mere accident, the difference of complexion."<sup>97</sup> The petition read that "we [Nantucket blacks] want no exclusive school privileges; we are citizens of this great republic; our veins are full of republican blood; we contend not for, neither do we desire, any rights and privileges that are not common to the rest of the members of this community."<sup>98</sup> Nevertheless, a motion to grant their prayer in the 1842 town meeting failed.<sup>99</sup> Then in 1843, abolitionists won a majority of seats on the Nantucket school committee and acted favorably on a petition by blacks to allow their children into the common schools.<sup>100</sup> When five blacks entered one school, fourteen whites left.<sup>101</sup>

<sup>93</sup> *The Liberator*, Aug. 27, 1841, at 139, col. 4.

<sup>94</sup> *Id.*, Sept. 2, 1842, at 139, col. 4. One commentator claims that the 1841 firing of a black primary school teacher convinced blacks that if they could not share control over the school, they should work for its abolition. See Levesque, *Before Integration*, *supra* note 55, at 125, and G. Levesque, *Black Boston*, *supra* note 34, at 172-74. This seems dubious. Blacks retained considerable influence over teacher appointments, and there was a popular black "monitor" at the Smith School in 1841. *The Liberator*, Aug. 27, 1841, at 139, col. 4. Although there is evidence of an outcry over the teacher's firing, the major popular push for integration began three years later—a long lag-time for a small complaint to begin to bear fruit.

<sup>95</sup> Reports of the Annual Visiting Committees of the Public Schools of the City of Boston, City Document No. 26, at 149 (1845).

<sup>96</sup> D. Ment, *supra* note 9, at 20.

<sup>97</sup> *The Liberator*, Mar. 18, 1842, at 42, col. 1.

<sup>98</sup> *Id.*

<sup>99</sup> B. LINEBAUGH, *THE AFRICAN SCHOOL AND THE INTEGRATION OF NANTUCKET PUBLIC SCHOOLS, 1825-1847*, at 17-20 (1978).

<sup>100</sup> *Id.* at 23-27.

<sup>101</sup> White, *Black Parents for Desegregation in the Nineteenth Century*, 10 INTEGRATED EDUC. 37, 40-41 (Nov.-Dec. 1972) [hereinafter White, *Black Parents*].

Integration became the chief issue in the next year's campaign, which swept the reformers from office, and allowed their successors to reverse the earlier vote.<sup>102</sup> Barred from the white schools, every black child on the island counter-boycotted.<sup>103</sup> Absalom F. Boston, a former sea captain and the richest black on Nantucket, sued to seek entry into the public schools for his daughter Phebe Ann.<sup>104</sup> In 1846, after the most hotly contested local campaign in Nantucket history, voters elected all members of the abolitionist slate by margins of less than one percent, reversing large majorities for what one local abolitionist called "the cossacks" in the two previous annual elections. These new committee members then opened all public schools to black children, and the policy was never reversed.<sup>105</sup> Their action mooted the Absalom Boston case—probably the first school integration case ever filed in the United States—which was never brought to trial.

In Salem, the few resident blacks were allowed to attend white schools from 1794 to 1807, from 1823 to 1826, and from 1830 to 1833. However, white protests caused the schools to be absolutely segregated in the intervening periods. In 1844, Salem blacks again petitioned for entry into the white schools, and more than two-thirds of the "African" school pupils stayed away when their request was rejected.<sup>106</sup> Seeking legal

102 *Id.* at 38-39.

103 *Id.* at 40-41.

104 The *Liberator*, Sept. 26, 1845, at 153, col. 4. The most complete treatment of the Absalom Boston case appears in B. LINEBAUGH, *supra* note 99, at 43-47. The case was transferred, without being heard first in the local court, to the Massachusetts Supreme Court, according to Nantucket local records. Letter from Pat Church, clerk of the Nantucket Superior Court, to J. Morgan Kousser (June 23, 1986). Absalom's father, Seneca Boston, had bought land on Nantucket in 1774. Afterwards, the Bostons intermarried with most of the other established black families on the island, and Absalom was a leader in the Baptist Church, as well as a merchant. Thus, a unified black community, led by its first citizen, demanded integration. On Absalom Boston and the black community, see Cary & Cary, *Absalom F. Boston, His Family, and Nantucket's Black Community*, 15 HIST. NANTUCKET (1977); Kraemer, *The Background and Resolution of the Eunice Ross Controversy* (pts. 1 & 2), 28 HIST. NANTUCKET 27 (1981), 29 HIST. NANTUCKET 11 (1981); A. Kaldenbach-Montmayor, *Black on Grey: Negroes on Nantucket in the Nineteenth Century* (1983) (unpublished senior thesis, Princeton University). After graduating from the high school, Phebe Ann died of dysentery in 1849, at the age of 21. See 5 VITAL RECORDS OF NANTUCKET, MASS. TO THE YEAR 1850, at 108-09 (1927).

105 White, *Black Parents*, *supra* note 101, at 38-39; The *Liberator*, Feb. 20, 1846, at 31, col. 3. Segregationists in Nantucket charged that the integrationists won the 1846 election by bribing 70 Washingtonians, who were moderate temperance men. The political machine methods of the Nantucketers, it may be noted, met no rebuke from Garrison. The 1849 Boston Grammar School Report claimed that Nantucket resegregated after 1846. Boston Grammar School Report at 37 (1849), reprinted in JIM CROW, *supra* note 31, at 116. Nevertheless, abolitionists in Nantucket showed in a letter to *The Liberator* that this was incorrect. The *Liberator*, Dec. 21, 1849, at 201, col. 4. Blacks attended the schools nearest them. Thus, while many went to a primary school on York Street, closest to the center of black settlement—others enrolled at previously white primary schools that were more convenient to them, or at the grammar or high schools.

106 G. Davis, *supra* note 39, at 110-13, 210-15; see also White, *Salem's Antebellum Black Community: Seedbed of the School Integration Movement*, 108 ESSEX INST. HIST. COLLECTIONS 99 (1972).

cover, abolitionist mayor Stephen C. Phillips, later the Free Soil party candidate for governor, solicited the written advice of Boston lawyer Richard Fletcher, who would later be appointed to the Massachusetts Supreme Court in 1846. Published as a pamphlet and in Horace Mann's *Common School Journal*, Fletcher's advice received wide attention.<sup>107</sup> He declared that since neither any law nor provision in the state constitution distinguished between citizens of different races, blacks could not be excluded from any school on account of race.<sup>108</sup> Even if a separate school were "equally advantageous," blacks had a right to identical treatment and were "not bound to accept an equivalent."<sup>109</sup> Salem abolished the "colored" school and integrated its students into the common schools.<sup>110</sup>

#### *F. Agitation in Executive, Legislative, and Judicial Arenas*

Although other Massachusetts communities fought their own integration battles, the center of attention was always Boston. During the 1840s, the Boston School Committee actually consisted of two separate committees. The Grammar School Committee was comprised of twenty-four members, with each of Boston's twelve wards choosing two members annually in partisan elections.<sup>111</sup> A much larger Primary School Committee consisted of one member for each of the numerous primary

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A separate school was reestablished in 1834 when a single black girl attempted to attend a common school. The \$1200 annual cost for the separate school, Garrison commented, "is paying dear for the whistle of prejudice." He did not restrain himself from adding, "It is an act that properly belongs to the days of witchcraft." *The Liberator*, Aug. 23, 1834, at 135, col. 4.

<sup>107</sup> As late as December 1873, a national black convention used the same rather singular wording as had Fletcher in their platform endorsing a school integration provision in Charles Sumner's national civil rights bill. *See Washington New National Era and Citizen*, Dec. 18, 1873, at 3, col. 2.

<sup>108</sup> Fletcher's advice is quoted in C. Slack, *Report Relative to Abolition of Colored Schools, included in Original Papers, Acts, and Resolves Passed by the General Court of Massachusetts*, ch. 256, at 8 (1855) (Massachusetts State Archives). Worcester maintained segregated schools through 1854. *Id.* at 17-20.

<sup>109</sup> *Id.*

<sup>110</sup> White, *Black Parents*, *supra* note 101, at 39. The Salem city council, which apparently also functioned as the school board, abolished the black schools. *Id.* White does not mention whether a vote was taken or whether Fletcher's advice was cited in debate.

<sup>111</sup> Opinions differ on how contested these elections were. One commentator claims they were tame affairs that returned the same local notables year after year. S. SCHULTZ, *supra* note 42, at 133. Yet, "Democritus," in an 1845 letter to the *Boston Whig*, declared that "[p]olitical considerations have too much influence in electing men to an office which never ought to be considered a political one." Competence and an interest in children's welfare "ought to be the questions asked respecting a candidate, rather than—Is he a Whig or a Democrat? a Native [a nativist] or an Abolitionist?" *Boston Whig*, (undated, but during 1845) (available in Boston Public Library, Government Documents Room, Boston Schools Collection). Issues were more important in some elections than others. In 1849, according to the major Whig newspaper, there were no issues except personality, and half of the successful candidates were incumbents. *See Boston Daily Atlas*, Dec. 3, 1849, at 2, col. 1; Dec. 11, 1849, at 2, col. 1.

schools, which numbered 137 in 1846.<sup>112</sup> Nominally appointed by the Grammar School Committee, the Primary School Committee was in fact self-perpetuating, filling its vacancies at quarterly meetings.<sup>113</sup> Both committees were overwhelmingly Whig. For example, the 1844 Grammar School Committee had twenty-one Whigs and three Democrats, while eighty-three percent of the members of the 1845 Grammar and Primary School committees whose names and party affiliations were available were Whigs.<sup>114</sup>

The first skirmish in the campaign to integrate the Boston schools was a textbook example of radical tactics. In 1843 and 1844, the secretary of the state school board, Horace Mann, and others publicly castigated Boston instructors generally for teaching by rote, for general incompetence, and particularly for excessive corporal punishment.<sup>115</sup> Segregation opponents coupled separate integration petitions from seventy-nine blacks and fifteen white Garrisonians with charges that Smith schoolmaster Abner Forbes used inordinate and inconsistent force in disciplining students and had become so antipathetic to black parents and children that he could no longer conduct the school effectively.<sup>116</sup> Nev-

<sup>112</sup> D. Ment, *supra* note 9, at 36; *Boston Daily Advertiser*, Dec. 10, 1846, at 1, col. 7; *Boston Post*, Sept. 14, 1854, at 1, col. 6.

<sup>113</sup> D. Ment, *supra* note 9, at 36; *Boston Daily Advertiser*, Dec. 10, 1846, at 1, col. 7; Nov. 8, 1849, at 2, col. 1; *Boston Post*, Dec. 22, 1853, at 1, col. 8. During the 1850s, 30 to 50 new members of the Primary School Committee were appointed each year. *Boston Daily Advertiser*, Sept. 14, 1854, at 1, col. 7. The committee was abolished by the new Boston city charter in November 1854. Until 1846, the primary schools enrolled children up to age 7, and after 1846 to age 8. *Boston Post*, Dec. 16, 1846, at 2, col. 4. As late as 1850, the majority of students enrolled in Boston public schools attended primary schools, and thus the Primary School Committee was quite important. See Katz, *The Emergence of Bureaucracy in Urban Education: The Boston Case, 1850-1884*, 8 *HIST. EDUC. Q.* 155, 157-58 (1968).

<sup>114</sup> While the names and parties of the Grammar School Committee members were listed in the newspapers before each election, those of the Primary School Committee were not. A partial list of the members of the Primary School Committee is contained in reports of roll calls on school integration. See *The Liberator*, June 27, 1845, at 102, col. 7, at 103, col. 1; July 10, 1846, at 111, col. 4. In the tables below, the only members of the Primary School Committee who are included are those present for votes on school integration. Their party affiliations were determined by combing lists of party nominees and meetings, appearing in the newspapers during other years. For the 1845 Primary School Committee, I was able to find the party affiliation of 46 of its 68 members.

<sup>115</sup> On the general importance of the issue of corporal punishment in Boston from 1843 to 1845, see *Boston Evening Transcript*, Dec. 9, 1843, at 2, col. 2; *Boston Daily Atlas*, Dec. 8, 1845, at 2, col. 2; H. SCHWARTZ, SAMUEL GRIDLEY HOWE: SOCIAL REFORMER, 1801-1876, at 124-29, 136 (1956).

<sup>116</sup> D. Jacobs, *supra* note 32, at 231-37; G. Levesque, *Black Boston*, *supra* note 34, at 178-85. By 1843, Forbes apparently turned against both white and black abolitionists, accusing them of inciting black parents to destroy the Smith School and dismissing criticism of himself as part of an integrationist ploy. A decade of teaching in a school with poverty-stricken students and extremely high student turnover had quenched some of Forbes' enthusiasm as well. See Letter from Forbes to Visiting Committee (Aug. 2, 1845) (in Papers of the Boston School Committee, 1844-1854 (available in Boston Public Library, Rare Book Room) [hereinafter referred to as BSC Papers]). Criticism of the quality of Forbes' teaching may therefore have been justified, apart from the opportune timing of the outburst.

ertheless, a "trial" of more than six days, complete with opposing counsel and eighty-six witnesses, largely exonerated Forbes, as had the less extensive investigation that cleared his predecessor William Bascom in the 1830s.<sup>117</sup> Yet the controversy did focus the attention of both blacks and whites on black education, consuming more of the Grammar School Committee's time, no doubt, than they had devoted to the Smith School over the preceding decade. Nonetheless, the committee rejected by a 17-to-2 vote a motion by George S. Hillard to grant the petition for integration.<sup>118</sup> A rising Whig politician, Hillard was the law partner of future U.S. Senator Charles Sumner.<sup>119</sup>

Boston blacks launched a boycott against the Smith School, led by John T. Hilton, a hairdresser and a vice president of the Massachusetts Anti-Slavery Society, William C. Nell, Robert Morris, soon to become Boston's second black lawyer, Henry L.W. Thacker, a bootblack, and Jonas W. Clark, a clothier. The boycott cut attendance by thirty to forty percent and subsided only when the schoolboard replaced Forbes with a white abolitionist, whom Horace Mann recruited because the replacement shared Mann's aversion to beating children.<sup>120</sup> Although their successes in carrying out the boycott and securing Forbes' dismissal were sound victories, black leaders must have been dismayed by the overwhelming defeat of Hillard's integration motion. Grammar School committeemen believed in segregation, and they also feared, as one

<sup>117</sup> On the Forbes episode, see *Boston Daily Atlas*, May 21, 1844, at 2, col. 4; *Boston Post*, July 26, 1844, at 2, col. 4; letter from Abner Forbes to Dr. Winslow Lewis (Aug. 2, 1845), included in BSC Papers, *supra* note 116. For discussion of the Bascom investigation, see *supra* notes 51-53 and accompanying text.

<sup>118</sup> The roll call vote is detailed in the BSC Papers, *supra* note 116.

<sup>119</sup> Hillard was a Harvard Brahmin and *literateur* who held local, state, and national elective and appointive offices. He remained in the Whig party and its American and Constitutional Union successors until at least 1861, yet continued to be a slavery opponent and a strong supporter of black civil rights. During the 1850s, Hillard served as a U.S. commissioner, the functional equivalent of a federal magistrate, and was thus required to hear all fugitive slave cases. Yet while Hillard felt bound by the fugitive slave law to return any slaves officially brought before him, he allowed his wife to hide them in their house. *See generally* T. O'CONNOR, *LORDS OF THE LOOM: THE COTTON WHIGS AND THE COMING OF THE CIVIL WAR* 122, 128 (1968); 1 PROFESSIONAL AND INDUSTRIAL HISTORY OF SUFFOLK COUNTY, MASSACHUSETTS 173-74 (W. David ed. 1894); H. SCHWARTZ, *supra* note 115, at 106, 191-92; 2 H. WILSON, *supra* note 9, at 690; 3 J. WINSOR, *THE MEMORIAL HISTORY OF BOSTON* 397 (1881).

<sup>120</sup> On the boycott, see A. White, *Blacks and Education*, *supra* note 46, at 217-18; BSC Papers, *supra* note 116; *Boston Evening Transcript*, June 28, 1844, at 4, col. 1. The Smith School Visiting Committee found the school in "deplorable condition" during Forbes' last year and "regretted" Forbes' lack of faith in the intellectual capacities of blacks and his diminished "enthusiasm" for teaching them. Reports of the Annual Visiting Committees of the Public Schools of the City of Boston, *supra* note 95, at 22-23. On Horace Mann's role, see C. MABEE, *BLACK FREEDOM: THE NONVIOLENT ABOLITIONISTS FROM 1830 THROUGH THE CIVIL WAR* 159-60 (1970). In 1846, William Cooper Nell reported glowingly on reforms introduced by Forbes' replacement Ambrose Wellington: "The Smith School is at present under as favorable auspices as the circumstances can admit, and much praise belongs to its teacher, who has so successfully introduced his system of moral suasion." *The Liberator*, Sept. 4, 1846, at 143, col. 3.

committeeman put it, "that no School Committee could ever be elected that would for a moment entertain any such idea" as integration.<sup>121</sup> White racism was apparently as firmly ensconced in Massachusetts in the mid-1840s as it seemed elsewhere in the nation.

After the defeat of Hillard's petition before the committee, the agitators turned their attention to the legislature. In early 1845, Wendell Phillips drafted a statute banning school segregation. He, Loring, and Garrison testified for the bill before the Joint Committee on Education of the General Court.<sup>122</sup> Because by 1845 the school integration question was not settled in Nantucket, black and white integrationists as well as white segregationists from the island presented petitions concerning the legislation.<sup>123</sup> Efforts to elicit public backing for the proposed bill from the influential Horace Mann failed, although Mann later claimed to have worked for it privately.<sup>124</sup>

Laws relating to school integration in the nineteenth century—when nearly all children walked to school, and cross-district or metropolitan integration was therefore physically impracticable—could take several forms, many of which were proposed or accepted as amendments to Wendell Phillips' initial bill. First, on the extreme integrationist end of the spectrum, a law might entirely ban schools that solely admitted members of the minority race. The Massachusetts Liberty Party proposed such a law in January 1845, but it did not reach the floor of the legislature.<sup>125</sup>

Second, a provision might prohibit the exclusion of any child from

121 Letter from Pickering to Lewis (Aug. 10, 1848) (available in BSC Papers).

122 *The Liberator*, Mar. 7, 1845, at 39, col. 3. Petitions for the bill came from Nantucket, where the integrationists were defeated in 1844 and 1845, but the floor discussion was at least as much concerned with Boston. *Boston Post*, Feb. 21, 1845 at 2, col. 2. Phillips later wrote that the Education Committee "threw aside" his draft of the bill and submitted a more "ambiguous" one that "would not secure our object." *The Liberator*, Apr. 15, 1853, at 58, col. 3.

123 *Boston Post*, Feb. 20, 1845, at 2, col. 2; Feb. 21, 1845, at 2, col. 2. On the Nantucketers' petitions, signed by nearly all the blacks and a majority of the white adult males on the island, see B. LINEBAUGH, *supra* note 99, at 40-41, 55. For discussion of the Nantucket school integration battle, see *supra* notes 96-104 and accompanying text.

124 On Mann's refusal to take a public stand, see *The Liberator*, Apr. 8, 1853, at 54, col. 3; Apr. 29, 1853, at 66, col. 5; May 6, 1853, at 3, col. 3. Mann's claims that he thought that the final bill did require integration and that Chief Justice Lemuel Shaw misinterpreted it in *Roberts* ring hollow. See *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 217-31. If Mann followed the bill's progress, as such a meticulous person in his position must have monitored the course of every education bill, he knew that the bill had been repeatedly adulterated by amendments. Carleton Mabee's argument that Mann trimmed on this controversial issue in order to accomplish what he deemed larger goals is convincing. See Mabee, *A Negro Boycott to Integrate Boston Schools*, 41 NEW ENG. Q. 341, 346-47 (1968).

125 See G. Levesque, *Black Boston*, *supra* note 34, at 186-88. It is not clear that the Liberty Party version, which banned the use of public funds for any segregated school, was actually introduced and Levesque writes only that it "became the basis" for an education bill. *Id.* at 187. The Liberty Party version was probably inspired by a line in attorney Richard Fletcher's published advice on the integration issue in Salem, which questioned whether public funds could legally be spent on racially

any school whatsoever on account of race or color, or, less precisely, for "unlawful" reasons. Such a specific prohibition appeared in an amendment offered on the senate floor by Henry Wilson, future U.S. Senator and Vice President during Ulysses Grant's second term. This form may well have been Phillips' original bill, because the version reported out of the Education Committee was referred to during floor debates as a compromise. The reported version forbade only "illegal" exclusion from any school, leaving the question of the legality of segregation to the courts.<sup>126</sup>

Third, even more ambiguous than "illegal" exclusions was a provision that no child could be completely barred from *public school instruction altogether* because of race. Such an amendment to the 1845 bill was successfully proposed by a Boston Whig state senator, who served simultaneously on the city's Primary School Committee. This amendment watered down the bill even more than prohibiting "illegal" exclusions and provided school boards and the judiciary with yet wider discretion. Yet in rural areas or small towns where few blacks lived, and where separate education was physically and financially unfeasible, such a law, if enforced, meant that schools would be integrated. Fourth, many nineteenth-century northern and border states, but not Massachusetts, at least temporarily enacted laws requiring or allowing localities to establish separate schools, when some minimum number of black children lived in a district.<sup>127</sup>

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exclusive schools. For discussion of Fletcher's advice, see *supra* notes 107-09 and accompanying text.

<sup>126</sup> The Massachusetts house and senate journals for 1845 are uninformative on the complicated legislative maneuverings. The rules in the Massachusetts legislature then did not require roll-call votes on amendments or final passage of a bill, and the house specifically refused to order a roll call on any of the crucial amendments. The bill's progress must therefore be pieced together from scanty legislative documents and newspaper reports. See Massachusetts Senate and House Documents, 1845, Sen. Doc. No. 42, House Doc. No. 45; Boston Daily Advertiser, Mar. 24, 1845, at 1, col. 4; Boston Daily Atlas, Feb. 20, 1845, at 2, col. 1; Mar. 4, 1845, at 2, col. 1; Mar. 10, 1845, at 1, col. 8; Mar. 15, 1845, at 2, col. 1; Mar. 24, 1845, at 2, col. 1; Mar. 25, 1845, at 2, col. 1; The Liberator, Mar. 7, 1845, at 1, col. 1; Boston Post, Feb. 21, 1845, at 2, col. 2; Mar. 4, 1845, at 2, col. 2; Mar. 15, 1845, at 2, col. 4; Mar. 25, 1845, at 2, col. 2; 1 H. WILSON, *supra* note 9, at 496-98. Basically, the Education Committee bill allowed damages for "any child unlawfully excluded from any public school." A floor amendment substituted "from public school instruction" for "from any school." A further compromise in the Judiciary Committee confusingly merged these provisions—"from any public school . . . or from public school instruction"—and the senate passed the bill in that form. After much discussion and several fairly close votes, the revised bill passed the house. The vote totals, but not the names of voting legislators, were recorded. The law as finally passed stated:

Any child unlawfully excluded from any public school, which such child has a legal right to attend, or from public school instruction, in this Commonwealth, shall recover damages therefor, in an action on the case, to be brought in the name of said child, by his guardian, or next friend, in the Court of Common Pleas, against the city or town in which such school is situated.

Massachusetts House Doc. No. 45.

<sup>127</sup> See, e.g., Chandler, *Friends in Time of Need—Republicans and Black Civil Rights in California During the Civil War Era*, 24 ARIZONA AND THE WEST 319, 330-31 (1982); Price, *School Segregation in Nineteenth-Century Pennsylvania*, 43 PENNSYLVANIA HIST. 121, 124 (1976); Balyeat, *Segregation in the Public Schools of Oklahoma Territory*, 39 THE CHRONICLES OF OKLAHOMA 180,

Finally, state codes might make no mention, even indirectly, of race. Such codes could be interpreted in three ways in judicial decisions or in common practice: (1) blacks were banned from public schools altogether;<sup>128</sup> (2) blacks were to be treated the same as whites;<sup>129</sup> and (3) local school boards could act at their discretion.<sup>130</sup> The Massachusetts school code before 1845 did not contain even an implicit reference to race, and the Commonwealth never followed other states in sanctioning segregation by statute. Naturally, variations occurred on each of these basic forms, and in practice minor changes often made a great deal of difference.

Both the Massachusetts senate and the house extensively debated and wavered between the second and third alternatives, the "any school" and "public instruction" forms of the proposed legislation. The version that finally passed did not explicitly allude to race at all, providing only that "any child unlawfully excluded from public school instruction" could recover damages against a school board in court.<sup>131</sup> Had the legislature adopted the Wilson amendment—prohibiting the exclusion of a child from "any school whatsoever" because of race or color, the *Roberts* case might not have occurred and would almost certainly have been won. Had the legislature accepted even the original committee compromise—prohibiting "illegal" exclusions—the ingenuity of the courts would have been strained to continue segregation. As it was, all the integrationists accomplished with the 1845 law was to explicitly establish the right to sue.

Simultaneously with their drive in the legislature, Boston blacks and their "anti-institutionalist" white allies moved forward in yet another forum, the Primary School Committee.<sup>132</sup> In 1845, the integration crusade

186 (1961-62); H. Williams, *The Status of Minority Public Education in Missouri from 1820 to 1954: A Legal History* 60-61 (1977) (unpublished doctoral dissertation, St. Louis University); L. Erickson, *The Color Line in Ohio Public Schools, 1829-1890*, at 78, 201-02 (1959) (unpublished doctoral dissertation, Ohio State University).

<sup>128</sup> This scenario existed in Indiana from 1851 to 1867. See J.M. KOUSER, DEAD END, *supra* note 29, at 20-21.

<sup>129</sup> This was how the Iowa Supreme Court interpreted a state code omitting mention of race in *Clark v. Muscatine*, 24 Iowa 266 (1868).

<sup>130</sup> Of course, this was the interpretation given to the Massachusetts code by Chief Justice Shaw in *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in JIM CROW, *supra* note 31, at 219-31.

<sup>131</sup> Some commentators incorrectly represent the law's provisions or maneuvers that led to its passage. See JIM CROW, *supra* note 31, at xx (confusing exclusion from "a public school" with exclusion from "any public school" that a student legally had a right to attend); J. HORTON & L. HORTON, *BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH* 72 (1979) (incorrectly stating that the statute required students to attend the school closest to their residence, unless special provisions were made); G. Levesque, *Black Boston*, *supra* note 34, at 186-88 (confusing exclusion from "public school" with exclusion from "any public school" that a student legally had a right to attend).

<sup>132</sup> Annals of the Boston Primary School Committee 208-09, 214-15 (J. Wightman ed. 1860); Boston Daily Advertiser, June 18, 1846, at 2, col. 4; Boston Daily Atlas, June 17, 1846, at 2, col. 7;

was led by longtime committeeman Henry Ingersoll Bowditch, a leading physician who eventually became a Harvard professor and president of the American Medical Association, as well as president of the nation's first state board of health.<sup>133</sup> In 1846, Bowditch was joined by Edmund Jackson, a merchant who like his brother Francis was a Garrisonian.<sup>134</sup> After losing an integration motion the first year by a 55-to-12 vote, Bowditch and Jackson offered a compromise motion to allow blacks freedom of choice. Separate schools would be continued, and blacks could attend them if they wished, while those who desired to attend common schools could do so. This temporizing gesture garnered only sixteen votes in 1846, while fifty-nine members of the Primary School Committee pronounced segregation "not only legal and just" but "best adapted to promote the education" of black children.<sup>135</sup> The majority informally agreed, however, to abandon the absolute color bar, by permitting children who lived considerable distances from the "colored" schools to attend the common schools.<sup>136</sup> In a few instances, some even before 1846, black students were allowed to enroll in "white" schools.<sup>137</sup>

The Primary School Committee decision in 1846 was reinforced by an opinion upholding the legality of school segregation, written by City Solicitor Peleg Chandler, who was a fervent opponent of the abolitionists. The year before, Chandler voted in the General Court's Education Committee to weaken the Wendall Phillips bill, and he later served as counsel for the city of Boston in the *Roberts* school segregation case.<sup>138</sup> Just as

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June 24, 1846, at 2, col. 5; *The Liberator*, June 27, 1845, at 102, col. 4; Aug. 21, 1846, at 133, col. 4, at 134, col. 1; *Boston Post*, June 17, 1846, at 2, col. 2; June 24, 1846, at 2, col. 5; *Boston Evening Transcript*, June 20, 1845, at 2, col. 1.

<sup>133</sup> Bowditch retained his office in the Garrisonian New England Anti-Slavery Society even after he renounced its antipolitical stance and became a Free Soiler. On Bowditch, see V. BOWDITCH, LIFE AND CORRESPONDENCE OF HENRY INGERSOLL BOWDITCH (reprint ed. 1970); 4 COMMONWEALTH HISTORY OF MASSACHUSETTS 324, 329, 337 (A. Hart. ed. 1930); 5 COMMONWEALTH HISTORY OF MASSACHUSETTS 551, 553 (A. Hart. ed. 1930); Folsom, *Henry Ingersoll Bowditch*, 28 PROCEEDINGS OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES 310-31 (1892-93).

<sup>134</sup> *The Liberator*, Nov. 7, 1845, at 178; Feb. 6, 1846, at 22; July 10, 1846, at 3.

<sup>135</sup> Report of a Minority of the Committee of the Primary School Board 1-20 (1846), reprinted in JIM CROW, *supra* note 31, at 41-62; *Boston Grammar School Board*, Majority Report at 28 (1849), reprinted in JIM CROW, *supra* note 31, at 79-148.

<sup>136</sup> The school committees did not always grant such special dispensations. If they had, the *Roberts* case would never have been filed.

<sup>137</sup> A similar compromise "freedom of choice" motion was proposed by Nantucket integrationists in 1843. See B. LINEBAUGH, *supra* note 99, at 28.

<sup>138</sup> See *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), reprinted in JIM CROW, *supra* note 31, at 217-31. For Chandler's earlier opinion on school desegregation, see JIM CROW, *supra* note 31, at 33-40. Chosen July Fourth Orator in 1844, Chandler used the occasion to attack the abolitionists as "a moral mob" whose doctrines were "dangerous to the State . . . and destructive of all true freedom." See J. LORING, THE HUNDRED BOSTON ORATORS 614-15 (1855). The Democratic *Boston Post* remarked of the speech that if Chandler "had been born and brought up under happier influences, he would have been a pretty good [D]emocrat." *Boston Post*, July 6, 1844, at 2, col. 2. In the 1845 legislature, Chandler, in a maneuver reminiscent of southern Democratic actions in Congress in the 1830s, moved to table all petitions to abolish slavery without referring them to

Chandler maneuvered in the legislative, administrative, and judicial arenas to preserve segregation, the integrationists, having met with little success in the first two arenas, turned to the third. In 1847 and again in 1848, the black printer Benjamin F. Roberts succeeded in registering his daughter Sarah at a "common" primary school. After a few weeks, however, she was expelled on grounds of color. Roberts then asked the Common Pleas Court, through his lawyers Robert Morris and Charles Sumner, to assess damages against the city for unlawfully excluding her, as provided in the 1845 statute.<sup>139</sup> By the time Roberts appealed to the Massachusetts Supreme Judicial Court, where he received an adverse opinion written by the prestigious Chief Justice Lemuel Shaw,<sup>140</sup> the blacks had once again petitioned the Grammar School Committee. Nevertheless, the committee defeated a motion by the Whig politician and lawyer Charles Theodore Russell to allow blacks to choose whether to attend "exclusive" or neighborhood schools.<sup>141</sup> The committee also tried with some success to divide the black community, by replacing Ambrose Wellington with the black Thomas Paul, Jr., at the Smith School. In addition, it extensively refurbished the Smith School in response to repeated denunciations of its physical condition by both committee members and the general public.<sup>142</sup>

any committee. Boston Post, Mar. 11, 1845, at 2, col. 2. On the "gag resolutions" in Congress, see, e.g., D. DUMOND, *ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA* 237-38 (1961). Chandler and Sumner had offices in the same building during the 1840s and "associated on the most familiar terms." 2 E. PIERCE, *supra* note 78, at 251. Chandler was a political opponent of Sumner and John A. Andrew, the radical Massachusetts governor during the Civil War who actually drafted the 1855 school integration statute. Yet, Chandler remained friendly with fellow Bowdoin graduate Andrew and later wrote a memoir about him. See P. CHANDLER, *MEMOIR OF GOVERNOR ANDREW, WITH PERSONAL REMINISCENCES* (1880). A conservative Republican by 1860, Chandler remained a staunch Whig at least through the mid-1850s, serving on the resolutions committee of the Whig state convention in 1854. Boston Post, Aug. 17, 1854, at 2, col. 3. For biographical details on Chandler, see ONE OF A THOUSAND 112-13 (J. Rand ed. 1890).

<sup>139</sup> The Liberator, Apr. 4, 1851, at 55, col. 4; G. Forbes, *supra* note 4, at 13. Roberts was too dark-skinned to pass for white and, unlike Edward Pindall in 1853, made no attempt to do so.

<sup>140</sup> See Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 217-31.

<sup>141</sup> For the Grammar School Committee's 1849 action, see Report of the Minority of the Grammar School Committee 12-13 (1849), reprinted in *JIM CROW*, *supra* note 31, at 79-148; Boston Post, Aug. 30, 1849, at 2, col. 4; *JIM CROW*, *supra* note 31, at 149-63. Like Phillips, Loring, Hillard, and Sumner, Russell could trace his American ancestors to the seventeenth century, and like them, he graduated from Harvard College and Harvard Law School. Russell served as a member of the lower house of the General Court in 1844, 1845, and 1850; he was a state senator in 1851, 1852, 1877, and 1878; a member of the Whig State Central Committee during the mid-1840s; and mayor of Cambridge in 1861-62. Like Hillard, Sumner, and Chandler, Russell was also a Fourth of July Orator in Boston. The Whig Establishment was not monolithic, and Russell's career, like Sumner's, was not hurt by his integrationist stance. PROFESSIONAL AND INDUSTRIAL HISTORY OF SUFFOLK COUNTY, *supra* note 119, at 292-93; Boston Daily Atlas, May 27, 1844, at 2, col. 1.

<sup>142</sup> Ambrose Wellington reported in 1846 that the building housing the Smith School evidenced "the most shameful negligence and abuse." See Levy & Phillips, *The Roberts Case: Source of the "Separate But Equal" Doctrine*, 56 AM. HIST. REV. 510, 511 n.8 (1951). The 1847 Visiting Commit-

## IV. THE ARGUMENTS FOR AND AGAINST SEGREGATION

Proponents and opponents of integration made the same types of arguments whatever the forum. To focus only on those made in courts, as much legal history does, fragments the historical record misleadingly. Since the basic contentions of each side did not change over the decade—indeed, not over the century and not much since—it is appropriate to summarize them in one place. Table 1 lists the sources of every Boston and Nantucket discussion during this period that I have found that contained an argument, not just a slogan, for or against school segregation. Examples of these contentions are quoted in the text. Table 2 indicates the frequency with which each argument was offered, to measure the emphasis their expositors gave them.<sup>143</sup> Sections A through I below discuss significant aspects of these arguments.

TABLE 1  
Sources of Integrationist and Segregationist Statements

<u>Pro-Integration Arguments</u>	<u>References*</u>
1. arbitrary, unlawful	[1], 48, 251; [6]; [10], 46-47, 49, 55; [12], 75-76; [16]; [17]; [19], 154-55, 165; [24], 182-85, 202, 204-05; [29], 242; [30]; [32], 19-20, 24, 26, 31, 42, 46, 51-52.
2. reinforces prejudice	[3]; [5]; [8]; [10], 54-55; [15]; [19], 154-55, 160, 165; [24], 212; [29], 243; [30].
3. interracial competition good, blacks favor integration	[2]; [10], 63-64; [22]; [24], 211; [27]; [28], 359-60.
4. distance to separate schools	[5]; [10], 54; [15]; [17]; [24], 186-88; [32], 33.
5. black schools inferior, expensive	[2]; [5]; [6]; [10], 54, 60; [15]; [23]; [30], 260; [32], 24, 33, 42, 53.
6. antislavery	[5]; [10], 60; [19], 158, 160; [31], 279.
7. protects weak	[3]; [6]; [10], 54-55; [24], 211-12; [30], 260.

\* The numbers in brackets refer to the sources listed beginning on the following page; those not in brackets are page numbers in each source.

tee found the building "unfit for the use of the school," remarked that white schools already abandoned by the city were "palaces in comparison," and recommended building an entirely new structure. BSC Papers, *supra* note 116 (May 19, 1847). Nothing having been done, in 1848 the committee called the building "discreditable to the city." A. White, Blacks and Education, *supra* note 46, at 160 (quoting City of Boston, Report of the Annual Examination 57 (1848)). A few months before the *Roberts* case was argued in court, the Grammar School Committee and the City Council finally spent \$2000 to repair the Smith School building.

<sup>143</sup> Although all the Nantucket arguments are cited from a single source, Linebaugh quotes from a variety of primary documents: school committee and town meeting reports, letters to newspapers, petitions, and statements at other public meetings. Listing these fragmentary sources separately would be more tedious than enlightening.

8. no white flight, schools not adversely affected	[3]; [5]; [10], 57-58; [29], 240-43; [31], 257-60, 278.
<u>Anti-Integration Arguments</u>	
1. blacks inferior or different	[5]; [9], 9; [14]; [25]; [32], 30-31, 47.
2. custom governs	[3]; [8], 103-04, 133; [23]; [26], 230-31; [32], 32-33.
3. blacks ashamed of themselves	[9], 11-12, 25; [18], 211; [32], 31.
4. segregation convenient for blacks	[3]; [9], 10, 31; [18], 106-07; [25]; [32], 41, 46.
5. black schools just as good	[9], 25; [25]; [26], 226; [32], 35, 40, 47.
6. blacks favor, only agitators oppose	[4]; [5]; [9], 15-20, 22-24; [13]; [18], 88-90, 143-44; [19], 101-02; [20]; [21]; [23]; [25]; [32], 48.
7. better for majority	[3]; [32], 35, 47.
8. white flight hurt schools	[3]; [9], 16; [18], 130; [21]; [32], 30, 46.

[1] Opinion of Richard Fletcher on Salem Segregation, quoted in *JIM CROW IN BOSTON: THE ORIGINS OF THE SEPARATE BUT EQUAL DOCTRINE* 48-49, 251 (L. Levy & D. Jones eds. 1974). Because Levy and Jones reprinted many relevant documents and since their volume is more widely available than the originals, I will refer to sources that they include with the designation *JIM CROW*, *supra* note 31, as in the main body of footnotes.

[2] Black Petition (1844), included in Boston School Committee Papers (available in Boston Public Library, Rare Book Room).

[3] Massachusetts Senate Debates (1845), discussed in Boston Post, Feb. 21, 1845; The Liberator, Mar. 7, 1845; and I H. WILSON, *THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* 496-98 (reprint ed. 1969).

[4] Boston Olive Branch, quoted in The Liberator, Aug. 8, 1845, at 1, col. 4.

[5] Primary School Committee Debate, discussed in Boston Transcript, June 20, 1845, at 2, col. 1; The Liberator, June 27, 1845, at 2, col. 4.

[6] Black Petition (1846), reprinted in *JIM CROW*, *supra* note 31, at 4.

[7] Primary School Committee Debate, discussed in The Liberator, July 10, 1846, at 3, col. 3.

[8] Testimony of Wendell Phillips, Ellis Gray Loring, and Robert Morris, Jr., Before Primary School Committee, included in Primary School Committee Majority Report (W. Crowell, J. Ingraham & D. Kimball 1846), reprinted in *JIM CROW*, *supra* note 31, at 12.

[9] Primary School Committee Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 1-32.

[10] Primary School Committee Minority Report (E. Jackson and H. Bowditch 1846), reprinted in *JIM CROW*, *supra* note 31, at 41-69.

[11] Opinion of Boston City Solicitor Peleg Chandler on School Segregation (1846), reprinted in *JIM CROW*, *supra* note 31, at 33-40.

[12] Critique of Wendell Phillips on Chandler Opinion, reprinted in *JIM CROW*, *supra* note 31, at 69-78.

[13] Smith School Visiting Committee Report (1847), included in Boston City Documents, 1847, No. 47, at 31-32 (1847).

[14] Letter from N. Pickering to Dr. Winslow Lewis, Jr. (Aug. 10, 1848), included in Boston School Committee Papers (available in Boston Public Library, Rare Book Room).

[15] Resolutions Adopted at Black Meeting, discussed in The Liberator, Aug. 10, 1849, at 3, col. 3.

[16] Testimony of John T. Hilton, Robert Morris Jr., and Benjamin Roberts before Grammar School Committee, Boston Daily Advertiser, Aug. 14, 1849, at 2, col. 4.

[17] Resolutions of [white] First Wesleyan Church of Boston (1849), included in Boston School Committee Papers (1849) (available in Boston Public Library, Rare Book Room).

[18] Grammar School Committee Majority Report (A. Bigelow, S. Reed, H. Dupee, & E. Beecher 1849), reprinted in *JIM CROW*, *supra* note 31, at 79-148.

[19] Grammar School Committee Minority Report (C. Russell 1849), reprinted in *JIM CROW*, *supra* note 31, at 149-64.

[20] Editorial, Boston Daily Advertiser, Aug. 16, 1849, at 2, col. 1.

[21] Editorial, Boston Post, Nov. 10, 1849, at 1, col. 8.

[22] Editorial, The Liberator, Nov. 16, 1849, at 2, col. 5.

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- [23] Testimony of Thomas P. Smith Before Grammar School Committee, *reprinted as letter in Boston Post*, Aug. 14, 1849, at 1, col. 7, and *The Liberator*, Oct. 5, 1849.
- [24] Charles Sumner Brief in *Roberts v. City of Boston*, 5 Cush. 198 (1849), *reprinted in JIM CROW*, *supra* note 31, at 165-216.
- [25] Peleg Chandler Brief in *Roberts v. City of Boston*, 5 Cush. 198 (1849), *discussed in The Liberator*, Dec. 14, 1849, at 1, col. 3, and April 26, 1850, at 2, col. 3.
- [26] *Roberts v. City of Boston*, 5 Cush. 198 (1849), *reprinted in JIM CROW*, *supra* note 31, at 217-31.
- [27] Statement of Benjamin Roberts, *The Liberator*, April 4, 1851, at 3, col. 3.
- [28] W. NELL, *COLORED PATRIOTS OF THE AMERICAN REVOLUTION* (reprint ed. 1968) (1855).
- [29] Boston City Council Report (G. Williams 1854), *reprinted in JIM CROW*, *supra* note 31, at 233-44.
- [30] Massachusetts House of Representatives Report No. 167 (C. Slack 1855), *reprinted in JIM CROW*, *supra* note 31, at 247-62.
- [31] Report of a Public Meeting Concerning the Triumph of Equal School Rights in Boston (Dec. 17, 1855), *reprinted in JIM CROW*, *supra* note 31, at 263-90.
- [32] B. LINEBAUGH, *supra* note 99.

**TABLE 2**  
Summary of the Content of Arguments for and Against  
Integration in Boston and Nantucket\*

<u>Pro-Integration Arguments</u>	<u>Boston</u>	<u>Nantucket</u>
1. arbitrary, unlawful	24	54
2. reinforces prejudice	19	0
3. interracial competition good, blacks favor integration	10	8
4. distance to separate schools	9	8
5. black schools inferior, expensive	14	31
6. antislavery	7	0
7. protects weak	9	0
8. no white flight, schools not adversely affected	9	0
TOTAL NUMBER	58	13
<u>Anti-Integration Arguments</u>	<u>Boston</u>	<u>Nantucket</u>
1. blacks inferior or different	11	14
2. custom governs	16	7
3. blacks ashamed of themselves	8	7
4. segregation convenient for blacks	13	14
5. black schools just as good	8	21
6. blacks favor, only agitators oppose	32	7
7. better for majority	3	14
8. white flight hurt schools	11	14
TOTAL NUMBER	38	14

\* Rows are percentages of total numbers of arguments.

#### *A. The Arbitrariness of Racial Distinctions*

The fundamental abolitionist argument against school segregation was that governmental agencies had no right to use race as a criterion for treating citizens differently.<sup>144</sup> It was "arbitrary," "unreasonable," un-

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<sup>144</sup> This had been a prime abolitionist tenet from the beginning. For example, the 1832 New

fair, not warranted by any constitutional or statutory provision, and, indeed, contrary both to the explicit provisions of the Massachusetts Declaration of Rights and to the egalitarian premises underlying the American legal system and its European antecedents.<sup>145</sup> In the words of eighty-six black petitioners to the Primary School Committee in 1846, segregation "deprives us of those equal privileges and advantages in the public schools to which we are entitled as citizens."<sup>146</sup> As the petitioners asserted before the committee, so did advocates argue before the court. The "fundamental right of all citizens," Charles Sumner wrote in his *Roberts* brief, was "Equality before the Law."<sup>147</sup> While the school committee could legally classify children according to age, sex, or "moral [or] intellectual qualifications," it could not "assume, a priori, and without individual examination, that all of an entire race are so deficient in proper moral and intellectual qualifications as to justify their universal degradation to a class by themselves."<sup>148</sup>

That, of course, was just the assumption that the school committees did make. The blacks' "peculiar physical, mental, and moral structure," the majority report of the 1846 Primary School Committee asserted, "requires an educational treatment different, in some respects, from that of white children," because blacks learned only by rote and imitation, while whites could also rely on "the faculties of invention, comparison, and reasoning."<sup>149</sup> Segregation was best for both races, the committee as-

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England Anti-Slavery Society platform stated that "[a] mere difference of complexion is no reason why any man should be deprived of any of his natural rights." Wiecek, *supra* note 80, at 160 (emphasis added).

<sup>145</sup> The antislavery legalists' usage of the terms "arbitrary" and "reasonable" is very much in accord with modern meanings. See BLACK'S LAW DICTIONARY 96, 1138 (5th ed. 1979). Recent uses of this argument abound. In his dissent in *McCleskey v. Kemp*, 107 S.Ct. 1756, 1790 (1987), for example, Justice Brennan remarked: "Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess." Ronald Dworkin refers to this as the "banned categories" principle. See R. DWORKIN, LAW'S EMPIRE 384-85 (1986).

<sup>146</sup> Black Petition (1844), included in BSC Papers, *supra* note 80, at 116 (1844).

<sup>147</sup> Brief of Charles Sumner, *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), reprinted in JIM CROW, *supra* note 31, at 165-216, 202 (emphasis in original).

<sup>148</sup> *Id.* Urging that Sumner's brief be reprinted, Henry Wilson's *Boston Emancipator and Republican* predicted that it would "long be a treasure-house for other laborers" against school segregation. *Boston Emancipator and Republican*, Dec. 13, 1849, at 1, col. 1. An obituary editorial about Sumner termed him "not so much . . . the friend of the colored people, as the advocate of justice toward all men. He was the personified logic of the question, calm, cold, inflexible . . ." San Francisco Alta California, Mar. 17, 1874, at 2, col. 2.

<sup>149</sup> Primary School Committee Majority Report (1846), reprinted in JIM CROW, *supra* note 31, at 31. Compare the assertions of the Primary School Committee with Jensen, *How Much Can We Boost IQ and Scholastic Achievement?* 39 HARV. EDUC. REV. 1, 109-17 (1969) (asserting on the basis of a statistical analysis of "intelligence" that the pattern of learning of blacks is qualitatively different from that of whites). Having referred to the white integrationists as "the alleged friends of the blacks," S. SCHULTZ, *supra* note 42, at 184, Schultz states that Bowditch's 1846 minority report denounced "the alleged prejudice of the Board." *Id.* at 186. This is carrying scholarly disinterestedness rather far.

serted, because separation did not insult blacks; rather, “[a]malgamation is degradation.”<sup>150</sup> Black schools had been established by the committee, Chandler argued in *Roberts*, “for the benefit of the colored people,” and to eliminate the black schools their opponents would have to show they “[were] not intended for the best good of the children, both colored and white.”<sup>151</sup>

Thus, both sides in the segregation controversy combined policy or philosophical arguments with what would now be labeled considerations of privileges or immunities, equal protection, or due process. It is misleading to conclude, as Schultz does, that “Sumner’s argument relied as much on a moral appeal as on an issue of law,”<sup>152</sup> for the two were inextricably intertwined. All parties agreed that the Massachusetts Declaration of Rights—explicitly—and the common law—implicitly—guaranteed citizens equal treatment. And all recognized that the power to govern the schools inherently carried with it the authority to distinguish among school children on some, but not all possible, grounds. Distinctions could legally be made, as long as their criteria were “founded on just grounds of reason and experience, and . . . the results of a discriminating and honest judgment,” as Shaw wrote in his opinion in *Roberts*.<sup>153</sup> The issue was what criteria were reasonable and what justifications for unequal treatment would pass muster with courts or public opinion. No one assumed that every distinction would be satisfactory. If the school committee had limited entrance to the Latin High School to the offspring of Whigs, for example, or barred from it children of immigrants, mechanics, or day laborers, the committee would probably have produced some rationale for its decision—probably only a few Democrats wished to apply and their presence might offend some elitist Whigs; rich men paid more taxes; or family background was then, as now, a good predictor of academic success. Indeed, integrationists in and out of the courts charged at the time *Roberts* was decided that a racial classification also could be used by the school committees to justify those along lines of class, religion, or national origin.<sup>154</sup> To demonstrate

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<sup>150</sup> Primary School Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 15.

<sup>151</sup> *The Liberator*, Dec. 14, 1849, at 197, col. 4. See also Primary School Committee Debate, discussed in *Boston Evening Transcript*, June 20, 1845, at 2, col. 1; *The Liberator*, June 27, 1845, at 2, col. 4. On the good intentions point, see Primary School Committee Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 15 (blacks better in separate schools to cultivate social identity); Boston City Solicitor Peleg Chandler opinion on school segregation (1846), discussed in *The Liberator*, Dec. 14, 1849, at 197, col. 3; Apr. 26, 1850, at 2, col. 3; Grammar School Committee Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 121-22; *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 230-31.

<sup>152</sup> S. SCHULTZ, *supra* note 42, at 202.

<sup>153</sup> *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 21-31.

<sup>154</sup> See, e.g., Richard Fletcher Opinion on Salem school segregation, quoted in *JIM CROW*, *supra* note 31, at 48 (laborers and mechanics); Primary School Committee Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 30 (discipline, ages, and sex); Primary School Committee

how ridiculous the racial distinction was, Nantucket abolitionists moved in an 1843 town meeting to "establish a School for all Children having Red Hair."<sup>155</sup> But courts would no doubt have been skeptical of the "honesty" with which a school committee containing no mechanics, no Catholics, and few Democrats had arrived at their conclusion to exclude such classes—a procedural due process criticism.<sup>156</sup> The courts also would have unquestionably considered such departures from equality "irrational." Even though party or class and school achievement were correlated, the correspondence was not perfect, and singling out people with such traits would therefore be arbitrary. Such arguments today would be labeled substantive due process arguments.<sup>157</sup>

To approve racial segregation, judges did not have to agree that it was the best of all possible policies. What they did have to claim to have determined was, first, that school authorities sincerely believed that race was different from other potential criteria and that segregation was best for both black and white children; and, second, that race was in fact so connected with learning that it could make good sense to separate students along racial lines. The former determination focused on an intent criterion and explains why school boards paraded their rhetorical good will to blacks so ostentatiously. The latter focused on an effect criterion and accounts for the "equal" part of "separate but equal."<sup>158</sup>

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Minority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 47 (Irish, poor); Wendell Phillips critique of Chandler opinion, reprinted in *JIM CROW*, *supra* note 31, at 75-76 (class, wealth, religion); Brief of Charles Sumner, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 182-85, 205 (religion).

<sup>155</sup> B. LINEBAUGH, *supra* note 99, at 24 (quoting Nantucket Town Records 177 (1843)).

<sup>156</sup> See L. TRIBE, *THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS: LIMITS ON GOVERNMENT AUTHORITY* 502 (1978) (defining procedural due process as "'the right to be heard before being condemned to suffer grievous loss of any kind'") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

<sup>157</sup> See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (segregation unconstitutional in District of Columbia) ("discrimination may be so unjustifiable as to be violative of due process"). In his 1868 classic, Thomas McIntyre Cooley contended that "a statute would not be constitutional which should proscribe a class or a party for opinion's sake." T. M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 390 (reprint ed. 1972). Specifically, such a statute would abrogate due process or "law of the land" clauses in state constitutions, which existed in most state constitutions before passage of the fourteenth amendment. *Id.* at 390. Cooley continued, saying that

the doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. . . . Equality of rights, privileges, and capacities unquestionably should be the aim of the law. . . . The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons or classes are still more so. . . .

*Id.* at 393.

<sup>158</sup> Ronald B. Jager charges that "Sumner's argument was too broad and insufficiently discriminating to be good law" and therefore was quickly disposed of by Chief Justice Shaw. Jager, *Charles Sumner, The Constitution, and the Civil Rights Act of 1875*, 42 NEW ENG. Q. 350, 359 (1969). Jager further argues that Sumner was too little concerned with "the harmful psychological and sociologi-

*B. Integration as a Positive Good*

The second abolitionist argument was that segregation reinforced existing prejudice, while intermixture tended to break it down. Segregationists disagreed on each count, and both sides appealed to folk sociology.<sup>159</sup> The abolitionist viewpoint was well represented in the 1846 Minority Report for the Primary School Committee, written by Edmund Jackson and Henry Bowditch:

[Segregation is] morally injurious to the white children, inasmuch as it tends to create in most, and foster in all, feelings of repugnance and contempt for the colored race as degraded inferiors, whom they may, or must, treat as such . . . . One of the great merits of our system of public instruction is, the fusion of all classes which it produces. From a childhood which shares the same bench and sports, there can hardly arise a manhood of aristocratic prejudice, or separate castes and classes."<sup>160</sup>

The purpose of the common schools, according to Charles T. Russell's 1849 Grammar School Committee Minority Report, "seems to be, and their whole influence is, practically to teach the great theoretical principle of our government, that 'all men are born free and equal'."<sup>161</sup> Sumner's brief in the *Roberts* case exuded abolitionist perfectionism. "Prejudice," he insisted, "is the child of ignorance. It is sure to prevail, where people do not know each other. Society and intercourse are means established by Providence for human improvement. They remove antipathies, promote mutual adaptation and conciliation, and establish relations of reciprocal regard."<sup>162</sup> Thus, while the first criterion for the

cal consequences of segregation" to make his brief an anticipation of the 1954 *Brown* case. *Id.* However, Jager's arguments are simply muddled. Sumner and Shaw considered both the intent and effect of segregation, at least as much as did Chief Justice Earl Warren in *Brown*.

<sup>159</sup> For references to parallel twentieth-century arguments, see Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS. 217, 225, 231-32 (Spring 1975); Cohen, *The Effects of Desegregation on Race Relations*, 39 LAW & CONTEMP. PROBS. 271 (Spring 1975). Scientific sociological studies come to the same contradictory conclusions as did folk sociology. See Cohen, *supra*, at 297. Similar studies underlay the famous footnote eleven in *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 n.11 (1954), which itself more systematically referred to the folk sociological contentions of Justice Henry B. Brown's opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, Justice Brown relied on Shaw's opinion in *Roberts v. City of Boston*. *Plessy*, 163 U.S. at 544. In doing so, Justice Brown concluded that reform legislation was powerless to eradicate societal discrimination. *Id.* at 551.

<sup>160</sup> Primary School Committee Minority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 54-55. Expert witnesses made the same argument in briefs presented to the Supreme Court for the *Brown* decision, although the Court ignored the point in its opinion. See Cohen, *supra* note 159, at 272 n.2 (referring to social science evidence that showed injury to white children from segregation).

<sup>161</sup> Grammar School Committee Minority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 155.

<sup>162</sup> Brief of Charles Sumner in *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 212. The apparent importance of this "universalistic ethic" in arguments that helped shape the consciousness of those who framed and voted for the fourteenth amendment casts doubt on Fiss's exclusion of that ethic from the "contours" of the amendment. See Fiss, *supra* note 79, at 208.

abolitionists was pure nondiscrimination, they also viewed integration as a positive good. From the beginning of the debates on the legality of racial discrimination in America, the liberal side combined rationales later identified as the present era's "Briggs dictum" of Appeals Court Judge John J. Parker and the more thoroughgoing pro-integration stance of *Green v. New Kent County*.<sup>163</sup>

In contrast to the abolitionist arguments, the majority report of the 1849 committee ridiculed the abolitionists' optimism. "[C]ustom," not governmental practice, was the source of the "massive wall of prejudice," and "the destruction of the Smith School would be but the fall of the puniest out-work."<sup>164</sup> Chief Justice Shaw echoed the report of the committee, on which he had served during the 1820s, when responding to the plaintiff's argument in *Roberts* that state maintenance of separate schools "tends to deepen and perpetuate the odious distinction of caste" that was "founded in a deep-rooted prejudice in public opinion."<sup>165</sup> Shaw wrote

<sup>163</sup> In *Briggs v. Elliott*, 132 F. Supp. 766 (E.D.S.C. 1955), Judge Parker noted in dictum what the Supreme Court "has and has not decided [in *Brown v. Board of Education*]":

It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

Then, in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), the Supreme Court found that the "freedom-of-choice" plan for school desegregation adopted by the respondent school board was unconstitutional under *Brown*. Instead, the Court in *Green* stated that *Brown* charged school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green*, 391 U.S. at 437-38. Similarly, Judge Parker's great antagonist, Judge John Minor Wisdom, stated that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 869 (5th Cir. 1966) (emphasis in original). One commentator denounces *Green* and *Jefferson County* as distortions of *Brown*, which he reads as going no further than *Briggs*. R. WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 7, 154-55, 288 (1984). The fourteenth amendment, Wolters asserts, means that the courts should be color blind, not color conscious. *Id.* at 288. Therefore, Wolter argues that *Green* must "be repudiated and . . . Judge Parker's dictum in *Briggs* be revived" to "prohibit[ ] . . . official racial discrimination, not . . . prohibit[ ] . . . racially neutral policies that do not lead to a substantial amount of racial mixing." *Id.* The antebellum Massachusetts example counts against Wolters' assertion that the constitutional tradition excludes color conscious remedies for racial discrimination.

<sup>164</sup> Grammar School Committee Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 103-04. Similarly, see Cohen, *supra* note 85, at 299 (schools cannot be held solely responsible for evils of discrimination and cannot alone effect change).

<sup>165</sup> *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 230-31.

that "[t]his prejudice, if it exists, is not created by law, and probably cannot be changed by law."<sup>166</sup>

### C. Competition and Malign Neglect

Black abolitionists welcomed competition with whites in the public schools and considered its absence a disadvantage of caste schools. "The present exclusion of our children from the best schools and from competition in learning with white children . . .," the signers of the 1844 petition contended, "is calculated to repress an honorable ambition. People are apt to become what they see is expected of them. It is very hard to retain self-respect, if we see ourselves set apart and avoided as a degraded race, by others."<sup>167</sup> Or, as Sumner wrote in his *Roberts* brief, segregation deprived blacks "of those healthful, animating influences which would come from participation in the studies of their white brethren."<sup>168</sup>

Such statements, the majority on the school committee of 1849 countered, indicated that integrationist blacks were "ashamed of themselves" and that they and "their officious advisers" among the whites believed "that a white skin was really better than a dark one."<sup>169</sup> "Let them cultivate a respect for themselves, for their own race . . .," the Primary School Committee majority report of 1846 exhorted. "Let them not come to us with the humiliating confession, that they cannot make their separate schools as good as those for the white children" and that they need "white children to pull them up . . . Do colored people contaminate colored people by being together?"<sup>170</sup>

Rather than undermining bigotry, the school committee and one faction of Boston blacks speculated that integration might strengthen it. Rather than offering blacks a chance for a better education, integration might offer them a poorer education. If the Smith School were abolished, John H. Roberts, a black day-laborer and integration opponent, predicted: "The poor and ill-educated colored children of the West End

<sup>166</sup> *Id.* at 230. For modern research on the question of whether custom or governmental practice is the source of racial prejudice, see H. SCHUMAN, C. STEEH, & L. BOBO, *supra* note 83, at 135-38.

<sup>167</sup> Black Petition (1844), included in BSC Papers (1844) (available in Boston Public Library, Rare Book Room); see also statement of Benjamin Roberts, printed in *The Liberator*, Apr. 4, 1851, at 3, col. 3. For parallel modern findings by sociologists, see Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROBS. 241, 244-53 (Spring 1975).

<sup>168</sup> Brief of Charles Sumner, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 211.

<sup>169</sup> Grammar School Committee Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 112. Cf. Congress of Racial Equality, *A Proposal for Community School Districts*, in THE GREAT SCHOOL BUS CONTROVERSY 311, 312 (N. Mills ed. 1973). The Congress of Racial Equality rejected the necessity of integration, arguing that the theory that racial segregation in schools yields inequality assumes that blacks need whites to help them become equal.

<sup>170</sup> Primary School Committee Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 15, 25.

would be brought into disadvantageous competition and association with the more advanced and wealthy white children . . . ." <sup>171</sup> Suffering "sneers, insults, assaults, [and] jeers," they would be isolated from their white peers informally, and "embarrassment would retard their progress." <sup>172</sup> Black schools, by contrast, offered a "retreat—an asylum secure from the taunts and reproaches heaped upon the innocent children" which should be retained for those "who were unwilling to suffer the persecution to which they would be exposed in a school where the great majority were of the favored complexion." <sup>173</sup> The black schools were "characterized by the spirit of equality, of enterprise, emulation and friendship . . ." <sup>174</sup>

The Boston school committee never delineated how a black community with sparse economic resources, little social standing, and no representation on the governing bodies, whose neglect of the black schools was freely admitted except when rebutting arguments for integration, could raise the caste schools to the level of the common schools. Sumner pounced on the last point in his brief. In a common school, "the poor, the humble, and the neglected not only share the companionship of the more favored, but enjoy also the protection of their presence, which draws toward the school a more watchful superintendence." <sup>175</sup>

#### *D. A Discriminating Distance*

The fourth inequity stressed by the abolitionists was distance. Had five-year-old Sarah Roberts attended the caste primary school nearest her home in 1847, she would have passed five common primaries on the

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<sup>171</sup> Report of a Special Committee of the Grammar School Board (1849), in the Petition of Sundry Colored Persons Praying for the Abolition of the Smith School, *quoted in* **JIM CROW**, *supra* note 31, at 131.

<sup>172</sup> *Id.* at 132. Perhaps the best known recent statement of this view is Armor, *The Evidence on Busing*, 28 THE PUB. INTEREST 90, 102-05 (Summer 1972). For a judicial statement, see Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667 (S.D. Ga. 1963) (denying injunction and citing sociological and psychological data as evidence integrated schools harmful to both blacks and whites due to their different abilities), *rev'd*, 333 F.2d 55 (5th Cir. 1964) (reversing and remanding, finding district court's distinctions based on separate aptitudes was not allowed under *Brown v. Board of Educ.*, 347 U.S. 483 (1954)), *cert. denied*, Roberts v. Stell, 379 U.S. 933 (1964).

<sup>173</sup> Boston Post, Aug. 14, 1849, at 1, col. 7, (quoting testimony of Thomas P. Smith before Grammar School Committee); *see also* The Liberator, Oct. 5, 1849, at 160, col. 3 (reprinting letter from Smith defending himself and elaborating on earlier testimony).

<sup>174</sup> Grammar School Committee Majority Report (1849), *reprinted in* **JIM CROW**, *supra* note 31, at 132.

<sup>175</sup> Brief of Charles Sumner, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), *reprinted in* **JIM CROW**, *supra* note 31, at 211. Cf. Fiss, *supra* note 79, at 200 (discussing theories as to why segregation is harmful to blacks, including proposition that "[s]egregation has the inevitable effect of reducing the financial and physical resources available to all-black schools because these schools are attended only by members of the least powerful group").

way.<sup>176</sup> Other black children had to travel even farther. Some had to cross the Charles River by ferry, while no white youngster of tender age had such a long walk in the Boston winter.<sup>177</sup> That it took no acceptance of high-flown rhetoric or abstruse legal reasoning, or even a conscious rejection of the widespread white belief in Negro inferiority, to empathize with black children traipsing through the cold may explain why nineteenth-century integrationists repeatedly emphasized this aspect of inequality. A tired, frozen child of whatever hue was an object of sympathy.

Faced with a powerful image of oppression, the authorities used discrimination in housing, as their counterparts would 130 years later, to justify school segregation.<sup>178</sup> Officials pointed out that because the overwhelming majority of Boston blacks, unlike those in other Massachusetts towns, were confined to a small geographic area, few were remote from the separate schools. Moreover, white adolescents who attended high schools, from which blacks were excluded, and white children elsewhere in Massachusetts sometimes had to walk even greater distances.<sup>179</sup>

#### *E. A Waste of Money*

The abolitionists seemed reticent to emphasize other inadequacies in the black schools, probably because they wanted to stress the principle that race was not a permissible dividing line, and because criticizing the quality of black schools might be interpreted as deprecating the character of black students, thereby increasing white fears that integration would cause the common schools to decline.<sup>180</sup> They did note, however, that while the cost per attendee in black schools was double that in white

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<sup>176</sup> Brief of Charles Sumner, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 187; see also *id.* at 186-88.

<sup>177</sup> Primary School Committee Debate, discussed in *Boston Evening Transcript*, June 20, 1845, at 2, col. 1, and *The Liberator*, June 27, 1845, at 2, col. 4; Primary School Committee Minority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 50-51; Resolutions Adopted at Black Meeting, *The Liberator*, Aug. 10, 1849, at 3, col. 3; Resolution of [white] First Wesleyan Church of Boston (1849), included in *BSC Papers* (1849) (available in Boston Public Library, Rare Book Room); Grammar School Committee Minority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 159.

<sup>178</sup> Garrison decried such justifications, writing that discriminators "by a cruel proscription, have compelled them to crowd together in a particular quarter of the city. They have had no alternative presented to them; and now one act of injustice, on the part of the whites, is adduced as a sound reason why another should be perpetrated!" Editorial, *The Liberator*, Nov. 16, 1849, at 2, col. 5. For a significant recent parallel, see *Milliken v. Bradley*, 418 U.S. 717 (1974) (segregated housing patterns, partly fostered by governmental actions, held insufficient to justify metropolitan dispersion of school children as a remedy for segregation).

<sup>179</sup> 1 H. WILSON, *supra* note 9, at 497 (speech by John C. Park).

<sup>180</sup> The Report of the Annual Examination of the Public Schools of the City of Boston, Doc. No. 39, at 42-43 (1849), showed just that tendency, castigating "the best scholars" of the Smith School as "deplorably deficient, considering the time, expense, and care that have been bestowed on them." The students' deportment, the antipathetic school committee members found, was even "more discouraging," and the "fault appears to be in the pupils themselves. . . ." For recent parallels to the abolitionists' dilemma, see Bell, *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROBS. 341, 368 (Spring 1975).

schools, the range of grades the Smith School offered was less than that available elsewhere, and the reports of its visiting committees were almost always dismal. "[T]he result in education conferred," Jackson and Bowditch declared, "is in an inverse ratio to the expenditure."<sup>181</sup> Officials responded by blithely asserting that the exclusive schools were "just as good" as the white ones,<sup>182</sup> or declaring that the expenditure differential reflected boycotts or blacks' lack of appreciation for education,<sup>183</sup> or even implying that it indicated the committee's good faith toward black schools, because it was willing to spend more money to make them "equal" to those for whites.<sup>184</sup>

#### *F. Segregation and Slavery*

In a highly rhetorical argument, the integrationists urged that ending racial exclusion was a strike against slavery. Jackson and Bowditch observed that the same specious paternalistic reasoning that represented segregated schools as a kindness to blacks defended slavery as a positive good.<sup>185</sup> Northern examples of segregation, moreover, buttressed the southern case for slavery. "Every mark of degradation put upon the blacks here," Whig lawyer Charles Russell<sup>186</sup> remarked, "is cited elsewhere in support of slavery."<sup>187</sup> Not wishing to defend that peculiar in-

<sup>181</sup> Primary School Committee Minority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 54. The debates' lack of emphasis on achievement in schools contrasts strikingly with post-Coleman Report arguments. See Levin, *supra* note 159, at 221-23, 226-30. Note that this contrast did not arise because achievement was unmeasured in the 1840s, because standard tests were administered in Boston at the time. See, e.g., Reports of the Annual Visiting Committees of the Public Schools, *supra* note 95, at 149.

<sup>182</sup> Primary School Committee Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 25; Brief of Peleg Chandler, Roberts v. City of Boston 59 Mass. (5 Cushing) 198 (1849), discussed in *The Liberator*, Dec. 14, 1849, at 1, col. 3, and Apr. 26, 1850, at 2, col. 3; Roberts v. City of Boston, 59 Mass. (5 Cushing) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 226.

<sup>183</sup> Primary School Committee Majority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 25.

<sup>184</sup> *Id.*

<sup>185</sup> Primary School Committee Minority Report (1846), reprinted in *JIM CROW*, *supra* note 31, at 60.

<sup>186</sup> For discussion of Russell's integration activities, including his motion before the Grammar School Committee to give blacks the choice between "exclusive" or neighborhood schools, see *supra* note 141 and accompanying text.

<sup>187</sup> Grammar School Committee Minority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 160. At least one southern newspaper reacted exactly as predicted, crowing over the *Roberts* decision. See Spartanburg (S.C.) Spartan, quoted in *The Liberator*, Aug. 26, 1850, at 4, col. 5 ("Those Boston folks are true to their abolition instincts, hypocrisy, pride, arrogance and cruelty. They preach amalgamation, and the obliteration of caste to the South, but they would suffer martyrdom before they will practice it. They will inveigle the negro from happiness and contentment at home, and when they get him among them, and have filled his shallow mind with dreamy notions of equality with a higher race, they will subject him to scorn, contumely and denigration of which he knew nothing practically before.").

stitution in overwhelmingly antislavery Massachusetts, the advocates of Jim Crow schools did not respond to this argument.

#### G. Who Spoke for Blacks?

To counter arguments for integration and to maintain an appearance of good faith in the face of overwhelming black opposition, the school committees made great efforts to prove that blacks wished to maintain the segregated schools.<sup>188</sup> They resurrected the 1800 petition from Prince Hall that provided the impetus for the segregated black schools,<sup>189</sup> and responded to suggestions that black opinions might have shifted since then by charging blacks with fickleness and disrespect for their forefathers.<sup>190</sup> Painstakingly comparing names on petitions and counterpetitions with city directories and school rolls, the committees denied the black integrationists' claims to speak for the black community or at least for its more respectable members. Unable to dispute the fact that opponents of caste schools enjoyed broader support among blacks than did those who wanted the schools retained, the committees reverted to the position that not all the segregation opponents had children who were eligible to attend and that only a minority of parents of current schoolchildren signed abolition petitions.<sup>191</sup> Claiming to represent the "true interests" of blacks, the committees and their defenders in the white press described the shadows of white abolitionists behind the scenes. The protests took place, the Democratic *Boston Post* intoned, "because a parcel of rabid enthusiasts, pretending to be friends of the colored people, chose to meddle with matters that did not concern them, and with a system which was working prosperously, in all love and harmony."<sup>192</sup> Not to be outdone, the Majority Report of the 1846 Primary School Committee played the mulatto card: "[T]his Petition," it surmised, "did not originate in the wishes of the colored people,—certainly not in those of the real and unmixed African race."<sup>193</sup> Black integrationist leaders,

<sup>188</sup> For recent parallels, see Bell, *supra* note 180, at 358-59 (describing Atlanta and Fort Worth plans in which black parents received more control over school policy-making in exchange for less integration, despite some parents' claims these compromises were "sell-outs").

<sup>189</sup> For discussion of the Prince Hall petition, see *supra* notes 33-37 and accompanying text.

<sup>190</sup> Primary School Committee Majority Report (1846), reprinted in JIM CROW, *supra* note 31, at 17-22, 25; Grammar School Committee Majority Report, reprinted in JIM CROW, *supra* note 31, at 102-03; Brief of Peleg Chandler in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), discussed in *The Liberator*, Dec. 14, 1849, at 1, col. 3.

<sup>191</sup> Primary School Committee Debate, discussed in *Boston Evening Transcript*, June 20, 1845, at 2, col. 1, and *The Liberator*, June 27, 1845, at 2, col. 4. Primary School Committee Majority Report (1846), reprinted in JIM CROW, *supra* note 31, at 22-24; Grammar School Committee Majority Report (1849), reprinted in JIM CROW, *supra* note 31, at 88-90; Editorial, *Boston Daily Advertiser*, Aug. 16, 1849, at 2, col. 1; Brief of Peleg Chandler in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), discussed in *The Liberator*, Dec. 14, 1849, at 1, col. 3.

<sup>192</sup> Editorial, *Boston Post*, Nov. 10, 1849, at 1, col. 8.

<sup>193</sup> Primary School Committee Majority Report (1846), reprinted in JIM CROW, *supra* note 31, at 24.

who held their own public meetings and did not seek white signatures on their petitions from 1844 through 1849, avowed themselves the originators of the struggle<sup>194</sup> and did not bother to respond to the attempt to set Afro-Americans of different shades of brown against each other.<sup>195</sup>

#### *H. Majority Tyranny and Equal Benefits*

Whatever the prevalent black view on school integration, those who governed a city and state that was ninety-eight percent non-black felt they had to pay more attention to the white majority, arguing that resistance to integration was their duty as representatives. During the 1845 debates in the state senate, John Henry Clifford, later a Whig attorney general and governor, opposed the integration bill because he "was unwilling to sacrifice the larger portion of the scholars for the benefit of the lesser."<sup>196</sup> Nothing could have aroused more ire in the "Natick cobbler" Henry Wilson, son of a wretchedly poor drunk, unschooled, apprenticed at ten, so ashamed of his birth that he changed his name at twenty-one, an entirely self-made man who never forgot his origins. The General Court's "imperative duty . . . was, when complaints were made of the invasion of the rights of the poorest and humblest, to provide a remedy that should be full and ample to secure and guard all his rights."<sup>197</sup> Anticipating the phraseology of an 1866 civil rights bill that he introduced in the United States Senate, Wilson in 1845 equated integration with a guarantee to each child of the "full and equal benefits of our public schools."<sup>198</sup>

<sup>194</sup> Editorial, *The Liberator*, Nov. 16, 1849, at 103, col. 4; Statement of Benjamin Roberts, *printed in The Liberator*, Apr. 4, 1851, at 3, col. 3.

<sup>195</sup> Thirty-nine and three-tenths percent of the people of color in 1855 were classified by the census takers as "mulatto." Massachusetts State Census, 1855, at 51, Table I. My future research will attempt to determine if light-skinned people were especially likely to be integrationists.

<sup>196</sup> Massachusetts Senate Debates (1845), *discussed in* 1 H. WILSON, *supra* note 9, at 496-98. Paradoxically, a half year later, Clifford and his New Bedford law partner, Lincoln Flagg Brigham, filed the Nantucket school integration case as lawyers for Absalom Boston! Since Brigham had only just come to the bar, it appears nearly certain that Clifford was actively involved in the case. I have no explanation for Clifford's actions.

<sup>197</sup> 1 H. WILSON, *supra* note 9, at 496.

<sup>198</sup> *Id.* Jackson and Bowditch used the same phrase, "equal benefit," in their 1846 Minority Report. Report of the Minority of the Committee, 1846, *reprinted in* JIM CROW, *supra* note 31, at 52. The repeated use of this language has interesting implications for Berger's view that the fourteenth amendment was intended to do no more than constitutionalize the Civil Rights Act of 1866. Wilson's 1866 bill in the United States Senate (S.55) contained the core of a broader 1866 civil rights bill framed by Lyman Trumbull, which eventually became the bill Congress enacted. The Trumbull-sponsored law incorporated the language from Wilson's bill. See Frank and Munro, *supra* note 22, at 139, on the 1866 developments. Apparently, the person who introduced the "equal benefits" phrase into the Civil Rights Act of 1866 considered the phrase a term of art that guaranteed integration. Thus, even if the fourteenth amendment merely wrote the Civil Rights Act of 1866 into the Constitution, at least one prominent framer equated doing so with integration. For biographical information on Wilson, see R. ABBOTT, COBBLER IN CONGRESS: THE LIFE OF HENRY WILSON,

### I. White Flight

Integration, opponents charged, would result in diminished public support for the schools and white flight, which would shortly produce resegregation. “[M]any scholars,” the 1846 Primary School Committee Majority Report warned, “would be driven from our schools by such a change. Many parents would not allow their children to associate with colored children; and these, too, from among the class who most need instruction: for the prejudices against color are strongest among the most ignorant.”<sup>199</sup> Three years later, the *Boston Post* elaborated on this scenario, but maintained it was the wealthy whites of the West End who would flee: “The consequences of abolishing the Smith school . . . would be great excitement, hard thoughts, political action, the revival of old prejudices, and, finally, the secession of the whites from several of the finest edifices in the city, . . . which, in turn, and per force, would become ‘separate schools’ for the blacks.”<sup>200</sup>

Like the segregationist speculations about “white flight” from integrated schools, liberal rejoinders spanned much the same ground that they would in the twentieth century, although they were expressed more vehemently by early racial egalitarians than they would be by the more timid egalitarians of the 1980s. Whites who would leave public schools if blacks were admitted, Charles Francis Adams announced, “were unfit inhabitants for a republic.” The sooner they went, the better, and the destination he preferred for them was “across the Atlantic.”<sup>201</sup> Responding to predictions that “the people of wealth and influence” would enroll their children in private schools, Henry Wilson invited them to “do it. If any portion of our people have tastes and prejudices so strong that they cannot use our public schools if colored children are admitted, let them gratify their tastes and indulge their prejudices at their own expense, and not infringe upon the rights of others.”<sup>202</sup> Wilson and other integrationists doubted, however, that many whites would leave, citing the examples of New Bedford, Salem, and Nantucket. The influx of black children, Jackson and Bowditch predicted, would cause less difficulty than that of the much larger number of Irish, and complaints about blacks would “soon decline and die out, especially if the district and local

1812-1875 (1972); E. MCKAY, HENRY WILSON, PRACTICAL RADICAL: PORTRAIT OF A POLITICIAN (1971).

<sup>199</sup> Primary School Committee Majority Report (1846), reprinted in JIM CROW, *supra* note 31, at 16. While claiming lower-class whites would desert the common schools, the Rev. Andrew Bigelow, who was an author of the 1849 Grammar School Committee report and lived only a block from the Smith School, specifically mentioned the impact of integration on two Beacon Hill common schools that served more affluent whites. See A. White, BLACKS AND EDUCATION, *supra* note 46, at 288.

<sup>200</sup> Boston Post, quoted in The Liberator, Nov. 16, 1849, at 183, col. 5 (emphasis in original).

<sup>201</sup> Boston Post, Feb. 21, 1845, at 2, col. 2.

<sup>202</sup> The Liberator, Mar. 7, 1845, at 37, col. 3.

committees should discharge their duty with firmness, tempered with discretion and mildness . . . ."<sup>203</sup>

### *J. Private Prejudice and Public Rationales*

Justifications designed for public consumption are not the same as private motives. The actions of the school committees, of their lawyer and press defenders, and of Chief Justice Shaw in his *Roberts* decision, were probably influenced more by their own antipathy toward blacks and their perceptions of the antipathy of the white electorate than any of them emphasized. Indeed, the fact that most comments by Boston segregationists protested their good faith and denied that blacks wanted integration—there were five times as many such remarks as openly biased ones—indicates how weak they believed their case in the courts of law and public opinion. The legal and moral presumptions in favor of equality were, they apparently believed, the general rule; inequality, the exception. They did not usually broadcast comments such as those found in an 1848 letter of one committee member to another: "There are some feelings inherent in our nature, which are paramount to all laws and of such is perhaps the distinction and natural separation between the colored and white races—as against the . . . arguments of the philanthropists or the teachings of [C]hristianity."<sup>204</sup> It is hard to take seriously the 1849 Grammar School Committee Majority Report, which claimed that its "opinions have been shaped not only by the firmest convictions of truth and right, but by a tender regard to the best interests" of blacks.<sup>205</sup> As Wendell Phillips remarked of similar protestations by Peleg Chandler:

Of course we do not believe, any more than Mr. Chandler, that this Committee ever dreamed that in maintaining such schools, they were really consulting the best interests of the colored child. Such things are said because something must be said, and [they are] believed, if at all, only by those weak

<sup>203</sup> Primary School Committee Minority Report (1846), reprinted in *JIM CROW*, *supra* note 7, at 57-58. For evidence against the position that court-ordered desegregation decrees cause whites to flee newly desegregated schools, see Rossell & Hawley, *Understanding White Flight and Doing Something About It*, in *EFFECTIVE SCHOOL DESSEGREGATION: EQUITY, QUALITY, AND FEASIBILITY* 157 (Hawley ed. 1981); Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman 'White Flight' Thesis*, 46 HARV. ED. REV. 1 (1976); Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675 (1975).

<sup>204</sup> Letter from N. Pickering to Dr. Winslow Lewis, Jr. (Aug. 10, 1848), included in BSC Papers (available in Boston Public Library, Rare Book Room).

<sup>205</sup> Grammar School Committee Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 121-22. Scholars might be less quick to accuse the abolitionists of being sanctimonious if they paid equal attention to the anti-abolitionists.

men who take print for proof.<sup>206</sup>

## V. THE OPINION IN THE *ROBERTS* CASE

Lemuel Shaw's opinion in the *Roberts* case was no more credible than the justifications of the committee members.<sup>207</sup> First, Shaw provided a long, incorrect summary of the facts of the case, conveniently ignoring the fact that Sarah Roberts was temporarily admitted to the "white" primary school, blithely asserting that the "colored" primary school was "as well conducted in all respects" as were the white schools, and denying the plain fact that primary and grammar schools in Boston were geographically zoned.<sup>208</sup> The Chief Justice then admitted Sumner's premise that the notion of equal rights pervaded the state constitution but left it to the discretion of the legislature and the school authorities to administer that principle in good faith.<sup>209</sup> Thus, in *Roberts*, Shaw dismissed the guarantee of equality in the Massachusetts Declaration of Rights as mere advice to the legislature, rather than a tangible yardstick against which judges should measure the constitutionality of legislative or administrative acts. All this, despite the facts that Shaw used this guarantee of equality to ban slavery in an 1836 case, although the practice was then safely dead for fifty years in Massachusetts,<sup>210</sup> and he later employed other, no more specific clauses in the Declaration to outlaw liquor prohibition<sup>211</sup> and indictment by "information" instead of by grand jury.<sup>212</sup> Furthermore, in *Roberts*, Shaw announced that legislative silence on a topic meant not that regulation by lesser elected bodies was prohibited, but that it was not constrained.<sup>213</sup> Instead of the state consti-

<sup>206</sup> Wendell Phillips' critique of Chandler opinion, reprinted in *JIM CROW*, *supra* note 31, at 72.

<sup>207</sup> See *Roberts v. City of Boston*, 59 Mass. (5 Cushing) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 217-31.

<sup>208</sup> *Id.* at 219.

<sup>209</sup> *Id.* at 228-30.

<sup>210</sup> See *Commonwealth v. Aves*, 35 Mass. (8 Pick.) 193, 209 (1836). In *Aves* (Med's Case), Shaw ruled that the first article of the Declaration had "abolished" slavery by implication; that is, that a legislative act establishing slavery in Massachusetts would be held unconstitutional by his court and that no person could be held as a slave in Massachusetts unless he or she were a fugitive from the south.

<sup>211</sup> See *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 28 (1854). In *Fisher*, Shaw threw out the state's prohibition law as "inconsistent with the principles of justice . . . and repugnant to the provisions of the Declaration of Rights," in part because it provided no trial regarding whether seized liquor was intended for sale. *But see G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 59 (1976) (misrepresenting Shaw's opinion as *only* requiring proper procedural safeguards for liquor regulation, when Shaw invalidated liquor prohibition entirely).

<sup>212</sup> *Jones v. Robins*, 74 Mass. (8 Gray) 329 (1857). In *Jones*, Shaw 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 misrepresented sources. By implication, Justice Merrick charged Justice Shaw with doing so in order to use a vague clause to overrule a law that he merely disagreed with.

<sup>213</sup> See *Fox, Discrimination and Antidiscrimination in Massachusetts Law*, 44 B.U.L. REV. 30, 52-53 (1964).

tution, Shaw substituted the entirely unguided, judge-made, common law standard of "reasonableness," which had been invoked previously in the Commonwealth to invalidate a sewer assessment scheme the judges did not like and to approve other municipal regulations with which they agreed.<sup>214</sup> Although the reasonableness test cabined interpretation no less than did the constitutional criterion of equality, it apparently freed judges psychologically to write their own values into the law, without feeling any necessity to produce elaborate rationales for their decisions—which Shaw did not do.<sup>215</sup>

Reasonableness in this case meant judicial deference to what Shaw assumed was the school committee's "honest judgment" that segregation was educationally best for children of both races and that it would do less to promote racial prejudice than integration would. Why the court was less willing to question the authorities' good faith on this matter than it had been in the previous cases that Sumner cited in his brief, Shaw did not bother to say. Nor did he go out of his way to rationalize the racial inequality in the distance some black children had to traverse—he merely announced that it was not "unreasonable."<sup>216</sup>

No dissent was recorded in the *Roberts* case. Justice Richard Fletcher rescued himself, apparently because he had issued extra-judicial advice about school segregation in Salem in 1844, before his appointment to the Massachusetts Supreme Court.<sup>217</sup> Fletcher's action was the begin-

<sup>214</sup> See *City of Boston v. Shaw*, 42 Mass. (1 Metcalf) 130 (1840); see also *Vandine's Case*, 23 Mass. (6 Pick.) 187 (1828); *Commonwealth v. Worcester*, 20 Mass. (3 Pick.) 462 (1826).

<sup>215</sup> Shaw, who owned thousands of acres of land in the slave state of Kentucky, served 12 years on the bench before declaring a single law unconstitutional. See L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW: THE EVOLUTION OF AMERICAN LAW, 1830-1860, at 17, 82 n.28 (1957). Then, in a case involving the fugitive slave George Latimer, he voided Massachusetts' 1837 "personal liberty law," as contrary to the federal fugitive slave law that Congress passed pursuant to its constitutional authority. *Id.* at 81-82 (citing *The Latimer Case*, 5 Month. L. Rep. 481 (Mass. Cir. Ct. 1842)). See also *supra* at note 80 (discussing Garrisonian denunciation of *Latimer* case). Shaw was also the first judge to write a full opinion sustaining the drastic Fugitive Slave Act of 1850, in the case of Thomas Sims. L. LEVY, *supra* at 98 (citing Sims' case, 7 CUSH. 285 (1851)). Shaw stayed loyal to his "Cotton Whig" principles by voting for the Constitutional Union Party in 1860, *id.* at 91, and calling for the repeal of the state's remaining personal liberty laws. T. MORRIS, *supra* note 44, at 208.

<sup>216</sup> *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 231.

<sup>217</sup> Information about Fletcher's recusal appears in Sumner's printed brief. Brief of Charles Sumner, *Roberts v. City of Boston*, 59 Mass. (5 CUSH.) 198 (1849), reprinted in *JIM CROW*, *supra* note 31, at 203. The suggested reason for his recusal appears in Darling, *Prior to Little Rock in American Education: The Roberts Case of 1849-50*, 72 MASS. HIST. SOC. PROCEEDINGS 130, 137-41 (1963). For discussion of Fletcher's advice to the Salem mayor, see *supra* note 107-08 and accompanying text. Boston Primary School Committee member Ingraham stated during 1846 debates before the committee that Fletcher had pronounced the legal section of the majority report sound, and had declared that the different organizations of the Salem and Boston schools made what was illegal in one place legal in the other. See *Boston Daily Advertiser*, June 18, 1846, at 2, col. 4. Ingraham's report is so craftily phrased, second-hand, and at odds with the broad terms of Fletcher's 1844 view, that I do not find it credible. Furthermore, it is supported by no other source. In addition, several

ning of a long line of honorable, but unfortunate, actions by racially liberal judges in school racial discrimination cases.<sup>218</sup> More conservative judges like Shaw, who represented the decision in *Roberts* as unanimous, followed a different course.<sup>219</sup>

## VI. BOYCOTTS, LOBBYING, AND THE REVOLUTION OF 1855

While the *Roberts* case was pending, the *Boston Post* predicted that if the court upheld segregation, "no more, doubtless, will be heard from 'colored petitioners' . . ."<sup>220</sup> *The Liberator* disagreed, promising that if the court decided adversely, "the work of popular agitation is only begun."<sup>221</sup> Enjoying special access to the black community, *The Liberator* proved the better prophet.

Even before *Roberts* was argued in December 1849, black integrationists had begun another boycott, which disrupted student registration in the fall of 1849 and cut average black attendance at the Smith School to twenty-five students, from 106 in 1846.<sup>222</sup> What would in the 1960s be termed a "freedom school" was set up, taught by black and white volunteers and supported financially by Loring, Phillips, Jackson, and other wealthy white abolitionists, in an attempt to ensure that the boycotters' studies would not suffer.<sup>223</sup> Between December 1849 and April 1850,

later quoted Fletcher's 1844 views as if they had not changed. If credited, however, Ingraham's report would make Fletcher's recusal in *Roberts* even more mysterious.

<sup>218</sup> Fletcher's action was honorable, because he apparently believed his earlier advice was quasi-judicial and wanted to avoid suggestions of bias in the *Roberts* case. It was unfortunate, because a strong dissent from Fletcher would have provided printed authority for other judges. For examples of other segregation cases in which liberal judges avoided broad constitutional pronouncements and decided cases on narrow grounds, see *Workman v. Board of Educ. of Detroit*, 18 Mich. 400 (1869) (Cooley, C.J.); *Board of Educ. of Ottawa v. Tinnon*, 26 Kan. 1 (1881) (Valentine, J.).

<sup>219</sup> Shaw gave the appearance of unanimity by not mentioning Fletcher's non-participation and by saying that the members of the court were "all of the opinion" that Sarah Roberts had not been unlawfully excluded. In other cases when Fletcher or other justices were absent, reported in the same volume of the *Massachusetts Reports*, this absence was noted. If the failure to note Fletcher's recusal in *Roberts* was an oversight, it was certainly a convenient one for Shaw. Therefore, Shaw's characterization may be assumed to have been deliberate. No dissents and no concurring opinions were recorded in a single case of the 615-page 1849-50 volume of *Massachusetts Reports*. The other three Massachusetts Supreme Court judges sitting on the *Roberts* case were Samuel Sumner Wilde, a Federalist appointed in 1815; Charles A. Dewey, a Whig appointed in 1837; and Theron Metcalf, a Federalist/Whig appointed in 1848. All served for long terms, all had been active in politics before their appointments, and all deferred to the forceful Shaw. See L. LEVY, *supra* note 215, at 337-39.

<sup>220</sup> Editorial, *Boston Post*, Nov. 10, 1849, at 1, col. 8.

<sup>221</sup> Editorial, *The Liberator*, Nov. 16, 1849, at 183, col. 5.

<sup>222</sup> S. SCHULTZ, *supra* note 42, at 198-99; *Boston Semi-Weekly Courier*, Aug. 9, 1849, at 4, col. 6.

<sup>223</sup> See BSC Papers (1846); *The Liberator*, Oct. 5, 1849, at 160, col. 2; Nov. 9, 1849, at 180, col. 2; Apr. 26, 1850, at 66, col. 3; Grammar School Committee Majority Report (1849), reprinted in JIM CROW, *supra* note 31, at 147; C. MABEE, *supra* note 120, at 174; A. White, *Blacks and Education*, *supra* note 46, at 297-98; G. Davis, *supra* note 39, at 181. It is important to recognize that the boycott was sporadic, and that it was effective only when precisely tailored to meet achievable ends. From 1844 to 1845, according to documents in the BSC Papers, average attendance at the Smith School dropped by more than one third. This no doubt helped to speed Forbes' departure. In the

when the decision in *Roberts* was announced, black and white abolitionists began planning for a legislative campaign should they lose in court.<sup>224</sup> Although the 1850 General Court adjourned too soon after the *Roberts* decision for the integrationists to mount a legislative campaign, Benjamin Roberts toured the state circulating petitions and, with the help of the Massachusetts and New England Anti-Slavery societies, a bill prohibiting the exclusion of a child from any school "on account of race or color"—the Phillips-Wilson bill of 1845—was introduced in the 1851 legislature.<sup>225</sup>

Integrationists had some hope in a narrow and fragile majority, comprised of a coalition of the Free Soilers and Democrats, in the 1851 General Court. Yet two factors prevented a favorable result. First, the Whigs swept the Suffolk County delegation, as usual, and the Cotton Whig faction in the lower house proved as responsive as ever to the "unanimous" plea of the Boston Grammar School Committee to defeat the bill.<sup>226</sup> Second, it took nearly four months for the legislature to choose Charles Sumner as the successor to Daniel Webster in the United

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fall of 1855, after blacks were guaranteed the right to attend common schools, the boycott reduced attendance at Smith to 7 or 8 students, which was sufficient to convince the City Council that it had become too expensive to maintain. See A. White, Blacks and Education, *supra* note 46, at 368-72; D. Jacobs, *supra* note 32, at 261-62; *The Liberator*, Aug. 17, 1855, at 131, col. 1. But in 1849, against a Grammar School Committee unalterably committed to segregation, and with a divided black community, the boycott had no substantial effect, and it eventually fizzled. Average attendance at Smith rose from 25 in 1850 to 37 in 1851, 54 in 1852, 51 in 1853, 54 in 1854, and 42 in early 1855. See BSC Papers (Aug. 27, 1850; Mar. 2, 1852; July 1854); and the printed Reports of the Annual Examinations for these years (available at Boston Public Library, Government Documents Collection). Levesque's claim that the 1849 boycott "never got off the ground" is undermined by the statistics on average attendance. See G. Levesque, Black Boston, *supra* note 34, at 218. So too is a statement by Schultz that "only a handful of Blacks" boycotted. S. SCHULTZ, *supra* note 42, at 198-99. Both parents and officials acted as calculating analysts of the costs and benefits of the maneuver—not as blind ideologues. See M. WEINBERG, *A CHANCE TO LEARN: THE HISTORY OF RACE AND EDUCATION IN THE UNITED STATES* 27-28 (1977); J. HORTON & L. HORTON, *supra* note 131, at 74.

224 See *The Liberator*, Feb. 8, 1850, at 23, col. 2; Massachusetts Anti-Slavery Society Annual Report 18, 45-47 (1850) (reprint ed. 1970).

225 *The Liberator*, Apr. 26, 1850, at 66, col. 3; June 7, 1850, at 191, col. 2; June 21, 1850, at 99, col. 5; Aug. 16, 1850, at 132, col. 3; Apr. 4, 1851, at 55, col. 3; June 6, 1851, at 90, col. 3. Representative Henry Wilson tried unsuccessfully to get the Education Committee to introduce such a bill in 1850, after the *Roberts* decision. See D. Ment, *supra* note 9, at 73. Note the similarity of the language in these bills to that of the fifteenth—not the fourteenth—amendment. The fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." On the fusion and confusion of legal standards concerning the fourteenth and fifteenth amendments, see Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing*, 6 THE PUB. HISTORIAN 5, 8-10 (1984).

226 BSC Papers (May 13, 1851). The Grammar School Committee resolution "ordered" the Suffolk delegation to oppose integration, which would disturb "the present liberal and happy arrangement of our Schools . . ." See A. White, Blacks and Education, *supra* note 46, at 343; G. Levesque, Black Boston, *supra* note 34, at 224; S. SCHULTZ, *supra* note 42, at 204; Joseph Wightman, longtime member of the Primary School Committee, was a Whig member of the Massachusetts house in 1851 and coordinated the battle against the bill. *Boston Post*, May 22, 1851, at 1, col. 7.

States Senate, as Democrats balked at electing an anti-slavery radical. Before Sumner's election was assured, Free Soilers hesitated to press forward on related issues, for fear of alienating the Democrats. Afterwards, too little time remained in the session to accomplish so significant a change.<sup>227</sup> This defeat and the resurgence of the Whigs in 1852-1853 broke the back of the boycott and perhaps dispirited the school reformers, who lapsed into passivity for two years.<sup>228</sup>

The school reformers did press a test case in 1854 to see whether Edward Pindall, a child of racially mixed ancestry who appeared white, could be forced out of the common schools. George Hillard, who had introduced a pro-integration motion in the Grammar School Committee in 1844, was compelled to defend the city's action in his position as city solicitor ten years later. Hillard denounced segregation as "unjust" even as he argued that *Roberts* left the definition of race to the discretion of the school committees. Several Boston City Council members recognized the absurdity of the "color" line that forced Pindall, who both seemed and claimed to be of overwhelmingly Caucasian and Native American ancestry, to attend a black school. However, these city council members could not move the Grammar School Committee, and Pindall was relegated to the "colored" schools.<sup>229</sup>

During 1852 and 1853, the Free Soil/Democratic coalition concentrated on constitutional changes to increase rural representation in the legislature and to reduce the importance of the majority-vote and at-large election provisions in the political structure. Nonetheless, these changes failed in a popular referendum.<sup>230</sup> Ironically, the defeat of these electoral rule amendments and of constitutional provisions aimed at prohibiting government funding of religious schools set the stage for Whig disas-

<sup>227</sup> For a prescient analysis, see 20 MASS. ANTI-SLAVERY SOCIETY ANNUAL REPORTS 35-36 (1852).

<sup>228</sup> On the events of 1851 to 1853, see *The Liberator*, Mar. 19, 1852, at 48, col. 3; Dec. 10, 1852, at 199, col. 1; G. Davis, *supra* note 12, at 221-23; A. White, Blacks and Education, *supra* note 46, at 344-45. The passivity of the school reformers also may have been caused by the Boston abolitionists' shifting their concentration to the issue of fugitive slaves after 1850. Bowditch was the chief organizer of the Vigilance Committee, which included nearly all the leading black and white abolitionists. The committee was especially involved in the trials and attempted rescues of Shadrach Wilkins, Thomas Sims, and Anthony Burns. As many as 100 blacks are said to have left Boston to avoid capture as fugitives during the early 1850s. See S. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, 98-100, 124-31, 148-51 (1972).

<sup>229</sup> On the Pindall case and the city council actions, see *The Liberator*, Oct. 7, 1853, at 158, col. 4; Aug. 18, 1854, at 131, col. 4; Nov. 10, 1854, at 3, col. 4; G. Levesque, *supra* note 34, at 228-30; S. SCHULTZ, *supra* note 15, at 203-05; A. White, Blacks and Education, *supra* note 46, at 355-59; Boston City Documents, No. 54, May 22, 1854 (available in BSC Papers, Boston Public Library).

<sup>230</sup> See Marti, Francis William Bird: *A Radical's Progress Through the Republican Party*, 11 HIST. J. MASS. 82, 86-87 (1983); V. Purdy, *Portrait of a Know-Nothing Legislature: The Massachusetts General Court of 1855*, 65-66 (1970) (unpublished doctoral dissertation, George Washington University).

ter.<sup>231</sup> By 1855, nearly a third of the whites in Boston were Irish-born, and most of them were recent potato-famine immigrants. Coupled both with the lingering outrage over the Compromise of 1850, which a series of spectacular captures and trials of fugitive slaves repeatedly reinforced, and with the uproar throughout the north at the 1854 Kansas-Nebraska Act, the rapid change in demographic composition offered ambitious politicians another opportunity to break the Whig monopoly of power. Wily Free Soilers, led by Henry Wilson, the masterful manipulator and steady foe of racial discrimination, used their years of experience in complicated coalition campaigns to infiltrate the burgeoning "American" or "Know Nothing" party. A four-way contest in the 1854 state elections resulted in a shocking decimation of the Whigs.<sup>232</sup> Garnering sixty-three percent of the vote, the Americans elected their governor, every congressman, and all but seven members of the General Court. Garrison termed the results "incredible,"<sup>233</sup> the *Boston Evening Telegraph*, "a remarkable revolution,"<sup>234</sup> and the *Boston Post*, "astonishing."<sup>235</sup> But Garrison's ironic post-election jibe that this was "a curious method of securing a Free Soil majority in both branches"<sup>236</sup> of the General Court turned out to be prescient.

The leader of the school integration forces in the 1854 General Court, Charles W. Slack, later coyly remembered that "it was a very singular and somewhat unexpected thing to find so many anti-slavery men" in the legislature. "He did not know how it happened . . ."<sup>237</sup> To the Democratic *Boston Post*, the plot was clear earlier. The paper opined that Know-Nothingism was "but freesoilism in disguise . . . [I]n place

<sup>231</sup> D. BAUM, *supra* note 7, at 29-37.

<sup>232</sup> Wilson was what all movements need, a principled opportunist. In his *Rise and Fall of the Slave Power*, he reports an 1846 speech in which he outlined a course of action that he proceeded to follow: "Whatever others may do, I am willing to act with any man or set of men, Whig, Democrat, Abolitionist, Christian, or Infidel, who will go for the cause of emancipation." 2 H. WILSON, *supra* note 9, at 116. President of the state senate in 1851, Wilson was the Free Soil candidate for governor in 1853 and the Republican candidate for that office in 1854. He effectively resigned the Republican nomination in the last week of the campaign, in a patent deal with the American party for a U.S. Senate seat, to which he was subsequently elected. Wilson's views on nativism fluctuated, and as the leader of the 1853 constitutional convention, he defended the rights of "men of every race, clime, and country." See R. ABBOTT, *supra* note 198, at 42-59. For discussion of Wilson's humble origins and the phraseology of civil rights bills he introduced in the U.S. Senate and the Massachusetts General Court, see *supra* notes 197-98 and accompanying text. For an interesting contrast of the self-described roles of Wilson and Wendell Phillips, see *The Liberator*, June 30, 1854, at 104, col. 2; July 13, 1855, at 110, col. 5.

<sup>233</sup> *The Liberator*, Nov. 17, 1854, at 182, col. 3.

<sup>234</sup> *Boston Evening Telegraph*, quoted in *The Liberator*, Nov. 17, 1854, at 182, col. 3.

<sup>235</sup> *Boston Post*, Nov. 14, 1854, at 2, col. 1.

<sup>236</sup> *The Liberator*, Nov. 17, 1854, at 182, col. 3. A later issue commented: "No sympathy can exist between true anti-slavery men and such a secret organization [as the Know Nothings]; for this order is evidently pro-slavery, and not a little of it pro-grog." *The Liberator*, Nov. 24, 1854, at 186, col. 2.

<sup>237</sup> *Id.*, Dec. 28, 1855, at 207, col. 2.

of promises it silently, everywhere, puts abolitionists in power."<sup>238</sup> After electing Henry Wilson to the United States Senate,<sup>239</sup> passing a tough "personal liberty" law over the veto of conservative governor Henry J. Gardner,<sup>240</sup> and almost impeaching a judge for adhering to the federal Fugitive Slave Law of 1850,<sup>241</sup> the General Court passed a school integration bill that was revised by future war governor John A. Andrew and shepherded through the legislative process by Slack.<sup>242</sup> While the Whig papers were apparently too numbed by their party's defeat to devote much attention to the bill, the Catholic *Boston Pilot* interpreted the desegregation bill as an attempt to "insult" Catholics in the public schools.<sup>243</sup> The Democratic *New York Herald* harangued: "The North is to be Africanized. Amalgamation has commenced . . . God save the Commonwealth of Massachusetts!"<sup>244</sup> Although the school committee half-heartedly reopened Smith in the fall of 1855, blacks were allowed to enroll their children in common schools.<sup>245</sup> So many did that the authorities soon fired Thomas Paul and closed down the de jure caste schools of Boston forever.<sup>246</sup> Only a half-dozen members of the school committee, by then overwhelmingly Know-Nothing, held out for segregation on the final roll call. Little white flight or harassment of black students was reported, and what there was lasted only a short time.<sup>247</sup>

## VII. BOSTON SOCIETY, POLITICS, AND SCHOOL INTEGRATION

What differentiated Boston integrationists from their opponents in each racial group? Why did the racial segregation of the tiny black mi-

<sup>238</sup> Boston Post, Jan. 16, 1855, quoted in V. Purdy, *supra* note 230, at 94 (emphasis in original). Along with the Baum and Purdy studies, the best work on the Know-Nothings in Massachusetts is J. Mulkern, *The Know-Nothing Party in Massachusetts* (1963) (unpublished doctoral dissertation, Boston University).

<sup>239</sup> See *Proceedings of Meeting at Southac Street Church, Dec. 17, 1855*, reprinted in *JIM CROW*, *supra* note 7, at 279.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Andrew defended Wendell Phillips against a criminal charge of interfering with a federal marshall who was returning Anthony Burns to slavery, and Andrew later organized John Brown's criminal defense. See Boston Post, Apr. 4, 1855, at 2, col. 1; Marti, *supra* note 230, at 88. On the school integration bill, see *The Liberator*, Mar. 30, 1855, at 152, col. 2; Dec. 28, 1855, at 207, col. 3; Boston Daily Atlas, Apr. 4, 1855, at 2, col. 1; and *Boston Daily Advertiser*, Apr. 4, 1855, at 2, col. 5; Mass. House J. (1855), 377, 926, 1125, 1160, 1259, 1359; 2 H. WILSON, *supra* note 9, at 640; A. White, *Blacks and Education*, *supra* note 46, at 368.

<sup>243</sup> Boston Pilot, Oct. 6, 1855, quoted in A. White, *Blacks and Education*, *supra* note 46, at 374 ("The Know-Nothings who have done this probably thought that Catholics would regard this as an insult. . . . They cannot annoy us so. There is in New England a deep repugnance to anything like social intercourse with the blacks.").

<sup>244</sup> New York Herald, quoted in *The Liberator*, May 4, 1855, at 69, col. 2.

<sup>245</sup> A. White, *Blacks and Education*, *supra* note 46, at 369.

<sup>246</sup> *Id.* at 371-74.

<sup>247</sup> *The Liberator*, Sept. 7, 1855, at 142, col. 4; Apr. 17, 1857, at 64, col. 4; S. SCHULTZ, *supra* note 42, at 205-06.

nority in Boston schools persist for so long, and why did the barriers fall when they did? What was the significance of the episode for the history of racial discrimination in schools in nineteenth-century America? What does it reveal about nineteenth-century legal doctrine, especially that which foreshadowed the fourteenth amendment?

#### A. *The Split in the Boston Black Community*

As in many internecine battles, the bitterness of the invective hurled in Boston's black factional conflict seemed inversely proportional to the actual policy differences between the two sides. For example, participants in an integrationist meeting expressed the hope that no black would allow himself "to be used as a TOOL" by white segregationists.<sup>248</sup> Longtime Garrisonian John T. Hilton attacked Thomas Paul Smith, the leader of the opposition, as an ally of "John C. Calhoun, Henry Clay, the American Colonization Society, and the entire pro-slavery community."<sup>249</sup> Benjamin Roberts termed Smith "a young ambitious bigot" out for his own "selfish gratification,"<sup>250</sup> and the black lawyer Robert Morris accused Smith of soliciting the mastership of the Smith School for his uncle Thomas Paul Jr. in return for cash.<sup>251</sup> An escaped slave, Henry Bibb, compared the competing faction to southern black "traitors" who foiled the plans of other slaves to escape or revolt by exposing the schemes to whites.<sup>252</sup> In return, Smith and his followers disrupted integrationist meetings, in one instance violently,<sup>253</sup> labeled white schoolmaster Ambrose Wellington an ineffectual teacher and an infidel,<sup>254</sup> added to their petitions the names of at least twenty people who did not sign them and may not have approved,<sup>255</sup> and gained the endorsement of a prominent black New York teacher by misrepresenting the object of their campaign.<sup>256</sup>

In fact, although the Grammar School Committee disingenuously

<sup>248</sup> *The Liberator*, Aug. 10, 1849, at 127, col. 3.

<sup>249</sup> *Id.*, Sept. 7, 1849, at 143, col. 1.

<sup>250</sup> G. Davis, *supra* note 39, at 177.

<sup>251</sup> *The Liberator*, Oct. 5, 1849, at 150, col. 2.

<sup>252</sup> *Id.*, Nov. 9, 1849, at 180, col. 2.

<sup>253</sup> A. White, *Blacks and Education*, *supra* note 46, at 297.

<sup>254</sup> The black integrationists strongly defended Wellington. See Petition in Favor of Thomas Paul, in BSC Papers (1848); Grammar School Committee Majority Report (1849), reprinted in JIM CROW, *supra* note 31, at 84-85; *The Liberator*, Sept. 7, 1849, at 160, col. 1; Sept. 21, 1849, at 151, col. 3.

<sup>255</sup> Black Petition (1844), included in BSC Papers (available in Boston Public Library, Rare Book Room).

<sup>256</sup> Thomas Paul Smith had written to James McCune Smith, the New York teacher, asking whether, if segregated schools were continued, J.M. Smith preferred black teachers for black children, other things equal. Thomas Smith did not reveal the move to abolish the black schools altogether. J.M. Smith replied in favor of black teachers—in a letter that T.P. Smith used and the Grammar School Committee Majority Report reprinted. But, when J.M. Smith was informed of the real issue in Boston, he expanded on his earlier letter and favored integration over black schools with

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avoided mentioning it, the "points of difference" between the two black groups were, in the words of Thomas Smith, "in reality very trifling."<sup>257</sup> Smith, who with Thomas Paul, Jr. had signed earlier petitions in favor of abolishing the black schools altogether, specifically endorsed the Bowditch-Jackson-Russell compromise allowing blacks freedom of choice and prohibiting exclusion on racial grounds from any common school. Yet Smith also spoke favorably of black-only schools.<sup>258</sup> Nor were the school committees consistent. Although the Grammar School Committee mouthed black pride slogans in its reports, it twice refused to hire Thomas Paul Jr., who suffered from chronic ill-health, performed badly at interviews, and apparently proved a timid, ineffectual teacher.<sup>259</sup>

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teachers of either race. See *The Liberator*, Jan. 4, 1850, at 2, col. 4. The Grammar School Committee took no note of J.M. Smith's amended and more comprehensive position.

257 See Grammar School Committee Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 87-89 (noting divergent opinions among black groups); D. Ment, *supra* note 9, at 42-43 (noting both factions in black community theoretically recognized the right of attending common schools but that Grammar School Board exploited division between those who stressed abolition and those who saw independent value in strengthening autonomous black institutions).

258 *The Liberator*, Sept. 7, 1849, at 143, col. 3; Oct. 5, 1849, at 160, col. 3; Feb. 15, 1850, at 27, col. 4. It is notable that the "dogmatic" Garrison allowed Smith space in his paper to state his position, although Garrison consistently disagreed with Smith. Among other things, *The Liberator* served as the black community newspaper in Boston during this period. A week before T.P. Smith circulated a petition for Paul's appointment, he had been secretary to an integrationist meeting that unanimously opposed doing anything to improve the Smith School, specifically including a change of masters. See A. White, Blacks and Education, *supra* note 46, at 264-67. At an August 1849 meeting, T.P. Smith "urged the necessity of abolishing the Smith School, but if it must continue, and there is no other alternative, then he wished for a colored teacher." *Boston Courier*, Aug. 16, 1849, at 2, col. 4 (daily edition) (emphasis in original). Similar statements from two other leaders of the opposition faction, Charles H. Roberts and John H. Roberts, appear in the same issue of the *Courier*. Smith claimed to have been "steady and unswerving in my present position." Grammar School Committee Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 126-28. The Grammar School Committee and the Boston Post fawned over Thomas Smith, but referred to the black integrationists as puppets of whites who failed to understand, as the Grammar School Committee claimed to, the true interests of black people.

259 Paul was a perfect choice to split the integrationists. He was the son of the deceased leader of the Boston black community, and the first black graduate of Dartmouth College. See *The Liberator*, Sept. 17, 1841, at 151, col. 2; Quarterly Report of the Grammar School Board, Nov. 1854, quoted in Slack, *supra* note 108, at 15-16; Mitchell, *supra* note 48, at 73; D. Jacobs, *supra* note 32, 160, 226-27. Paul had been an apprentice on *The Liberator*, D. Jacobs, *supra* note 32, at 90, and a student at the short-lived abolitionist Noyes Academy in New Hampshire, which was destroyed by a mob. A. White, Blacks and Education, *supra* note 46, at 295-96. Thomas Paul Smith also was soon reconciled with the abolitionists. In 1851, he was indicted, along with lawyer Robert Morris and others, for helping the slave "Shadrach" escape. See S. CAMPBELL, *supra* note 228, at 150. In 1868, Paul was fired from a teaching job in Albany, New York, according to the Albany School Board, because of his "lack of vivacity and ambition." See R. Madsen, Desegregation of Albany Public Schools, 1870-1873: A History of the Wilberforce School for Black Children 12-13 (unpublished paper in Albany Public Library). In later years, Thomas Paul Smith published tributes to Robert Morris, Charles Sumner, and William C. Nell. Mitchell, *supra* note 48, at 73. The Grammar School Committee was transparent in its effort to use the hiring of Paul to quell dissent: "[T]he Committee might reasonably hope that the appointment of suitable, well-trained teachers of their own complexion, would naturally secure from colored parents, as well as pupils, a cordial sympathy, co-operation

Many black integrationists, including Benjamin Roberts, had endorsed Paul for the job of Smith School master at various points from 1845 to 1848, apparently preferring a black master over a white one if the school were to remain segregated. Thirty-five blacks, having second thoughts, later authorized Roberts to ask the Grammar School Committee to remove their names from Paul's endorsement petition.<sup>260</sup>

The black integrationists held numerous meetings in black churches, while only one conclave of the Thomas Smith group was reported, and petitioned separately from their white friends between 1844 and 1855. Thus, to attain their goal of treating individuals as if race did not matter, the black integrationists had to organize themselves separately from the white integrationists. Moreover, to ensure the scattering of black children from the segregated schools, the black reformers adopted what would in the 1980s be called a "race-conscious" remedy—closing the "colored" schools altogether.

What distinguished members of the two black cliques? Among the leaders, the chief differentiating trait was the closeness of their connection to white abolitionist William Lloyd Garrison. Of fourteen officers at integration meetings, John T. Hilton had long been a Vice President of the Massachusetts Anti-Slavery Society; Nell had been an apprentice and reporter on *The Liberator* and an officer of the Massachusetts and New England Anti-Slavery societies; William J. Watkins's family had befriended Garrison when he was in a Baltimore jail; and, most of the rest had participated in at least local Garrisonian meetings. On the other hand, Thomas Smith, who was only 21 years old in 1849—while Hilton was 48, and Nell 33—had broken with Garrisonian nonpartisanship to endorse the Free Soilers in 1848.<sup>261</sup>

Black integrationists at the time claimed to be "the cream of the colored population. We have the property and intelligence with us."<sup>262</sup>

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and support." Grammar School Committee Majority Report, reprinted in *JIM CROW*, *supra* note 31, at 147.

260 The integrationists claimed that T.P. Smith changed the terms of the petition after they signed it, and that they only favored Paul if Wellington first resigned. See A. White, Blacks and Education, *supra* note 46, at 226-27, 264-67. At least 20 signatures on the Paul petition appear to be in the same handwriting—probably that of Smith.

261 *The Liberator*, Jan. 28, 1848, at 15, col. 2; D. Jacobs, *supra* note 32, at 300, 306. One should avoid taking the nonpartisanship of the integrationists too seriously. Charles H. Roberts and Henry Bibb both favored the abolition of the Smith School and supported the Free Soil Party in 1848. Nell and Lewis Hayden, who arrived in Boston in the 1850s and immediately assumed a leadership role in the anti-segregation campaign, ran for the General Court on the Republican Party ticket in 1854. See *Boston Daily Advertiser*, Nov. 14, 1854, at 1, col. 1.

262 See A. White, Blacks and Education, *supra* note 46, at 276 (quoting John T. Hilton). Of 15 large American cities in 1850, Boston had the highest percentage of black male adult freemen who were unskilled or semiskilled, ranked tenth in proportion of artisans, but had the second highest proportion of blacks who were merchants. Less than 1% of black male adults in Boston owned *any* property in the city, which put it last among the 15 cities, but it ranked fourth in *average* property-holding. The statistics paint a picture of mass poverty, but with a small, solid, merchantile elite

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Although several of the numerous petitions to the school committees, including the integration petition with the most signatures, do not appear to have survived in the committee records, papers containing more than 250 decipherable signatures are extant.<sup>263</sup> Traces of the occupations of all signers in the 1844-49 city directories yielded Table 3, which also includes figures on comparable occupational classifications for all black males over age fifteen in most of Massachusetts in 1860 and for all blacks listed in the 1847-48 Boston city directory.<sup>264</sup>

TABLE 3  
Occupations of Black Petition-Signers in Boston

Category	Integration	Black Teach.	State, 1860	City Dir.*
1	31.6	15.1	10.6	12.3
2 } relatively prestigious	11.0	3.8	13.9	12.9
3 }	12.5	6.3	4.4	7.2
4	2.2	4.4	1.4	2.1
5	0.0	0.6	0.4	0.3
6	5.2	5.0	5.6	3.5
7	1.5	1.9	1.1	0.8
8	2.9	3.8	4.9	2.4
9	1.5	5.0	14.6	7.8
10	0.0	0.0	0.9	0.3
11	0.7	1.3	0.0	2.1
12	2.2	0.6	0.8	0.8
13	0.7	1.9	0.2	2.4
14	0.0	0.0	1.8	0.3
15	0.0	0.0	0.0	4.0
16 }	0.0	0.0	9.2	0.8
17 } unskilled or	3.7	6.3	30.2	18.0
18 } unemployed	1.5	4.4	0.0	22.0
19 }	22.1	39.6	0.0	0.0
Number	136	159	1940	373

\*NOTE: All column numbers except the last row are expressed in percentages and add to 100% by columns, except for rounding errors.

among Boston's antebellum blacks. See L. CURRY, THE FREE BLACK IN URBAN AMERICA, 1800-1850: THE SHADOW OF THE DREAM 24, 258-71 (1981).

263 If those who later removed their names from the Thomas Paul petitions were excluded from Column 2 of Table 3, the conclusions in the text would be strengthened. Eight of the 24 of these men whose names survive were clothiers or tailors, 2 were laborers, 2 were waiters, and the occupation of only 1 was unlisted. It is possible, of course, that those on other, longer lists of integrationists would be more representative of Boston's entire black population.

264 Twenty-seven percent of the males over 15 in Massachusetts in 1860 lived in Suffolk County, which was mostly Boston. Massachusetts State Census, 1860, at 356-57. Excluding farmers and farm laborers, the percentage rises to approximately 31%. The state figures, therefore, should fairly closely reflect the actual occupational characteristics of Boston's black population. The occupational table in the Massachusetts Census did not include Barnstable County. The city directories, of course, excluded a great many people and included some women who headed households. The directories are especially likely to have omitted live-in servants, boarders, and those who moved frequently.

**COLUMN DEFINITIONS:**

Integration	=	Black signer (with decipherable name) of extant petition for school integration, 1844-1849.
Black Teach.	=	Black signer of petition recommending Thomas Paul for teacher of Smith School, including those who later withdrew names.
State, 1860	=	Occupations of males over 15 for whole state—farmers, farm laborers, and several very minor categories excluded—from 1860 Census of Massachusetts, 356-57.
City Dir.	=	Occupations for all people listed as "colored" in segregated section of 1847-1848 Boston city directory.

**CATEGORY DEFINITIONS:**

1	=	clothing, millinery, tailor, trader, fancy goods, jobber, furniture;
2	=	barber, hairdresser;
3	=	waiter, cook;
4	=	caterer, grocer, restaurateur;
5	=	printer, newspaper editor;
6	=	blacksmith, cigar manufacturer, tobacconist, shoemaker, bootblack;
7	=	clergyman, preacher;
8	=	chimney sweep, whitewasher, housewright, restorator;
9	=	mariner, sailor;
10	=	lawyer, physician;
11	=	tender, janitor;
12	=	teacher, musician, clerk, agent, gymnast;
13	=	boarding, boarding house;
14	=	washerwoman, washing;
15	=	teamster;
16	=	porter, servant;
17	=	laborer;
18	=	none;
19	=	unlisted.

Table 3 supports the integrationists' claims. More than half of the signers of Paul's petition were laborers, recorded no occupation, or were not listed in the directories (rows 17, 18, and 19), whereas the comparable percentage on petitions to abolish the Smith School was 27.3. The Paul group's proportion in these categories was comparable to that for the state for laborers, porters, and servants (rows 16 and 17), and higher than that recorded in the Boston city directory for the laborer and no occupation categories (rows 17 and 18). While those who sought a black teacher for black students were fairly representative, occupationally, of average blacks in antebellum Boston, the integrationists constituted an elite.<sup>265</sup> Table 3 also suggests that the integrationists, much more than those who advocated black teachers, made up a network: 55.1 percent of

<sup>265</sup> Levesque tabulated the occupations of Boston blacks from the 1850 U.S. Census. His categories are roughly equivalent to mine. See G. Levesque, *Black Boston*, *supra* note 34, at 254-56. The major differences between his distribution of 575 blacks employed and the state and city directory figures are that 25.7% of the 1850 census listings were sailors or stevedores, while only 7.5% had no occupation recorded. Using his statistics as a reference category would change no conclusions about the differences between the integrationists and the Paul group.

the abolitionist forces, compared to 25.2 percent of the opposition, 28.9 percent of Massachusetts males, and 32.4 percent of Boston directory listings, were clustered in just three occupational groups—clothing, hair-cutting, and waiting on tables (rows 1, 2, and 3). Concentrated in close-knit and relatively prestigious occupations, the integrationists were more capable of sustaining a movement than their more diverse and probably more geographically mobile competitors.<sup>266</sup>

A third implication of the table is that black operators of independent businesses, who probably dealt with whites most often, did not shrink from protest for fear of losing white trade.<sup>267</sup> Since the black community was poor and relatively small, black barbers or hairdressers such as Hilton, caterers such as Joshua B. Smith, or clothiers and tailors such as Thomas Dalton or Henry Weeden, most likely depended on white customers. Interracial contact apparently made integration seem less unusual and less threatening to them than to their black critics. On the other hand, those whose positions at work made them subordinate to whites—servants and laborers—were unlikely to sign either petition. Interaction with whites by itself was insufficient to foster activism; the interaction had to be between those in fairly equal positions.

The level of participation—black integrationists held at least fifteen public meetings in 1849 alone<sup>268</sup>—indicated how significant blacks considered the issue. According to the 1860 U.S. Census, 30.8 percent, or 704, of Boston's 2284 blacks were adult males.<sup>269</sup> Applied to an 1850 population of 1999, this ratio yields an estimated adult male population of 616 for the earlier date. A critic, probably Thomas P. Smith, acknowledged that approximately 300 blacks had attended one or more of the integrationist meetings, and since a reported vote in favor of abolishing the caste schools at one meeting was 159-0,<sup>270</sup> 300 for all of them does not appear too high. Since few women or children took part, this figure amounts to approximately 40 percent of the relevant population—a very high figure for a poor, not well educated, frequently transient group. Combined with those who signed the Paul petitions, the proportion of blacks who recorded an opinion on the issue surely reached a quarter of the adults of both sexes. Despite the disparaging comments of the Grammar School Committee,<sup>271</sup> Boston blacks clearly were deeply concerned with the nature of their children's education.

<sup>266</sup> As White shows, the illiteracy rate among members of these "elite" occupations in 1850 was much less than among the unskilled. A. White, *Blacks and Education*, *supra* note 46, at 167-68. Only 1 of 21 hairdressers and 0 of 12 waiters could neither read nor write, compared to 15 of 43 sailors, 18 of 67 laborers, and 38 of 172 of the "unskilled." White, *Black Parents*, *supra* note 101, at 38, also stresses the role of the black elite in integration campaigns.

<sup>267</sup> See J. HORTON & L. HORTON, *supra* note 131, at 75-76.

<sup>268</sup> A. White, *Blacks and Education*, *supra* note 46, at 288-90.

<sup>269</sup> Census of the United States (1860).

<sup>270</sup> Boston Daily Advertiser, Aug. 17, 1849, at 2, col. 3.

<sup>271</sup> Grammar School Majority Report (1849), reprinted in *JIM CROW*, *supra* note 31, at 84-85.

And Boston blacks just as clearly favored the end of exclusion from common schools on account of race.<sup>272</sup> The case of antebellum Boston casts considerable doubt on the later claim of 1960s' black radical Malcolm X: "The word 'integration' was invented by a Northern [white] liberal . . . . The black masses prefer the company of their own kind."<sup>273</sup> A strictly segregationist banner was not raised by either black faction but only by the white school committees. Actions taken by the integrationists involved much higher levels of participation—attending meetings, actively boycotting—than did actions taken by those who wished to preserve black schools, who only had to sign petitions. In the fall of 1855, when the black schools remained open and those who wished to keep them open could have sent their children there, fewer than ten students enrolled.<sup>274</sup> The Hub City's blacks agreed overwhelmingly that enforced segregation was wrong, and most wanted their own children to attend schools in common with the children of other citizens.<sup>275</sup>

### B. Which Whites Supported Segregation?

At its January 1856 meeting, the Massachusetts Anti-Slavery Society greeted the abolition of separate schools as "the triumph of law and justice over the pride of caste and wealth . . . ."<sup>276</sup> In a speech at that convention, Wendell Phillips remarked that "[t]he Whig party left it [the segregated school system] a legacy to the wealth of Boston."<sup>277</sup> Statistics bear out the Garrisonians' charges and undercut the Grammar School Committee assertion that prejudice was most prevalent among the lower classes of whites. Segregation was supported by a political, social, and economic white elite.

As Table 4 shows, the school committees that blocked integration in the 1840s were solidly dominated by Whigs.<sup>278</sup> Of those who ran for

<sup>272</sup> Levesque contends that "[t]he numerical strength of the opposing factions within the Negro community is well-nigh impossible to resolve." See G. Levesque, *Black Boston*, *supra* note 34, at 224 n.30.

<sup>273</sup> THE AUTOBIOGRAPHY OF MALCOM X 272-73 (1966).

<sup>274</sup> A. White, Blacks and Education, *supra* note 46, at 371. Claims might be raised that community pressure kept other blacks from enrolling in the black schools. If so, the numbers who may have wanted to enroll would be underestimated, but such effective pressure would only reinforce the notion of the nature and strength of dominant black opinion.

<sup>275</sup> This is not to deny that such racially separate institutions as churches or lodges were important to the black community. Indeed, the struggle for race-irrelevant schools was organized in these institutions. But to attribute the abolition of exclusive schools "more importantly" to a heightened level of black community organization after 1844, as Levesque does, is to mistake correlation for cause. See G. Levesque, *Black Boston*, *supra* note 34, at 234-35. Black institutions were not much, if any, less developed in 1851, when the General Court refused even to bring an integration bill to the floor, than they were in 1855, when it passed such a bill almost unanimously. The key change was in which white group controlled politics.

<sup>276</sup> The Liberator, Feb. 1, 1856, at 18, col. 6 (emphasis added).

<sup>277</sup> *Id.*

<sup>278</sup> The General Court refused to record a single roll call on the school segregation issue, which

election on party tickets or participated sufficiently in party activities to be mentioned in contemporary newspapers, 57 percent were Whigs. Although Table 4 also shows that Democrats were even less likely than Whigs to support integration, the fact remains that too few Democrats served on either committee at any time to determine the outcome on integration issues. The real divisions were, first, between the overwhelmingly segregationist Whig activists and the men who apparently abstained from partisan politics, serving on the appointed primary committee as a matter of civic duty; and, second and even more strikingly, between partisans of the two major parties of the 1840s and the Know-Nothings of 1855. Table 5 renders these notions more precise, demonstrating that statistically significant differences in voting patterns on integration existed between the Democrats and Whigs on the one hand, and the unknowns on the other, but not between the two major parties. Furthermore, Know-Nothings were much more racially liberal than any of the other political groups. The Whig Establishment preserved segregation; to end it, that elite had to be overthrown.<sup>279</sup>

TABLE 4  
Parties and School Committee Votes on Integration\*

Votes on Integration**	Whig	Party		
		Democrat	Know-Nothing	Unknown
For	11	0	55	37
Against	63	69	5	63
No Vote or Not Polled	25	31	40	0
TOTAL NUMBER	175	29	58	46

\* Votes were in Grammar School Committee 1844, 1851, 1855 and those signing majority and minority reports, 1849; and in Primary School Committee, 1845 and 1846. Not polled or no vote means voted recorded on Grammar School Committee, but not recorded on issue. Know-Nothing includes 1 Republican and 2 member-years of the Liberty Party. Note that if a man served multiple terms, he is counted separately for each year that he served.

\*\* Numbers in columns, except last row, are percentages.

unfortunately precludes an analysis of opinion in that body. The party affiliations were taken from pre-and post-election day lists in the Boston newspapers, usually the *Atlas* or the *Advertiser*. If someone was nominated on more than one ticket in the same year, I assumed that he was a Whig, unless other information indicated that he was not fundamentally a Whig. I counted all those nominated as "Americans" in 1855 as Know-Nothings, regardless of previous party affiliations, because the emergence of the Know-Nothings during 1855 disrupted all three traditional parties—the Whigs, the Democrats, and the Free Soilers.

279 Because Nantucket newspapers were less numerous than those in Boston, identifying the names and party affiliations of Nantucket school committee members is more difficult. But Nantucket was so overwhelmingly Whig—and some of the segregationist leaders can be identified as Whigs—that it is very likely that opponents of integration were Whigs. In the 1848 presidential and gubernatorial elections, for instance, the Whigs received 64 to 69% of the votes on Nantucket, and the Free Soilers, who finished second on the island, 21 to 23%. See *Boston Daily Atlas*, Nov. 9, 1848, at 2, col. 2; Nov. 16, 1848, at 2, col. 2.

TABLE 5

WHICH PARTY DIVISIONS ON INTEGRATION ARE SIGNIFICANT?  
(Chi-Square Values for Sub-Tables of Table 4)Categories Included\*

<u>Vote</u>	<u>Party</u>	<u>Chi-Square</u>	<u>Significance Level</u>
F,A,N	W,D,K,U	94.70	< .01
	W,U	24.84	< .01
	W,D	3.95	.14
	U,K	47.97	< .01
F,A	W,D,K,U	84.93	< .01
	W,U	9.00	.03
	W,D	3.69	.05
	U,K	24.68	< .01

Category Definitions:

F	= For Integration
A	= Against Integration
N	= Not Polled on Integration
W	= Whig
D	= Democrat
K	= Know-Nothing, Republican, Liberty
U	= Party Unknown

\* The chi-square values and associated significance levels in each row apply to the subsets of Table 4 indicated in each category definition. For instance, the first row gives the statistics for all of Table 4; while the sixth row pertains to a sub-table of Table 4 with only four entries: Whigs who were for integration, Whigs who were against integration, those of unknown party who were for integration, and those who were unknown and against.

The establishment supporting segregation was also a social and economic elite. Schultz's assertion that the "[r]efusal to mix the races came most strongly from lower-class and immigrant parents"<sup>280</sup> receives no support from data about the decisionmakers. Occupationally, the committees were dominated by professionals and merchants, who were hardly typical of Boston's population. For instance, no clerks, teamsters, carpenters, painters, tailors, or sailors, who together composed 31.4 percent of Boston males over age fifteen in 1860, appear to have served. None of the committeemen during this period had an obviously Irish surname. On the other hand, the establishment categories of bankers, clergymen, physicians, lawyers, and government officials made up only 2.2 percent of the 1860 adult males in Boston but at least 47 percent of the school committee members. The masses of whites may have supported school segregation, but it was the socioeconomic elite that articulated its rationale and kept it in force.<sup>281</sup> Another index of the relation of

<sup>280</sup> S. SCHULTZ, *supra* note 42, at 193. An obituary notice for the black lawyer Robert Morris noted that most of his \$100,000 in property had been built up in a practice which was "almost entirely among the Irish people." Quincy (Illinois) Daily Herald, Jan. 10, 1883, at 2.

<sup>281</sup> For example, abolitionists, black and white, decried the "illiberality" of clergymen on the committees, which they believed to be as typical of the largely anti-abolitionist clergy as it was shameful. See *The Liberator*, Sept. 7, 1849, at 143, col. 2; Nov. 9, 1849, at 180, col. 3. That these

social status to integrationist sentiment is in Table 6. Searches of the 1850 U.S. Census and local histories located 41 percent of the persons who served each year on the committees.<sup>282</sup> Of that 41 percent who were geographically stable, notable, wealthy, or egotistic enough to merit biographical mention in the celebratory Brahmin histories, only 14 percent favored integration. Of those who did not record their biographical sketches for posterity, 29 percent were integrationists.<sup>283</sup>

TABLE 6  
Birthplace and Vote on Integration\*

Vote	Birthplace		
	Mass.	Elsewhere	Not Found
For	14	14	29
Against	64	45	45
No Vote	21	40	23
TOTAL NUMBER	90	42	177

Chi-Square = 15.342 P < .01

\* Numbers in columns, except last row, are percentages.

Even within the relatively restricted occupational categories represented on the school committees, significant relationships existed between social status, party, and votes on racial integration. As Table 7 evidences, those from the five categories that I believe constituted the Brahmin establishment were slightly less likely to favor integration than

ministers came primarily from "evangelical" churches—Congregationalist, Presbyterian, Unitarian, Baptist—in the home of the Puritans casts doubt on an "ethnocultural" explanation of opinion on racial discrimination in schools. Historians who espouse an "ethnocultural" thesis treat the outburst of antebellum "reform" movements—such as temperance, anti-slavery, and sabbatarianism—as a reflection of the Second Great Awakening, a period of revivalism in American culture. Thus, in politics, "pietists" tried to legislate "right behavior," while "liturgicals," whose theology stressed "right belief" as a means of salvation, opposed efforts to mandate conduct by law. For the most completely developed statement of the ethnocultural thesis, see P. KLEPPNER, *THE THIRD ELECTORAL SYSTEM, 1853-1892* (1979). If this scheme were applied to the integration movement—which it has not been, at least explicitly—it would imply that the integrationists ought to have been pietists, while the segregationists ought to have been liturgicals and members of non-evangelical churches. Clearly, the ethnocultural thesis is wrong in the context of the integration movement, because many of the segregationists were pietists in matters other than racial integration. For example, the 1852 Whig Senate, so antipathetic to integration that no bill was even introduced, passed a state liquor prohibition law. For the vote, see *The Liberator*, Mar. 12, 1852, at 42, col. 5. One of the chief opponents of the prohibition bill was Charles T. Russell, who led the fight for school integration in the 1849 Grammar School Committee.

282 Persons are counted separately for each year that they served.

283 This pattern strongly parallels the more extensive analysis in V. Purdy, *supra* note 230, at 118-235. Comparing the members of the 1855 Know-Nothing General Court to those of the Whig-dominated 1850 body, she found the 1855 group much less wealthy, at least in the cities; much less likely to have served previously in the legislature; much less likely to have prestigious occupations, and much younger. My categories correspond generally to those Purdy used. See *id.* at 253-61.

were men in the five "non-establishment" groups. Table 8 demonstrates that the establishment was more likely to be Whig and also more likely to take part in partisan political activity than those in less prestigious occupations.

TABLE 7  
OCCUPATION AND VOTE ON INTEGRATION

<u>Occupation</u>	<u>For*</u>	<u>Against</u>	<u>No Vote</u>	<u>Total</u>	<u>Number</u>
Clergy	18	39	43	100	49
Lawyer	11	41	49	101	37
Government Officer	0	78	22	100	9
Physician	29	51	20	100	59
Banker	33	56	11	100	9
<b>TOTAL 'ESTABLISHMENT'</b>	<b>20</b>	<b>47</b>	<b>33</b>	<b>100</b>	<b>163</b>
Merchant or Manufacturer	22	67	10	99	98
Teacher	33	67	0	100	3
Printer	44	44	11	99	9
Other	31	23	46	100	13
Missing	26	52	22	100	23
<b>TOTAL NON-'ESTABLISHMENT'</b>	<b>25</b>	<b>60</b>	<b>15</b>	<b>100</b>	<b>146</b>

Chi-Square (10 Occupational Categories) = 47.701 P < .01

Chi-Square (2 Occupational Categories: "Establishment" vs. "Non-Establishment") = 13.550 P < .01

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\* Numbers in columns, except last column, are percentages.

TABLE 8  
Occupation and Party

Occupation	Party					Total Number
	Whig*	Democrat	Nothing	Unknown	Know-	
Clergy	65	8	14	12	99	49
Lawyer	75	5	16	3	99	37
Government Officer	33	22	11	33	99	9
Physician	56	12	25	7	100	59
Banker	100	0	0	0	100	9
<b>TOTAL 'ESTABLISHMENT'</b>	<b>65</b>	<b>9</b>	<b>18</b>	<b>9</b>	<b>101</b>	<b>163</b>
Merchant or Manufacturer	53	9	13	24	100	98
Teacher	67	0	33	0	100	3
Printer	56	0	33	11	100	9
Other	46	0	31	23	100	13
Missing	46	0	5	17	100	23
<b>TOTAL NON-'ESTABLISHMENT'</b>	<b>49</b>	<b>10</b>	<b>20</b>	<b>22</b>	<b>99</b>	<b>146</b>

Chi-Square (10 Categories) = 49.03 P < .01

Chi-Square (2 Occupational Categories: "Establishment" vs. "Non-Establishment") = 12.749 P < .01

\* Numbers in columns, except last column, are percentages.

Table 9 reveals that nothing but politics mattered. Because votes on integration can take only three values—for, against, and unrecorded—the dependent variable is “limited,” and ordinary least squares regression is inappropriate.<sup>284</sup> Since several of the independent variables seem to fall into naturally ordered categories, ordered probit models were estimated.<sup>285</sup> The first eight equations of the table report predictions only among those who voted on the issue, while the last three equations also include those Grammar School committeemen whose position on integration is unknown. In each case, the equations present the probit coefficients (which, unlike ordinary regression equations, have no simple intuitive interpretation), the associated “t” statistics in parenthesis, and, to assess overall predictive power, the logarithmic likelihood functions and percentages of correct predictions associated with each equation.<sup>286</sup> Overall, whether measured through a single four category variable, as in

<sup>284</sup> For a relatively accessible introduction to limited dependent variables methods, see E. HANUSHEK & J. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 179-216 (1977).

<sup>285</sup> On ordered response models, see G. MADDALA, *LIMITED DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS* 46-49 (1983). Unordered logit equations yielded quite similar results.

<sup>286</sup> The smaller the likelihood ratio, the better the prediction. The higher the percentage of correctly predicted responses, the better the prediction. Precise statistical tests can be computed to determine whether one model fits better than another. See Q. Vuong, *Likelihood Ratio Tests for Model Selection and Non-Nested Hypotheses* (1986) (unpublished working paper, California Institute of Technology). If one performs such tests, models with very similar likelihoods, such as (1) and (2) or (1) and (4), are not significantly different. Although likelihoods do not have such a

Table 4, or through a series of "dummy" variables, partisanship was a good predictor of integration sentiment, but none of the social traits of the voter adds significantly to the political explanation.<sup>287</sup> A man's social background may have influenced his vote, but it did so only by affecting his party choice.<sup>288</sup>

**TABLE 9**  
**ORDERED PROBIT REGRESSIONS PREDICTING VOTE ON**  
**INTEGRATION**

**VARIABLE LISTING**

F	= For Integration
A	= Against Integration
N	= Not Voting on Integration
P	= Party (Ordered 0 = Democrat; 1 = Whig; 2 = Unknown; 3 = Know-Nothing, Republican, or Liberty)
D	= Democrat
W	= Whig
U	= Unknown Party
K	= Know-Nothing Republican or Liberty
E	= Occupation (0 = Merchant, Manufacturer, Teacher, Printer, Other, or Missing; 1 = Clergy, Physician, Lawyer, Government Official, or Banker)
B	= Birthplace (0 = Not Found In Census or Local History; 1 = Found)
Y	= Birthyear (0 = Missing; 1 = Pre-1789; 2 = 1790-1799; 3 = 1800-1809; 4 = 1810-1819; 5 = 1820-1825)

**EQUATIONS\***

			Log Likelihoods	% ** Correct Predict.
(1)	F,A	= 1.37(4.53)K - 2.37(-7.18)W - 5.63(-0.35)D - 1.70(-4.77)U	- 98.38	82.40
(2)	F,A	= -2.17(-9.39) + 1.07(7.99)P	- 100.92	82.40
(3)	F,A	= -0.53(-4.47) + 0.01(0.07)E	- 142.41	69.96
(4)	F,A	= -0.33(-2.98) - 0.52(-2.87)B	- 138.20	69.96
(5)	F,A	= -2.37(-8.57) + 1.11(7.97)P + 0.30(1.46)E	- 99.85	80.69
(6)	F,A	= -2.03(-7.86) + 1.04(7.67)P - 0.24(-1.13)B	- 100.28	81.12
(7)	F,A	= -2.11(-8.18) + 1.06(7.74)P - 0.03(-0.52)Y	- 100.79	80.69
(8)	F,A	= -2.22(-7.63) + 1.07(7.67)P + 0.35(1.65)E - 0.30(-1.37)B	- 98.90	81.54
(9)	F,A,N	= 1.10(6.68)K - 1.45(-7.93)W - 1.74(-6.10)D - 1.10(-4.64)U	- 278.14	62.14
(10)	F,A,N	= -0.94(-7.12) + 0.62(8.01)P	- 281.06	62.14
(11)	F,A,N	= -1.04(-5.79) + 0.63(7.83)P + 0.29(2.07)E - 0.15(-1.08)B	- 278.46	61.49

\* "t" statistics in parentheses. "t" values  $\geq 2.0$  are significant at the 0.05 level.

\*\* % of cases correctly predicted.

natural interpretation as  $R^2$  in ordinary least squares regression, they are similarly useful in assessing the fit of a particular response model.

287 A "dummy" variable takes on the value 1 if the characteristic is present, and 0 otherwise. For instance, in equation (1), K = 1 if the member was a Know-Nothing, Republican, or Liberty man, and 0 if he was a Whig, Democrat, or of no determinable party.

288 Of course, other social traits that I have been unable to measure may have had effects independent of party. For example, besides the traits listed in Table 9, I assessed the influence of religion and college attendance. Nonetheless, these traits had no substantial effect, once party was controlled for in the assessment.

One might think that in a community that favored segregation, a prominent opposition role would damage a politician's career. Yet the example of Charles Sumner, elected to the United States Senate less than eighteen months after he argued *Roberts*, suggests that this conclusion might be incorrect. Table 10 supports the Sumner example, comparing lists of committeemen and members of the city council and General Court in elections through 1856. Segregationists were not significantly more likely to be promoted than integrationists were, even though the vast majority of segregationist committeemen were Whigs, as were the vast majority of higher officeholders until 1855. Perhaps the more ambitious and competent were especially likely to back equality. Whatever the explanation, white public opinion was apparently not so solidly racist as to punish dissenters.<sup>289</sup>

TABLE 10  
Did Voting for Integration Hurt a Politician's Career?

<u>Known To Have Higher Office</u>	<u>Vote On Integration*</u>	
	<u>Yes</u>	<u>No</u>
Yes	11	19
No	89	81
<b>TOTAL NUMBER</b>	<b>70</b>	<b>163</b>

Chi-Square = 2.02 Significance Level = 0.155

\* Numbers in columns, except last row, are percentages.

### C. The Irony of Massachusetts History

Why, then, did segregation last as long as it did? Why did the school committees fight so hard to keep two percent of the children separate from the other ninety-eight percent? Why did people who articulated and enforced an ideology of the common school as a democratizing, homogenizing institution—who repelled proposals to create separate German-language schools or to provide public support for sectarian education as attempts to set up "exclusive schools" to cater to "private prejudices"<sup>290</sup>—not apply the same general conception to blacks? Certainly the self-confident Brahmin elite did not feel the threat of economic or social competition from such a small, deprived group. The blacks were not about to throng into the Latin or English high schools or take places at Harvard from aristocratic scions. Neither was a majority of the articulate black community satisfied with segregation, nor were the

<sup>289</sup> See also Finkleman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L. REV. 415, 428 (1986).

<sup>290</sup> Boston Grammar School Committee, Report of the Annual Examination of the Public Schools 19-21 (1853), quoted in D. Ment, *supra* note 9, at 64-65.

struggles by abolitionists of both races inept or incomplete. It is difficult to imagine what more white abolitionists could have done to prove their sincerity or what additional political tactics could have been tried. The Garrisonians may have alienated potential antislavery allies by attacking the Constitution and the Union. In the battles for integration, however, they largely avoided denunciatory rhetoric, and they compromised.

Nor can Boston's segregated schools be explained by saying that blacks have always been treated as The Great Exception in American democracy; that is, that pervasive white racism is a sufficient explanation for every particular discrimination.<sup>291</sup> After all, segregation was upheld only partly by officials who were democratically elected. It was later eliminated by an elected body, and in 1855, desegregation was quietly accepted without attempts to reverse it. Racism was obviously important, but it was neither omnipresent nor omnipotent. What made the challenge to school segregation so seemingly futile for so long was the racial view of the overwhelming majority of the elite combined with biased political institutions—the at-large election system for the legislature and the majority vote requirement for governor, de facto nomination for the Grammar School Committee by Whig caucuses, a self-perpetuating Primary School Committee, and appointment for life in the Supreme Judicial Court. School segregation ended only when Whig rule was overthrown and a new counter-elite came to power, leavened by men with non-establishment occupations and a more democratic, antislavery ideology.

Just as racism was a necessary, but not sufficient, explanation of the longevity of school segregation, the campaign by black and white abolitionists was a necessary, but not sufficient, cause of its demise.<sup>292</sup> The long crusade for antislavery and equal rights educated and pressured, but it could not break through until a more responsive group of politicians took power.<sup>293</sup> The dominant Cotton Whig faction in Massachusetts upheld the national Compromise of 1850, enforced the Fugitive Slave Act, did not accommodate the shift in public opinion against slavery after the Kansas-Nebraska bill, and seemed unresponsive to native Protestant perceptions of the immigrant and Catholic "threats." At that point, the all-or-nothing political structure that had protected the Whigs from incremental change exposed them to an avalanche. The collapse of the Whigs, coupled with the fact that a nominally nativist force outlawed racial discrimination, should have been enough irony for any one event.

But it was not. The greatest irony was that Boston's school integra-

<sup>291</sup> But see Franklin, *American Values, Social Goals, and the Desegregated School: A Historical Perspective*, in *NEW PERSPECTIVES ON BLACK EDUCATIONAL HISTORY* 193, 196 (V. Franklin & J. Anderson eds. 1978) (discussing the *Roberts* decision).

<sup>292</sup> Schultz's suggestion that integration came about because "[t]he 'sense of the community' had changed" is merely tautological. See S. SCHULTZ, *supra* note 42, at 206.

<sup>293</sup> D. Ment, *supra* note 9, at 285-86.

tion law and the fifteen-year struggle to achieve it were of less consequence for later events than Chief Justice Shaw's opinion in *Roberts*, which he did not bother to justify, that segregation was reasonable. Enshrined in a widely available report, issued under the imprimatur of perhaps the most prestigious antebellum state judge, originating from the center of antislavery agitation, the *Roberts* decision provided a convenient pretext for later judges who sought not reasons but precedential excuses for segregationist opinions. Yet the *Roberts* opinion could have other consequences. Some judges might not be as willing as the Whig establishmentarian Shaw to accept at face value school board protestations of good faith toward black people or assurances that the separate schools were, in fact, equal. Such judges might then rule that segregation had a discriminatory intent in a particular instance. Or, their unguided value judgments about the *effect* of segregation under a reasonableness standard might not accord with that of Shaw. In either case, *Roberts* could be honestly cited, but to reach a different decision.<sup>294</sup>

That Chief Justice Shaw based his opinion on natural law and reasonableness grounds was typical of nineteenth-century judges deciding segregation cases. "[T]he most important purpose" of a judge, Shaw remarked in his first speech from the bench in the 1830s, is to apply the principles of a case "in a manner consistent with the plain dictates of natural justice . . ."<sup>295</sup> Natural justice spoke differently to Shaw than to Sumner, but each claimed to be listening to the same voice, one that could be embodied in constitutions, laws, or practices but still remain behind or, perhaps better, above them. What are now termed substantive due process or substantive equal protection standards—standards that impose on judges the responsibility to decide what they think is fair or reasonable—were central to the law long before the passage of the fourteenth amendment.

### VIII. THE ANTEBELLUM STRUGGLE AND THE AMERICAN DILEMMA

What conclusions should we draw from an analysis of this most important movement for equal rights for free blacks in antebellum America? First, nearly all the issues about racial discrimination were discussed—in strikingly modern terminology—in antebellum Massachusetts. Abolitionists ended segregation in transportation and schools and prohibitions against racially mixed marriages. They adopted a race-conscious remedy for discrimination by closing racially designated schools. They employed all the techniques of the civil rights movement of the 1950s and 1960s, such as petitions, lobbying, legislative action, legal suits,

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<sup>294</sup> See Ransmeier, *The Fourteenth Amendment and the 'Separate But Equal' Doctrine*, 50 MICH. L. REV. 203, 209 (1951).

<sup>295</sup> See L. LEVY, *supra* note 215, at 23-24.

boycotts, and electioneering. The legal theories and phrases they used bear close resemblance to those of recent times: "arbitrary" or "unreasonable" distinctions, "equality before the law," concepts akin to what are now called "suspect classifications" and the affirmative duty to provide an integrated school setting. Their opponents, moreover, generated nearly every argument and legal or psychological theory that would be used over the next century and a half to justify refusals to integrate. Since Boston was the fountainhead of the abolitionist movement and the intellectual center of the nation in the 1840s and 1850s, these events and expressions were widely broadcast and formed a not inconsiderable part of what Jacobus tenBroek called "the antislavery origins of the Fourteenth Amendment."<sup>296</sup> The antebellum Massachusetts civil rights campaigns strike familiar chords partly because ideas, tactics, and theories have—unbeknownst to us—been passed from generation to generation as folk wisdom, and partly because only a limited number of rather obvious strategies exist for dealing with the continuing dilemma of racial discrimination.

Second, white racism in Massachusetts and arguably in most of the north during the middle and late nineteenth century, was broad, but not deep. The edifice of school segregation in Nantucket and Boston seemed impregnable, until it suddenly collapsed, never to be restored in its original form.

Third, the agitators, black and white, who assailed slavery and segregation in Massachusetts were not cut off from the mainstream of political thought and action on account of a principled rejection of politics, a refusal to compromise, or exclusion as extremists by more "responsible" leaders of public opinion. In the integration struggle, the group around Garrison—led by black members such as William C. Nell, John T. Hilton, and Robert Morris, Jr.—eagerly embraced politics, framed compromises, cooperated with Free Soilers, and shared credit for the final victory with two United States senators and Massachusetts' Civil War governor. To treat the abolitionists as impractical extremists whose views on constitutional and natural rights were irrelevant to the shaping of nineteenth-century law, as Raoul Berger and others do, is seriously misleading and badly misinformed.

Fourth, litigation on racial discrimination always has been simply the continuation of politics by other means, and analyses that divorce the courts from other forms of political action distort what occurred in both. Charles Sumner argued for integration in exactly the same terms in the courts of law and of public opinion. The thread of consistency in Lemuel Shaw's career does not run through his blatantly contradictory judicial pronouncements, but from his acquiescence in racism as a member of the

<sup>296</sup> J. TENBROEK, EQUAL UNDER THE LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (rev. ed. 1965) (1951).

Boston School Committee, to his disingenuous acceptance of separate as equal in the *Roberts* case and his approval of strengthening southern slavery in his vote for the Constitutional Union party in 1860. We will understand neither courts nor politics until we stop segregating them from each other.

Fifth, it was the Whig establishment—Lemuel Shaw, Peleg Chandler, the State Street lawyers and Congregational clergymen of the School Committee—that maintained segregation, not the potato famine Irish or the native white workers. Spurred on by the elite of the small black community, such rebellious Brahmins as Wendell Phillips, Ellis Gray Loring, and Charles Sumner served as spokesmen for the much less homogenous integrationist group. Their electoral base of American-born Protestant artisans and small businessmen were first Free Soilers, then Know-Nothings, and eventually Republicans. Men of influence, not the masses, have shaped and preserved institutional discrimination in America. Egalitarians should not mistake their true enemies.<sup>297</sup> Nor should they either overrate or underrate their opponents' power, for the largest lesson of this story is the variability of white racial attitudes. Racial lines are often of less importance for whites than religious, class, or political party differences. People also change their minds, especially when an astute band of agitators reveals previously ignored socioeconomic conditions and forces people to confront the contradictions between the public ideology of equal rights and the reality of unequal treatment.

The abolitionists' rejoicing at their December 1855 celebration was, as they realized, partial, hopeful, and prospective. Few present that evening would have guessed that emancipation would be accomplished in less than ten years. Fewer still would have imagined that it would take a century after the death of slavery to guarantee in law "the supremacy of equal rights."

<sup>297</sup> But see Cottrol, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483 (1986). Basing his discussion entirely on secondary sources, Cottrol portrays Irish immigrants as the principal opponents of the blacks and the "upper-and middle-class elements of the Yankee population" as allies of the blacks in the antebellum Boston legal struggles. *Id.* at 514-515, 526-57. Because he implicitly recognizes that the Irish came to dominate Boston only after 1880, Cottrol's position contains a contradiction: if the Irish were not so potent before the Civil War, some other group—that is, the Whig elite—must have perpetuated racial discrimination in antebellum Massachusetts. Moreover, Cottrol's argument that the alliance between blacks and nativist whites later "exacerbated tensions" with the Irish seems strained. Why should the Irish retaliate against blacks in the 1880s and 1890s, long after the abolition of both substantial and petty legal apartheid in Massachusetts, and just when the most important Boston black leader of the era, William Monroe Trotter, was allying with the Democratic party? On Trotter, see S. FOX, THE GUARDIAN OF BOSTON: WILLIAM MONROE TROTTER (1970).