

DIVISION OF THE HUMANITIES AND SOCIAL SCIENCES
CALIFORNIA INSTITUTE OF TECHNOLOGY

PASADENA, CALIFORNIA 91125

BEFORE *PLESSY*, BEFORE *BROWN*:

THE DEVELOPMENT OF THE LAW OF RACIAL INTEGRATION IN LOUISIANA AND KANSAS

J. Morgan Kousser

Forthcoming: *In Paul Finkleman and Stephen E. Gottlieb, eds., Toward A Usable Past: An Examination of the Origins and Implications of State Protections of Liberty* (Athens: University of Georgia Press).



SOCIAL SCIENCE WORKING PAPER 681

October 1988

**BEFORE PLESSY, BEFORE BROWN:
THE DEVELOPMENT OF THE LAW OF RACIAL INTEGRATION
IN LOUISIANA AND KANSAS**

J. Morgan Kousser

ABSTRACT

In the face of the Nixon–Reagan counterrevolution against liberal decisions of the Warren Court, some liberal judges and legal commentators have called for an increased reliance on state courts for the protection of civil rights and civil liberties. To gauge how well state courts and legislatures protected civil rights in the nineteenth century, I examined twenty school integration cases and numerous legislative and state constitutional convention actions in Louisiana and Kansas from 1868 through 1903.

Contrary to what Raoul Berger and others have asserted, black integrationists had many allies in the mainstream of the Republican party in the late 19th century. Not only did they pass laws prohibiting the exclusion of children from any school because of race, color, or previous condition of servitude, but they represented black plaintiffs in numerous school integration cases, most of which have previously been unknown to or at least little noticed by scholars. At least one judge ruled segregation contrary to the Fourteenth Amendment, while another came close to doing so. The arguments of lawyers, legislators, and black petitioners to legislative bodies were all similar and often quite sophisticated. In particular, the unpublished briefs in three Louisiana cases made clear how intermixed contentions based on state and national constitutions were. If the state constitution and laws created a right and the national constitution and laws prohibited unequal enjoyment of state–created rights, then legal inequities violated rights on both governmental levels simultaneously.

From 1877 on in Louisiana, and from 1903 on in Kansas, blacks lost the strong protection against unequal schools that they had enjoyed, at least *de jure*, earlier. Whether the reversals reflected shifts in white public opinion is unclear, for it was not the white populus that made the changes, but a new, younger set of white racist judges. Their ability to reverse or bypass earlier liberal judicial decisions or legal provisions demonstrates how fragile rights can be in the several states and undermines the empirical foundations of what might be called "the new states' rights."

I. PROLOGUE: "ABSOLUTELY EQUAL BEFORE THE LAW"

J. Morgan Kousser
California Institute of Technology
Pasadena, California 91125

Robert H. Isabelle faced a complicated legal situation when he tried to get his son William admitted to a school in his ward of New Orleans in 1870.¹ Under articles 13 and 135 of the Louisiana Constitution of 1868, every public facility, specifically including schools, was declared open to every person regardless of race.² Fearing that courts might rule the constitutional guarantee not self-executing, the radical Republican legislature of 1869, of which Isabelle was a leading member, wrote the integration provision into the state education law.³ Still, the Democratic-dominated Orleans Parish school board refused to grant "colored" children — Isabelle was lighter in complexion than many people who were considered "white" — the permits necessary to admit them to the "white" schools.⁴ The legislature in 1870 therefore acted to circumvent the board by authorizing the state superintendent of schools, Thomas W. Conway, a white Radical carpetbagger, to appoint new school boards for each ward of Orleans parish which would supersede the parish board.⁵ When Conway packed the ward boards with integrationists, as the legislators had no doubt intended,⁶ the teachers still refused to admit Isabelle's child, preferring to obey the parish board segregationists, rather than the ward board integrationists.⁷ Isabelle sued.

The petty legal point immediately at issue in Judge Henry C. Dibble's Eighth District court on Nov. 21, 1870 was which boards had legal control of the money that the state had allocated to schools. Behind this, however, lay the question of integration. Isabelle's lawyer could have argued the case purely on the basis of the 1870 law, the grounds on which the wily Judge Dibble decided it, or he could have relied on the nondiscrimination section of the 1869 law, or he could have harkened back to section 135 of the state constitution, or he could have pled the Equal Protection Clause of the Fourteenth Amendment, or like the usual risk-averse attorney, he could have argued all of these. But in his brief, the lawyer, John B. Howard, did not cite any specific provisions of state or national law at all. Instead he appealed to the general nature of "republican government." "That universal consent, so essential to the safety of a republic," Howard proclaimed, "requires — 1st. That the laws of a public character should be universal in their application; 2nd. That such laws should be framed and enacted so as to recognize, enforce and maintain the duties and rights of all inhabitants — in government, in property, in person, in society, in morals and in education, and in whatever satisfies the wants of every one, without injury or trespass on the domain of any other."⁸

Howard's short extant brief in this unreported state district court case was extreme in its refusal even to go through the formal mechanics of citing constitutional or statutory provisions, but it was typical of nineteenth century briefs and judicial opinions on school segregation in its lack of distinction between "legal" issues, on the one hand, and "legislative" or "policy" issues, on the other, as well as in its explicit grounding in the fundamental questions of what was "reasonable" for legislators or administrators to do and what rights each citizen had. Howard's two natural law arguments amounted, after all, to equality and protection — just the phrase that his fellow Republican John A. Bingham had recently written into the Fourteenth Amendment.⁹ But since the Isabelle case was never appealed — there was a substantial degree of school integration in New

Orleans from 1870 to 1877, no doubt including William R. Isabelle, Robert's son, among its beneficiaries — and since Judge Dibble, an integration sympathizer who later became president of the reorganized Orleans parish school board, decided the issue narrowly, the *Isabelle* case did not become an integrationist, equal rights precedent in the state that two decades later produced *Plessy v. Ferguson*.¹⁰

For a second, somewhat less obscure factual prelude to the discussion of school segregation law in the nineteenth century, let us take the Mississippi river and its tributaries north to Kansas, as many black folks from Louisiana did at the end of the 1870s. In his opinion for the Kansas supreme court in the 1881 case of *Board of Education of Ottawa, Kansas v. Leslie Tinnon*, Justice Daniel M. Valentine¹¹ used the same type of sonorous language about equal rights that John Howard had several hundred miles down the Mississippi river in 1870.¹² Since some legal commentators, such as Herbert Hovenkamp and Raoul Berger, have alleged that ". . . the Radical Republicans did not want racial integration any more than southern whites did",¹³ it is worth quoting Valentine's words at length:

The tendency of the times is, and has been for several years [Justice Valentine remarked], to abolish all distinctions on account of race, or color, or previous condition of servitude, and to make all persons absolutely equal before the law. . . .

. . . Is it not better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other? At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; there they may learn human nature in all its phases, with all its emotions, passions and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human actions, and the attractions and repulsions, which lead with irresistible force to particular lines of conduct.¹⁴ But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools. . . .

. . . And what good reason can exist for separating two children, living in the same house, equally intelligent, and equally advanced in their studies, and sending one, because he or she is black, to a school house in a remote part of the city, past several school houses nearer his or her home, while the other child is permitted, because he or she is white, to go to a school within the distance of a block? No good reason can be given for such a thing. . . . If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes.¹⁵

Like Judge Dibble in New Orleans, Valentine rested his opinion, representing also the views of Chief Justice Albert H. Horton of the three-man state supreme court, formally on the narrowest possible grounds. He assumed, "for the purposes of this case", that neither the Fourteenth Amendment nor the Kansas constitution prohibited a school board from classifying students by race, and inquired only whether the Kansas legislature had authorized such a classification, and, if not, whether the board's general mandate to regulate schools included an inherent power to segregate.¹⁶

In a larger sense, however, Valentine's consideration of this last question opened up all the issues related to the reasonableness of segregation that courts discussed throughout the nineteenth century whenever they decided school or public accommodations segregation cases. From *Roberts v. Boston* to *Plessy v. Ferguson* and beyond courts asked two fundamental questions: First, was treating people of different races differently "reasonable" or merely "arbitrary"? Second, if racial distinctions were unreasonable, did judges, under the Fourteenth Amendment, state laws or constitutions, or natural law, have the power to disallow such actions or were they bound to defer to legislative or administrative bodies?¹⁷ That contemporaries understood that Valentine's soaring rhetoric had these wider implications is shown by the vigorous dissent of future U.S. Supreme Court Justice David J. Brewer in the *Tinnon* case.¹⁸ Brewer, who earlier had presided as school superintendent and school board member over the segregated schools of Leavenworth, found a "suggestion" in Valentine's opinion that the Fourteenth Amendment prohibited segregation, and "dissent[ed] entirely" from that position. Moreover, even though he conceded that racial segregation "may be unreasonable," Brewer, whose career on the nation's highest court constituted a continual quest for judicial supremacy, insisted in *Tinnon* that the Kansas courts had to defer to the local board, because the board was "elected by the community".¹⁹

Since Justice Henry Billings Brown in *Plessy* tested the reasonableness of segregation under the Fourteenth Amendment by citing laws and state and lower federal court opinions on the subject, it should have been incumbent on him to distinguish or at least mention the majority opinion in *Tinnon*.²⁰ Ironically, Brown's finesse — he did not directly refer to *Tinnon*, other pro-integration cases, or the numerous northern laws mandating integration in schools and public accommodations — would have been even more blatant had Valentine merely followed the opinion of Kansas district court judge Nelson T. Stephens in the first stage of the *Tinnon* case.²¹ Quoting plentifully from both the U. S. Supreme Court majority and minority opinions in *Slaughter House*, as well as from Justice William Strong's 1880 opinion in *Strauder v. West Virginia* and Justice David Davis's opinion in the 1873 case of *Railroad Co. v. Brown*, Stephens concluded that "it is evident to every mind" that the Fourteenth Amendment prohibited segregation.²²

II. NINETEENTH CENTURY LESSONS FOR THE NEW STATES' RIGHTS

Why bother about obscure cases, over a century old, one of them not even publicly printed? What possible relevance can they have to contemporary efforts to reinvigorate state courts as protectors of individual rights in the face of the Nixon-Reagan counterrevolution against the Warren Court?²³ Their relevance, and that of the other cases from those two states that I will discuss in this paper, is three-fold: First, in each the lawyers, and, in *Tinnon*, the judges, discussed the broadest issues, exactly the same issues that judges always considered when they asked baldly whether the Fourteenth Amendment or natural law prohibited some regulation or classification. There was [and *is*] no escaping such issues, and to phrase the inquiry in terms of *state* constitutions, laws, or traditions, instead of more abstractly or nationally, strikes me as artificial and disingenuous.²⁴ Second, in their laudable effort to follow the best judicial practice, liberal nineteenth century judges crafted their final opinions in formally narrow terms of state law, which greatly reduced the value of the decisions as precedents, even in their own states. When the state laws or constitutions changed, or when the issues were framed in formally larger terms, later lawyers and judges could more easily ignore, dismiss, or distinguish these rulings. By contrast, opinions in cases that upheld segregation logically *had* to consider the more abstract, national questions of whether racial classifications were against the Fourteenth Amendment or fundamental notions of equal rights. Thus, these latter, pro-segregation opinions, interpreted under the usual legal shorthand convention that cases "stand for" pithy principles, inevitably played a larger role in shaping equal protection law than the state-based, closely-focused, pro-integration decisions.

Analogous dangers may lurk in the *saufe qui peut* stance of current liberal states' righters. Third, even the clearest of state constitutional guarantees and the most expansive egalitarian judicial rhetoric provided fragile support for civil rights in the face of the violent counterrevolution in Louisiana and the subtler pressure-group machinations in the Kansas legislature. James Madison's commendation of national diversity as a protection of minority rights in Federalist number 10 is forgotten at our peril.²⁵ As a citizen of the state that recalled Rose Bird and two other liberal justices of the state supreme court, I cannot ignore the comparative ease with which policy in the states can be reversed.

In addition to seeking to avoid some unintended consequences of contemporary legal tactics, there are other, more "historical" reasons for recounting these tales. First, they refute or at least greatly complicate the pessimistic view, shared by some on the left and nearly everyone of an opposite policy orientation who have written on the subject, that white racial opinion in nineteenth century America was uniformly and deeply racist.²⁶ Second, the analysis that proves this point expands the usual boundaries of constitutional history, which has been slow to follow the examples of Hurst, Horwitz, and others into social, economic, and non-"legal" political history, and to venture beyond the covers of printed books of cases.²⁷ Third, many published accounts of the history of school integration in these two states during the nineteenth century are either incomplete or incorrect and need revision.²⁸ Fourth, many of the brave, idealistic men and women who fought for racial justice then have been forgotten or unjustly maligned, while their opponents have often been celebrated or at least insufficiently pilloried.²⁹ Both groups deserve more fitting notice.

III. THE LEGAL FRAMEWORK

The laws, administrative acts, and state constitutional provisions on school integration in Louisiana and Kansas were more complex than historians have sometimes realized, and one cannot understand the judicial actions on the subject without first reviewing the actions of these (other) political bodies.

A. *From Exclusion to Integration to Segregation in Louisiana*

Blacks were taxed to support public schools in antebellum Louisiana, but prohibited from entering them. The relatively affluent community of *gens de couleur* in New Orleans was permitted to establish private academies and schools for black indigents, however, and Paul Trévigne, who later figured prominently in the school integration struggle, was a longtime teacher in an antebellum indigent school.³⁰ The first system of publicly supported schools for blacks in the state was established by the occupying Union Army during the Civil War. As its control was limited, the system it established was temporary and failed to reach many of the "country" parishes. Even so, New Orleans blacks made an attempt to integrate the existing schools, an effort which failed in the wartime confusion.³¹

In a move to restore state control of education, the 1864 constitutional convention, called by moderate white Unionists under Lincoln's wartime "ten percent" plan, first adopted a "conservative" plan providing that segregated public schools would be supported by racially segregated taxes—the taxes paid by whites would be used for white schools, and those relatively tiny taxes paid by blacks, for black schools. Reasoning that the numerous group of predominantly white Afro-Americans "could not be distinguished from the whites by facial features or color," some delegates (none of whom was "colored" under any such rule) proposed to define people with three-fourths or more white ancestry as "white" for school purposes. The convention rejected this "quadroon bill," 47–23, and they also voted down a proposal to integrate all persons

indiscriminately in the schools, 66–15.³² Under pressure from radicals outside the convention, the 1864 delegates three weeks later removed all mention of race from the constitution (55–29), leaving the legislature to structure a public education system now open to all children between the ages of 6 and 18.³³

With the collapse of the Confederacy, a radically racist Democratic government replaced the Unionists. Its state superintendent of schools, Robert M. Lusher, simply disregarded the state constitution, refusing to authorize any funds at all to be spent on what he termed "the mental training of an inferior race."³⁴ The Congressional refusal to recognize this government of ex-rebels, the landslide Republican victory in the 1866 national elections, and the calling of a new constitutional convention in Louisiana, with the delegates to be elected by black as well as white voters, gave blacks a chance to reverse Lusher's patently unconstitutional policies. Presciently fearing that once established, a segregated system would be impossible to change, a group of black activists grouped around the radical *New Orleans Tribune* pushed simultaneously for an end to exclusion and for completely non-segregated institutions.³⁵ In the 1868 constitutional convention, half of the delegates to which were considered black, the integrationists attained their goal. Among the whites voting in favor of integrated schools and public accommodations was Louisiana-born Simeon Belden, later state attorney general and subsequently a lawyer for blacks in three school integration suits.³⁶

Despite the explicit ban on segregated schools in the 1868 constitution and in the 1869 state law, schools in parishes outside New Orleans seem to have been almost entirely segregated.³⁷ The key was enforcement, which depended on the views of local school administrators, who were appointed by the state superintendent of schools, and on white public opinion, which was virtually a unit against school integration. Indeed, upper class whites were none too favorable to publicly-financed schooling at all. When Democrats violently "redeemed" the state in 1876, they did not explicitly require segregation by state law, though they did repeal the 1869 legal guarantee of no racial discrimination.³⁸ Similarly, fearing intervention by the federal government, the 1879 state constitutional convention delegates repealed Article 135 of the 1868 constitution, but did not make school segregation mandatory.³⁹ Instead, they authorized the new state superintendent of education, Robert M. Lusher (again), to appoint new school boards that would carry out the discriminatory will of the legislature less formally.⁴⁰ In New Orleans, the board resolved on July 9, 1877, to segregate students beginning in the fall term.⁴¹

B. *From Exclusion to Segregation to Integration to Confusion in Kansas*

In the 1850s, Kansas was the national focal point of the slavery controversy. Ever since, Kansans have clashed over issues of race relations. Proslavery Missourians exploded into the territory after 1854, to be met with "Beecher's Bibles" from New England. "Bleeding Kansas" became not only a potent symbol of slave state aggression, but also an important ingredient in Kansans' creation myth. Its sanguinary epitome was John Brown, whose "Pottawatomie Massacre" took place in the same county as the later *Tinnon* case. In the 1870s, Kansas became the goal of the black "Exodusters." Even before the organized exodus, Kansas had the highest black percentage outside the former slave states. Overwhelmingly Republican from the late 1850s until the Populist revolt of the 1890s, the state followed a zig-zag course on racial legislation that no doubt perplexed contemporaries. It has certainly confused scholars since. Indeed, the shifts in the legal status of blacks in public education in the Jayhawk State were so frequent and dramatic that they can be followed only with a tabular guide, such as Table 1.

[Table 1 about here]

In 1855, the first territorial legislature, fraudulently elected by proslavery Missourians, banned the territory's few free blacks from the public schools altogether, as well as voting to prohibit further black immigration. Even the nascent Free State Party initially endorsed an all-white Kansas.⁴² By 1858, however, the power of the antislavery forces was secure enough that the legislature omitted a black exclusion clause in its education law.⁴³ The next year, delegates to the convention that framed the constitution that Kansans would enjoy throughout the nineteenth century avoided all mention of race in the section on education, as Louisiana Unionists did in 1864. Although Democrats warned the Kansas convention's dominant free-state forces that the section would enable blacks to sue for admission into white schools, the majority refused to change it, and the delegates explicitly rejected attempts to exclude blacks from all schools and to require segregation.⁴⁴ As Maine-born Republican Dr. J.J. Blunt of Anderson County prophesied: "We don't know what will be the peculiar views of the people of Kansas upon this subject before there will be a change of the organic law. There may be a progress made by which the prejudices which involve and surround this question of negroes or mulattoes to our common schools may be laid aside; and then the Legislature could provide for the education of persons of color."⁴⁵

During the War, the legislature first mandated separate but equal across the state, then allowed the town of Marysville and the city of Leavenworth (the state's only "first class city" at the time) to allocate all taxes paid by whites to white schools, leaving only the pittance paid by refugee freedmen for black schools.⁴⁶ At the close of the conflict, the legislature authorized localities that had too few blacks to make segregation feasible to admit them into the common schools. It is difficult to determine the effect of these laws. Leavenworth county, which by itself contained 47% of the state's black population in 1860, certainly had a separate black school by 1864, but many other black children probably went without public schooling, while others presumably entered the common schools.

Under pressure from the state teachers' association, which had endorsed integration in 1866, and the Radical Republican state school superintendent, Peter McVicar, the 1867 legislature moved to guarantee blacks access to schooling, allowing localities to exercise their option on whether it would be segregated or not.⁴⁷ After reenacting the 1861 equal advantage law, perhaps just as a reminder to school boards, the legislature explicitly authorized segregation in "second class" cities. On the session's last day, the members rushed through a bill levying a mandatory \$100 a month fine on any district board that refused admission to "any children into the common schools," the fines to be allocated to a special fund to be spent by each county school superintendent for the education of the locked-out children. In small towns or rural areas, such a sum would pay for two teachers and a rented school room — a quite adequate school for blacks or whites by the standards of the time.⁴⁸

Despite annual pleas for integration from Superintendent McVicar, the legislature from 1868 to 1872 merely reaffirmed earlier laws permitting first and second class cities to establish segregated schools.⁴⁹ In 1873, however, the Congressional struggle for a civil rights law spun off movements in several states (New York, California, and Pennsylvania, as well as Kansas) to pass state guarantees of non-discrimination in admissions to schools and other places of public accomodation.⁵⁰ Black Kansans from throughout the state lobbied the legislature and succeeded in getting a nearly unanimous repeal of segregation in second class cities and in convincing the lower house to mandate integration everywhere.⁵¹ The state senate failed to act on the bill.

The next year, the black lobby succeeded. H.B. 1, a slightly rearranged version of the 1873 H.B. 247, passed both houses overwhelmingly. Prohibiting school officials, as well as those in charge of businesses that served the public, from making "any distinction on account of race, color

or previous condition of servitude," and repealing all contrary laws or parts of laws, it clearly made it illegal to deny any Kansan entry into a common school because of race.⁵² The parallel to articles 13 and 135 of the 1868 Louisiana constitution and the subsequent statutes is clear and striking. Kansas followed Louisiana, at this time, on issues of civil rights. If litigation and practices in other states are a guide, then under such a law, districts could still maintain one or more "colored" schools.⁵³ This issue was apparently not litigated in Kansas. What they could not do was to exclude a black student who met the age, achievement, and neighborhood qualifications from any white school, nor could they force students into segregated schools by maintaining different, overlapping attendance zones for children of each race. This was, in effect, the practical definition of *de jure* school segregation in the nineteenth century, and it underlines the connection between non-exclusion and integration — a connection that has sometimes confused historians.⁵⁴

When it codified the school laws in 1876, the legislature deleted all authority to operate segregated schools in Kansas cities. Far from an "error...of oversight", as one historian alleged, or an event that occurred "for reasons that are not stated", as the lawyer who represented the state in *Brown v. Board of Education* before the U.S. Supreme Court concluded, the 1876 codification merely reaffirmed the doctrine in the state's 1874 civil rights law.⁵⁵ In fact, the Senate Education Committee's draft of S.B. 202 had explicitly allowed segregation, but the Republicans on the floor, chastized by Samuel N. Wood, a reformer who supported every cause from abolition, through black and female suffrage, to the Greenback and Populist parties, amended the bill to omit all authorization of segregation.⁵⁶ The small minority of Democrats in the legislature race-baited in classic fashion, a representative from Coffeyville declaiming, for instance, that he "would not insult nor misrepresent his intelligent and respectable constituents by voting such an outrageous proposition as to have 'niggers' and white children educated together....He was glad that the [R]epublicans were going to put themselves on record in favor of 'nigger' equality. The white people were paying all the taxes and they should be permitted to say how their children should be educated."⁵⁷

Three years later, the legislature reversed course again, authorizing racial separation in first-class cities in a bill passed near the two month session's end. Why the still overwhelmingly Republican body took this action is presently unclear, but two suggestions may be offered. First, such bills were generally drafted by and sent to committees composed of the representatives of the cities involved, and the legislature usually followed their lead.⁵⁸ Second, legislative deference to local delegations was encouraged by the utter confusion that prevailed at the end of each fifty-day session. As a reporter for the *Topeka Commonwealth* noted, "It is almost impossible at the closing hours of the session to give a clear and succinct account of the proceedings. Bills pass in one house, are considered in the other, conference committees are appointed and so on. Hardly one of the members can tell you just the condition of a given bill."⁵⁹

And as blacks learned when they tried to repeal the 1879 act two years later, bedlam could kill a bill as well as pass it. S.B. 238, which would have negated the 1879 law, passed the Senate very late in the 1881 session, but was not considered in the House.⁶⁰ The same fate awaited them when in 1889 blacks launched a more thoroughgoing campaign, spearheaded by the state's first black legislator, Alfred Fairfax, and complete with a petition drive and an active lobbying effort.⁶¹ In that year, several bills providing for integration in first-class cities were proposed and then abandoned, in favor of an amendment to a more general education bill. That bill, however, was defeated at the last moment, apparently because of a disagreement not over integration, but over tax rates.⁶² From then until the mid-twentieth century, the best Kansas Afro-Americans could do was to block all attempts to expand segregation, except for a 1905 act allowing segregated high schools in Kansas City.⁶³

IV. THE INTERDEPENDENCE OF NATIONALLY- AND STATE-BASED RIGHTS AND THE FAILURE OF STATE PROTECTION

A. *Louisiana: Judicial Farces*

Within two weeks of the ratification of the Radical state constitution, blacks filed the first New Orleans school integration case.⁶⁴ Alderman Blanc Joubert, whose given name announced the tone of his skin, entered his daughter Cecile into a private school for white girls at the Convent of the Sacred Heart in January, 1868.⁶⁵ During February, the school expelled her on grounds of "color". Retaining Alexander P. Field, a Kentucky-born white Unionist politician who had previously flirted with various factions of the Republican party and who became the state attorney-general in 1873, Joubert charged that, as a publicly-licensed corporation, Sacred Heart could not discriminate between patrons on the ground of race.⁶⁶ The defendants responded not by disputing the constitutional argument, but by denying that the three-teacher school had any legal affiliation with the Convent. Sixth district judge Guy Duplantier, a native white Republican who was later associated with Simeon Belden as counsel in Paul Trévigne's integration suit, accepted the teachers' contention, and dismissed the suit, which was not appealed, presumably because their control of the new government gave people of color other means of attaining their goals.⁶⁷ With an administration friendly to integration, at least in New Orleans, there was no need for suits between 1870 and 1876.

Faced with widespread Democratic violence and intimidation in the last years of the Reconstruction regime, Louisiana Republicans sought the best deals they could get for themselves and their constituencies.⁶⁸ Most expected that the Grant and Hayes administrations (the latter seated with disputed Louisiana electoral votes) would preserve law and order. As that hope failed, some, such as former Lt. Gov. P.B.S. Pinchback, who was the son of a white Mississippi planter and his ex-slave common-law wife and the principal framer of the state's civil rights laws, had little choice but to accept the Democrats' public assurances that they would abide by the postwar national constitutional amendments.⁶⁹ When it became clear that trusting in the vaunted honor of the southern upperclass was futile, blacks turned to the courts, only to see the same honorable men brazenly disregard laws that they initially feared to repeal, and then, when northern pressure receded further, renege on even separate but equal.⁷⁰

The first case was filed by Paul Trévigne—teacher, editor, and bilingual poet, who served on the Orleans parish school board from 1876 until the Redeemers replaced almost all the Republicans with White Leaguers in 1877.⁷¹ In September of that year, Trévigne, through his lawyers Belden and Duplantier, sought in the state district court to enjoin the parish school board from putting its July segregation resolution and the accompanying enabling regulations into effect when the schools opened, thereby barring Trévigne's son, also called Paul, from the common school that he had previously attended.⁷² Belden and Duplantier claimed that segregation doubly violated Trévigne's privileges or immunities under the Fourteenth Amendment—as a citizen of the United States and of the state.⁷³ As a national citizen, Trévigne had a fundamental right to be free of discrimination in public services on account of race. As a citizen of Louisiana, he was guaranteed by article 2 of the 1868 state constitution enjoyment of "the same civil, political, and public rights" as any other Louisianian, and by article 135, access to public schools without racial distinction.⁷⁴ Egalitarian provisions of the state constitution, then, strengthened as well as complimented the federal guarantee, Trévigne's counsel asserted, and the two were intrinsically intertwined.⁷⁵ The injury that gave Trévigne standing to sue, furthermore, expressed at the same time the fundamental national and state right that had been infringed: Segregation by law, in the words of his petition, "tends to and does degrade . . . petitioner and his son Paul Trévigne and the

entire colored population of this city⁷⁶. . . . [H]owever meritorious they may be, a distinction thus made detracts from their status as citizens and consigns them to the contempt of their fellow men and citizens of this community and elsewhere."⁷⁷

With state constitutional provisions so clearly against them, city attorney Benjamin F. Jonas⁷⁸ and volunteer counsel Edgar H. Farrar⁷⁹ quibbled over questions of remedy and standing.⁸⁰ The segregation resolution had already passed, so how could it be enjoined? But since it had not yet been put into effect, Trévigne had suffered no real, but only a prospective injury.⁸¹ Further, even if Trévigne had been injured, others might approve segregation, and enjoining it might trample on their rights. What gave Trévigne the right to speak for all people of color? As for the national and state constitutions, Jonas and Farrar paid them no more attention than their fellow White Leaguer, 6th district Judge Nicholas H. Rightor, did to Belden and Duplantier's precise and detailed answer to the board lawyers' pettifoggery.⁸²

Trévigne, Judge Rightor ruled, "cannot assume either the tasks or the prerogatives of a public functionary nor constitute himself the champion of any right but his own." Even if the remedy the former school board member requested were applied to the sub-district in which he resided, his petition would fail, for it did not specify that sub-district. If the law was as clear as Belden and Duplantier claimed, should the court presume that administrators would defy it by denying young Trévigne access to his neighborhood school? Adding insult to disingenuousness, Rightor closed his opinion with a rhetorical flourish: "Courts have a sufficiently difficult task in the effort to redress 'real and actual' rights, without multiplying their duties in the rectification of prospective injuries which may never be suffered and the vindication of future rights which may never be born."⁸³

Trévigne appealed to the state supreme court, which delayed the case and finally issued an opinion, which it did not deign to publish, on January 20, 1879.⁸⁴ Justice Alicibiades De Blanc's opinion was brief and cynical.⁸⁵ Judge Rightor said Trévigne had come to court too early, before his son had been excluded. De Blanc said he came too late. Since segregation was now an accomplished fact, a mandamus directing the board to admit the boy, not an injunction restraining it from refusing to admit him, was the proper remedy, and Belden and Duplantier had not asked for a mandamus. Like Rightor, DeBlanc ignored the fact, strongly pressed by Trévigne's lawyers, that the wrong continued, just as he paid no attention to the increasing merger of notions of injunction and mandamus in 19th century law.⁸⁶ No doubt as a prophylactic against such frivolous lawsuits, he assessed costs to the plaintiff.

Three weeks after Judge Rightor's decision in *Trévigne*, but before the appeal to the state supreme court was entered, Belden filed two more state cases in the 6th District court, one of which, *Harper v. Wickes*, was subsequently dropped for unstated reasons.⁸⁷ When Judge Rightor dismissed the other case, *Ursin Dellandev. George H. Gordon*, on the grounds that Gordon, then a school principal, was a functionary who was merely acting on the orders of the school board, Belden sued the school board in Dellandev's name.⁸⁸ In his briefs at the local and state supreme court levels, Belden referred to the same provisions of the 1868 Louisiana constitution as he had in *Trévigne*, but this time invoked the Fourteenth Amendment generally, rather than singling out the Privileges or Immunities Clause. The Fourteenth Amendment made all people "equal before the law," which, Belden claimed, meant the same thing as did article 135, the explicit school integration provision of the 1868 state constitution. Citing two Louisiana and one U. S. Supreme court public accommodations cases that had ruled separate but equal unlawful, Belden again grounded his case on the confluence of state and federal constitutional provisions.⁸⁹

In his May 20, 1878 district opinion, Judge Rightor wrote as if an 1877 Democratic law had not merely repealed the Radical 1869 school integration statute, but had blotted the earlier act out of memory—as, indeed, it was no doubt meant to. Article 135 was not self-executing, but "a mere general declaration addressed to the legislative department," unenforceable by the judiciary. Even the Radicals in the legislature, the impartial jurist announced, had failed to implement an integrationist policy "which upsets the whole order of society, tramples upon the usages of centuries and contains the germ of social war . . . so much do men shrink in action from what their madness may proclaim in theory."⁹⁰ Rather than respond directly to this revisionism in his appellate brief, perhaps because it would have forced him to admit that the 1869 law had been overturned, Belden rested his case on natural rights constitutional theory: "No enabling act is ever necessary to carry into effect a constitutional declaration of a personal right or liberty. It [the declaration] is simply the enunciation of a pre-existing right and carries the force of recognition in the declaration made."⁹¹

The Louisiana supreme court delayed justice in order to deny it. Although Rightor made his decision in May, 1878, the supreme court waited three years to issue its judgment, which it reported in a mere one sentence summary.⁹² In the meantime, the 1879 Redeemer state constitutional convention expunged articles 2, 13, and 135 from the constitution, leaving the rights of blacks to the mercies of Democratic legislators and administrators.⁹³ Justice Felix Poché might have stopped after recognizing that the articles' repeal mooted the state-based part of the case. (He ignored the Fourteenth Amendment entirely.) But the Justice, a plantation-born Louisianian whose college oration was a panegyric of John C. Calhoun, and a Democratic activist who had been key member of the education committee at the 1879 constitutional convention, went on to deny that the now-moribund article 135 had been meant to prohibit segregation!⁹⁴ The Radicals, according to Poché, had not even clearly intended to establish separate but equal, but only to ban "public schools for the *exclusive* benefit of any race" which would "*entirely* deprive other races of school facilities or privileges. . . ."⁹⁵ No wonder the Court did not print its opinion.

In an earlier editorial, the *New Orleans Daily Picayune* condemned the Republicans who had recently been unseated from the state supreme court. "Many of these [Republicans'] decisions bear evidences of a strong political bias, and of the influence of the partisan and sectional prejudices and passions of the times. The present [Democratic] tribunal is composed of men who have too exalted an idea of the responsibility and dignity of their position to yield to any such influence, or to be swerved from the straight path of jurisprudential truth, logic and authority by any political considerations or sentiments. It is a great blessing to our people to have this confidence in the purity of this tribunal of last resort to receive from so pure a source, the true doctrines and interpretations of their legal rights and duties."⁹⁶

Shortly after *Dellande* had first been filed, New Orleans blacks prosecuted a fourth anti-segregation case, this time in the federal district court of William B. Woods.⁹⁷ Through his skillful lawyer John Ray,⁹⁸ Arnold Bertonneau charged that by excluding his sons John and Henry from the school nearest his residence, the board of education had denied them nationally guaranteed privileges or immunities, as well as the equal protection of the laws.⁹⁹ Like Belden, Ray based his case not only on the Fourteenth Amendment, but on article 135 of the 1868 state constitution.¹⁰⁰ Article 135 gave Bertonneau the right as a state citizen to a nonsegregated education. To deny that right was an abrogation of his Fourteenth Amendment right to the equal protection of state laws, even if integration were not guaranteed by the Fourteenth Amendment *per se* (which Ray did not admit). For the "degradation placed on" Bertonneau and his family by the act of segregation, Ray asked \$10,000 damages and an order requiring school officials to admit Bertonneau's sons to their neighborhood school.¹⁰⁰

Jonas and Farrar, who again represented the school board, simply ignored Ray's elaborate statements on the federal laws and the state and national constitutions and denied that the court ever had jurisdiction over any controversy between a state and a citizen of the same state.¹⁰² Under this constitutional theory, the state could prohibit black education entirely, reinstitute the post-Civil War black codes that had so inflamed northern public opinion, or even reestablish slavery. True, article 3 of the 1868 state constitution prohibited slavery, and other provisions guaranteed education for all children and sought to prohibit legal discrimination by race. But if the state courts refused to vindicate a black's equally clear right to be admitted into a common school under section 135, and federal courts were powerless to intervene, what legal remedy would a slave have unless, like Dred Scott, he happened to be owned by a resident of another state?¹⁰³ Perhaps like Judge Rightor and Justice DeBlanc, Jonas and Farrar wished to revise history — in their case, to deny that the Civil War took place.

Judge Woods did not go quite that far.¹⁰⁴ A "doughface" Democrat (a "northern man with southern principles") in Ohio before the War, Woods as speaker of the Ohio House had continued to lambaste the Lincoln administration and oppose all efforts to prepare for war until the day Fort Sumter was fired upon. He then became a patriot and a soldier, being brevetted to the rank of major general before his decommissioning. Though a nominal Republican when he settled in Alabama after the War, he was always sufficiently conciliatory to white southerners to avoid being treated as a stereotypical carpetbagger, and when he was nominated for the U.S. Supreme Court in 1880, there was an outpouring of support from southern bar association meetings. His three-page opinion in *Bertonneau*, the first printed opinion by a federal district judge on the constitutionality of segregated schools, was undoubtedly a major reason for the support that white southerners gave him.¹⁰⁵

Without giving any consideration whatsoever to the argument that excluding a person from a public school because of race degraded him and denied him the "equal benefit" of the laws, guaranteed in the national 1866 civil rights act, Woods merely asserted that under segregation "Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all."¹⁰⁶ Ignoring cases from Michigan and Iowa that had ruled segregation unlawful, Woods lifted one phrase from a pro-segregation case from his native Ohio and another from U.S. Supreme Court Justice Nathan Clifford's one-man attempt to revivify the doughface tradition in *Hall v. De Cuir*.¹⁰⁷ "Any classification which preserves *substantially equal* school advantages," Judge Woods disingenuously asserted, "does not impair any rights and is not prohibited by constitution of the United States. *Equality of rights does not necessarily imply identity of rights.*"¹⁰⁸ Moreover, if segregation did no damage to any federal right, that was the end of the inquiry. Even if article 135 gave blacks rights to non-exclusion as Louisianians, the federal court lacked "authority to inquire into every violation of a state law or state constitution by officers of the state."¹⁰⁹ This striking extension of Justice Samuel Miller's view in *Slaughter-House* that the Privileges or Immunities Clause protected only the rights Americans held as national citizens lacked even Miller's crucial linguistic evidence in its favor, for the Equal Protection Clause applied to all "persons," not just to "citizens of the United States."¹¹⁰

In its triumphant editorial commending Woods' rebuff to what it called "political and social theorizers," the *New Orleans Daily Picayune* lamented a little that Woods had not gone further and ruled that the Fourteenth Amendment could not "be invoked to set aside any regulations of the subject of education that the State may choose to make."¹¹¹ Even so, Woods' blank check gave Democrats the ability to slash expenditures for the education of blacks and poor whites with no fear

of effective judicial intervention. In 1900, Louisiana had the highest rate of black illiteracy among adult males in the south, as well as the second highest rate for whites.¹¹²

Bertonneau filed a bond for an appeal to the U.S. Supreme Court — he was the second black plaintiff in a school segregation case to do so — but the appeal was abandoned for unstated reasons.¹¹³

B. *Kansas—Of Floors & Ceilings*

In Louisiana, the contrasts between pro- and anti-integration forces were clear and stark, the stakes, high, and the constitutional issues, broadly drawn. In Kansas, on the other hand, divisions were blurred, struggles, often inconclusive, and legal questions, narrow. At the mouth of the Mississippi, statutory guarantees proved worthless when administered by unfriendly hands. Along the same river system, but further north, blacks could usually invoke the state civil rights law successfully, but could not extend it to the larger cities, and they often had to go to court to obtain their rights. In consequence, there were at least fourteen court cases on school integration in Kansas from 1880 to 1910 (see Table 2), and, while the blacks won at least eight of them, the legal doctrines enunciated did not expand on *Tinnon*.

[Table 2 about here]

During the 1870s, the black percentage of the population in Topeka rose to 31%, which exceeded that of Orleans parish, Louisiana (27%).¹¹⁴ Most of the black immigrants probably came from the south (one section of Topeka became known as "Tennesseetown") during the black "exodus" late in the decade. Almost immediately after arriving from the south, where schools, if available at all to blacks, were usually very poor, and, outside Louisiana, always strictly segregated, Topeka blacks began political and legal actions to bring about integration. There may have been a test case as early as 1878, and the 1880 *Phillips* suit illustrates both the porous quality of segregation in Kansas and the sort of incident that typically set off northern school integration cases.¹¹⁵

At the opening of school in October, 1880, Eveline and Lilly Phillips were refused admission to the mostly white Clay St. school, which they had attended during the preceding year, and sent instead to an all-black school much farther from their house — a school named, ironically, for the deceased national leader of the school integration struggle, Charles Sumner. After personally appealing to the teacher, the superintendent of schools, and various board members, their father, James Phillips, sued, charging a violation of the state civil rights law. Conceding that Topeka had recently attained the population requisite to qualify as a first-class city, which would allow it, under the 1879 statute, to maintain segregated schools, Phillips's counsel pointed out that the mayor had not yet completed the requirements to bring the city under the shelter of the first class city law.¹¹⁶ While the litigation was continued, apparently because both sides expected the 1881 legislature to repeal the 1879 law allowing segregation in first-class cities, some blacks seem to have boycotted Sumner school.¹¹⁷ The suit was later dismissed on what one historian calls a "technicality".¹¹⁸

Had it reached the state supreme court, *Phillips* might have set a useful precedent for integrationists, because the judges would presumably have had to face the question of whether the Fourteenth Amendment prohibited segregation, and Valentine's opinion in *Tinnon* seemed to promise a majority for an affirmative answer. At least one contemporary legal observer even believed that the U.S. Supreme Court would decide the question that way, and, indeed, there is little

in the language and specific findings in *Slaughter–House*, *Strauder v. West Virginia*, and the *Civil Rights Cases* to indicate otherwise.¹¹⁹

However powerfully and clearly stated an appellate court opinion, there is, in the American system, little besides fear of embarrassment to force lower court or future appellate court judges to follow precedents. South Topeka, a second class city in the mid–1880s, had no attendance zones, but assigned all black students to one school, and all whites, to another. Each school served the same grades, allegedly had the same seating capacity and equally competent teachers, and was approximately equally convenient to the homes of plaintiffs Columbus Daniel and Violet Jordan. But when on September 20, 1886, Daniel and Jordan attempted to register at the white Walnut Grove school, they were told that the room in which grades 3–6 were taught was full, 57 white students having enrolled, and that they should go to the black Quincy Street school, which had only 25 students in the room for grades 3–6.¹²⁰

Despite an extensive argument by future Congressman, Senator, and Vice President Charles Curtis¹²¹ applying the clearly governing *Tinnon* precedent to the case, district court judge John Guthrie,¹²² recognizing that the law was against him, decided the case on "the facts." The white teacher just couldn't effectively minister to more than 57 students in four grades — how the judge knew that 57 and not 59 was the tipping point, he did not say. To force the school board to transfer some whites to Quincy Street in order to allow Daniel to attend Walnut Grove, moreover, would mean that "The colored boy would have advantages that would be denied to the white boy." How racial assignment in a second class city could be legal under *Tinnon* or the 1874 Kansas civil rights bill, Guthrie did not bother to explain.¹²³

Twenty–five miles northeast and some years later, blacks in the hamlet of Oskaloosa tried to enter the high school, which, under Kansas law, they had a perfect right to attend. Yet the Kansas supreme court, in a one paragraph *per curiam* decision, brushed aside their contention, ruling that the racially separate schools were equal even though whites, but not blacks, could continue past the ninth grade.¹²⁴

Yet in two other small towns in eastern Kansas, Toganoxie and Olathe, Republican¹²⁵ and Democratic¹²⁶ district court judges, relying only on *Tinnon*, ordered the schools integrated in cases in which the facts were very similar to those in *Daniel*.¹²⁷ And in a case from Independence, Kansas supreme court justice Albert H. Horton curtly ruled that blacks could not be excluded from the only school in the ward in which they lived. *Tinnon*, he held, was determinative.¹²⁸ The only novelty in the *Independence* case was that it was the first school integration case at the state supreme court level in which all the plaintiffs' attorneys were black. One of the lawyers, William A. Price, had been born a slave, while the other, younger man, Albert M. Thomas, had been one of the first black graduates of the University of Michigan Law School.¹²⁹ The state supreme court ruled similarly in a 1906 case from Coffeyville¹³⁰ and a 1907 case from Wichita,¹³¹ and in a 1908 Parsons case, it went further in examining the facts, declaring that integration was a fitting remedy for extreme inequalities even in first–class cities.¹³²

Having avoided the issue of whether school segregation was contrary to the Kansas constitution and the Fourteenth Amendment in *Tinnon* in 1881, *Crawford* in 1889,¹³³ and *Jones* in 1900, the Kansas supreme court finally faced it in 1903.¹³⁴ Lowman Hill, then on Topeka's outskirts, had had racially mixed elementary schools, and continued to do so after being annexed to the city. In 1900, however, the school accidentally burned down, but before a new brick school opened in 1902 at a less swampy location than the old one, white patrons petitioned the school board to segregate schools in the area. The board secretly agreed and left nearly half the rooms in

the brick building unfinished, while dragging to the old site an abandoned frame school building from central Topeka.¹³⁵ Unaccustomed segregation and resentment at the contrast between the up-to-date white building on the hill and the second-hand one for blacks down in the hollow touched off a black protest, a boycott (100% successful for four months), and, when the Republican-dominated board refused any compromise, a suit.¹³⁶

The participants in the suit were particularly notable. Tennessee-born William Reynolds was a young tailor and political activist who had been a captain in the Spanish-American war during the 1890s.¹³⁷ His chief lawyer was one of the town characters, Gaspar Christopher Clemens, born poor in Xenia, Ohio, orphaned and left to fend for himself at 13, open agnostic, public defender of the Haymarket anarchists, leading advisor to Populist governor L. D. Lewelling, and later Socialist gubernatorial candidate himself, a prolific newspaper controversialist, pamphleteer, and legal treatise writer.¹³⁸ The lead opposing counsel was James Wilson Gleed, Vermont-born grandson of a pioneer abolitionist minister, scion of a family wealthy enough to provide him with a European tour, railroad lawyer, 10-year school board veteran, president of the state temperance alliance, and legal defender (against Clemens) of compulsory prayer and *Bible*-reading in the schools.¹³⁹ Clemens, who claimed to be a cousin of Mark Twain, loved to taunt people whom he considered pharisaical hypocrites, and he no doubt relished the chance to spar with Gleed.¹⁴⁰

Clemens charged that segregation violated the Thirteenth as well as the Fourteenth Amendment because it placed on blacks "the badge of a servile race, and holds them up to public gaze as unfit to associate, even in a public institution of the State, with other races and nationalities. . ."¹⁴¹ He also cited the 1859 state constitution's "equal protection and benefit" and "uniform system of common schools" clauses,¹⁴² as well as making technical arguments about what laws, in the confusing welter of Kansas statutes, were legally in force.¹⁴³

The Kansas electorate in 1900 expanded the state supreme court from three to seven members, and gave Republican governor William E. Stanley the right to nominate the four new ones.¹⁴⁴ Valentine, Horton, and Brewer were now gone, and into their places and the new seats moved men almost all of whom were too young to have participated in the abolition movement, the Civil War, or even Reconstruction. The average justice in *Reynolds* was born in 1853, the year before the passage of the Kansas-Nebraska Act, and at the time of the passage of the Kansas Civil Rights Act in 1874, he had barely reached manhood.¹⁴⁵ For many in the earlier generation, the Republican party was "the party of great moral ideals" forged in the struggle against slavery, secession, and racism. For most in the *Reynolds* era, it was the convenient choice of aspiring railroad lawyers, the haven of the satisfied bourgeois, the party, to use a phrase common in the state of the time, of "stand-pat."

Justice Rosseau Burch did not distinguish between the state and national equal protection clauses or a similar guarantee in the 1780 Massachusetts constitution, and he seemed to view the "uniformity" and "common schools" clauses as more specific applications of the concept of equality to schools.¹⁴⁶ The uniformity and common schools phrases of the 1851 Indiana constitution, on which the 1859 Kansas constitution makers no doubt drew, had been construed by the supreme court in Burch's home state as allowing segregation.¹⁴⁷ Uniformity, Burch held, did not prevent school boards from establishing different types of schools in city and rural areas or in different sub-districts, and they could make any classification of scholars that they judged best.¹⁴⁸ Whereas Justice Valentine in *Tinnon* had scornfully dismissed the defendant's reliance on the 1850 Massachusetts case of *Roberts v. Boston* as a "very old" decision that was "rendered before the war," Burch padded his pages with quotations from its segregationist dogma.¹⁴⁹ State supreme court decisions from Ohio, New York, and California ruling school segregation in accord with the

Fourteenth Amendment largely disposed of that question,¹⁵⁰ Burch averred, and if this were not enough, he invented a novel reading of the argument from silence: The fact that no school segregation case had ever reached the U.S. Supreme Court proved "a remarkable consensus of opinion on the part of the bar of the country as to the result of such an appeal."¹⁵¹ Moreover, U.S. Supreme Court Justice Brown's decision in *Plessy*, in an aside, had cited the same state cases as Burch had upholding the validity of school segregation.¹⁵² The patent inequality of the school facilities Burch dismissed as a mere "incidental matter," and the Thirteenth Amendment argument, he entirely ignored.¹⁵³ There was, as usual in the Kansas supreme court, no dissent.¹⁵⁴

V. IMPLICATIONS FOR CONTEMPORARY TACTICS IN THE PROTECTION OF CONSTITUTIONAL RIGHTS.

It was a long way, figuratively speaking, from Ottawa to Topeka, and an even longer and bloodier one from John Howard's optimistic, egalitarian argument in *Isabelle* to Judge Felix Poché's desecration of the moribund 1868 Louisiana constitution's integration clause, but both journeys reaffirm the old aphorism that constitutions are what the judges say they are. The protections offered by laws and the state and federal constitutions were not useless. Blacks did win nearly half the cases sketched in this paper, and in other instances, they no doubt used the laws and decisions as levers to wedge the school door open or at least to obtain physical and other improvements in racially isolated schools. In Kansas, the state supreme court might well have ruled all school segregation unconstitutional, and legislators did outlaw it from 1874 to 1879 and only barely failed in another repeal attempt in 1889. After 1874, Kansas blacks outside the larger cities never lost the nominal right to attend racially mixed schools. The political careers of judges, legislators and lawyers who fought for equal rights did not suffer, as might be expected if white racism had been omnipresent. But in the end in both states, blacks lost out because a new set of racist judges took office and emasculated constitutional guarantees.

To assess the adequacy of judicial protection of rights at the state level, it is obviously necessary to go beyond printed cases. Only half of the twenty cases treated here appear in casebooks, and the briefs, which especially in Louisiana contain much more theoretically interesting arguments than the judges' opinions, must be ferretted out in archives. Furthermore, the judge-centered constitutional history that still dominates the field should be broadened to include pressure groups, legislators, and those who bring and argue cases. While judges are by no means the passive seers of convenient myth, they and the Framers are not the only relevant shapers of the constitution, either. It is those non-judicial figures who struggled for constitutional rights — and mostly lost — who impress me most in the dramas from these two states, and it is they, not those who passed upon and denied their pleas, whose memory deserves to last: Belden, Bertonneau, Isabelle, Ray, and Trévigne of Louisiana; Clemens, Curtis, Daniel, Reynolds, and Tinnon of Kansas.

In the briefs and opinions in these cases, state and national laws and constitutional provisions were intermixed not simply because nineteenth century jurists were confused or imprecise, but because the motives of those who passed the enactments and the basic issues involved really were the same, regardless of distinctions of form. Proponents of equality might appeal to state law, as in *Knox*; to natural law, as in *Isabelle* and *Tinnon*; to the state constitution, as in *Trévigne*; to a combination of the state and national constitutions, as in *Bertonneau*; or to all of these, as in *Reynolds*. But, to paraphrase Judge Woods, there was no "substantial" distinction between the contentions, whatever their formal bases.

More recent claims of "separate state grounds" are not only often patently disingenuous, they are potentially destructive of constitutional rights. In his most recent pronouncement on the subject — ironically in lectures named for James Madison, who more than anyone else understood how size and diversity protect civil rights — Justice William J. Brennan, Jr. repeatedly promised his audience that "federal preservation of civil liberties is a minimum, which the states may surpass..."¹⁵⁵ Nineteenth century school segregation cases suggest that this view is both too optimistic and too simple. It is too optimistic because state judicial interpretations of laws, constitutions, and written understandings do not stand apart, but help to shape the ultimate readings of national rights by the Supreme Court. State and lower federal court judges, and state legislators as well, can raise the ceiling or undermine the floor of those rights. It is too simple because, as John Ray and Simeon Belden understood, all the guarantees — of natural law, national and state laws, and national and state constitutions — form part of the same structure. To rest the foundation of rights on state laws or constitutions alone is to hazard a collapse of the whole building later. It is better, the experiences of nineteenth century Louisiana and Kansas show us, for judges to declare openly and honestly that their opinions rest on their fundamental views of liberty, equality, and reasonableness drawn from their study of not only the constitutions of their state governments, but also that of the national government and of moral philosophy and their own practical experience in policymaking. That was what Justice Daniel Valentine actually *did* in *Tinnon*, and if he had just said so openly, we might not have had to wait 73 more years for *Brown*.

TABLE 1:

Kansas Legislative and Constitutional Convention
Actions on Black School Rights

Session	Nature of Bill or Amendment	Action on Bill (Journal Reference)*	Session Law Reference
1855	Exclude blacks	Passed	Ch.144,art.1,sec.1
1858	End exclusion	Passed	Ch.8,sec.71
1859 Con. Con.	Equal expend. ban integration exclude blacks	Lost, 26-6 Lost, 25-17 Lost, 26-25	Debates,170-75
1861	Sep.but equal	Passed	Ch. 76, art. 3, sec.1
	seg.tax, schools in Marysville	Passed	Private, Ch. 43,sec.5
1862	Seg. taxes,schools in 1st class cities	Passed	Ch.46, art. 4, sec.18
1865	Equal tax, possibly seg. schools	Passed	Ch.46, sec.1
1867	Sep. but equal in 2nd class cities	Passed	Ch. 69, sec. 7
	Sep.but equal (reenacted 1861 law)	Passed	Ch. 123,sec. 1
	fines if blacks not offered education	Passed	Ch. 125, sec. 1
1868	Sep. but equal in 1st class cities (no seg. taxes)	(H.B. 131) House 66-0 (HJ, 535-6) Sen. 23-0 (SJ, 399)	Ch.—,sec.75
1870	Require seg. schools	(H.B. 219) no vote (HJ,661)	
1872	Sep.but equal in 2nd class cities	(H.B. 478) House 56-0 (HJ,910) Sen.17-0(SJ,588)	Ch.100, sec.105
1873	No seg. in	(H.B 39)	

TABLE 2:

Currently-Known

Kansas School Integration Cases, 1880 – 1910

Plaintiff	Defendant School Board	Date	Level ¹	Outcome ²	Reported
Eveline Phillips	Topeka	1880	L	?	N
Leslie Tinnon	Ottawa	1881	L	B	N
			S	B	Y
Columbus Daniel	South Topeka	1886	L	W	Y
?	Tonganoxie	1889	L	B	N
Georgianna Reeves	Ft. Scott	1888	L	W	N
Buford Crawford	Ft. Scott	1889	S	W	N
Luella Johnson	Olathe	1890	L	B	N
Jordan Knox	Independence	1891	S	B	Y
George Jones	Oskaloosa	1901	S	W	Y
William Reynolds	Topeka	1903	S	W	Y
Bud Cartwright	Coffeville	1906	S	B	Y
Mamie Richardson	Kansas City	1906	S	W	Y
Sallie Rowles	Wichita	1907	S	B	Y
D.A. Williams	Parsons	1908	S	B	Y

¹ L = local court S = state supreme court

² ? = unknown B = black victory W = school board victory

Session	Nature of Bill or Amendment	Action on Bill (Journal Reference)*	Session Law Reference
	2nd class cities	House, 67-2 (HJ, 642) Sen. 22-1 (SJ, 436-7)	Ch.65, sec.5
	no racial disc. in schools	(H.B. 247) House, 57-7 (HJ, 980-1)	
1874	No exclusion from any school	(H.B.1) House 64-17 (HJ,662-3) Sen, 24-2 (SJ, 313)	Ch.49,sec.1
1876	No exclusion from any school reenacted 1867, Ch. 125, sec. 1	(S.B. 202) House, 56-30 (HJ, 1386-9) Sen, 27-4 (SJ, 698-701)	Ch.122, art. 5, sec.3
	no authority for seg. in 1st class cities	Part of S.B. 202	Ch.122, art.5, sec. 4
	banned seg. in 2nd class cities		Ch.122,art. 11
1879	Sep.but equal in 1st class cities	(S.B. 35) Senate,30-0 (SJ, 430) House, 96-4 (HJ, 1069-70)	Ch.81,sec.1
1881	Repeal 1879 law, Ch. 81,sec. 1	(S.B.238) Sen, 25-3 (SJ, 533)	
1889	Allow seg. in 1st class cities only if 2/3 of each race favor, neighborhood schools	(S.B. 197) no floor action	
	ban seg. in Wichita	(S.B. 351) House, 78-0 (HJ, 897-8)	Ch.227,sec.4
	ban seg. in 1st class cities	(S.B. 108) Senate, 29-0 (SJ, 474)	
	ban seg. everywhere (part of gen.school school law revision)	(H.B. 42) Sen., 10-24 (SJ, 922,970) House, 93-0 (HJ, 442-3)	

Session	Nature of Bill or Amendment	Action on Bill (Journal Reference)*	Session Law Reference
1905	seg. h.s. ok in KC	Passed	Ch. 414
1911	seg. h.s. ok in 1st class cities	House, 119-0 Sen (no action)	

*HJ = House Journal, relevant year
 SJ = Senate Journal, relevant year

Footnotes

1. *State of Louisiana ex rel. R.H. Isabelle v. Board of Public School Directors of Orleans Parish*, was not reported in any official document. The sketchy case records, hereafter referred to as Isabelle Case File (Case #153, 8th District Court, Orleans Parish, 1870) are in the Orleans Parish Public Library. The opinion of the court, some background information, and editorial responses are in *New Orleans Daily Picayune*, Nov.22, 1870, 2, 4; Nov.24, 1870, 1, 4; *New Orleans Times*, May 1, 1870, 4; August 20, 1870, 4; Nov. 22, 1870, 5; Nov. 23, 1870, 4; *New Orleans Republican*, Nov. 22, 1870, 5. I discovered this case while perusing the *San Francisco Elevator*, Mar. 14, 1874, 2.
2. The relevant sentences of article 135 stated: "All children of this state between the ages of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." Francis Newton Thorpe, *The Federal And State Constitutions* (Washington, D.C.: G.P.O., 1909), III, 1465.
3. Act 121, section 81, *Louisiana Laws* (1869). On Isabelle's role in the 1869 and 1870 legislative sessions, see Charles Vincent, *Black Legislators In Louisiana During Reconstruction* (Baton Rouge: Louisiana State Univ. Press, 1976), 89–97.
4. The background of this struggle may be followed in Roger Fischer, *The Segregation Struggle In Louisiana* (Urbana, Ill.: Univ. of Illinois Press, 1974), 113–14. See also the classic article by Louis R. Harlan, "Desegregation in New Orleans Public Schools During Reconstruction," *American Historical Review*, 67 (1962), 663–75.
5. Act 6, *Louisiana Laws* (1870) 12–29. In the usual calm, measured phrases of Louisiana Democrats of the era, the *New Orleans Times*, November 23, 1870, 4 denounced Conway as "that malignant, ignorant and vulgar demagogue and insatiate enemy of this people. . ." whose only purpose was ". . . with diabolical activity, to kindle bitter hostilities between the white and colored people." The legislature it denounced as ". . . that body of unparalleled ignorance, dishonesty and corruption." Blacks, the paper felt sure, preferred segregation, but Conway and "a few pestulent [*sic*] white demagogues" forced integration on them.
6. The House voted 44–11 to require integrated schools in New Orleans. This explicit amendment was later shelved, and the matter disposed of in a general education bill, but the action clearly indicates the legislature's intent. See *New Orleans Daily Republican*, Feb. 12, 1869, 3.
7. During the debate over the integrated schools provision of the U.S. Civil Rights Bill in 1874, Conway claimed in a public letter that school integration had worked in New Orleans and asserted, in a touchingly idealistic statement that echoes many similar remarks of the 1950s, "All that is wanted in this matter of civil rights is to let the foes of the measure simply understand that we mean it." *Washington (D.C.) New National Era*, June 4, 1874, 2.

8. Isabelle Case File.
9. A convenient introduction to the vast historiography of the Fourteenth Amendment is Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), 251–261.
10. Born in Indiana in 1844 of an old but not particularly prosperous New England family, Dibble enlisted in the Civil War in 1862 and lost a leg in the battle of Port Hudson. During his recuperation in Louisiana, he read law, and was admitted to the bar before he was 21. By the age of 23, he was the *de facto* head of the Republican organization in New Orleans. President of the school board for all six integrationist years, he was twice nominated for Congress, but defeated by the Democrats. He was acting state attorney general in 1875. In 1881, he moved to Arizona, where he became the law partner of former Nevada Supreme Court Judge James F. Lewis, who had sat in the school integration case of *Nelson Stoutmeyer v. James Duffy et al.*, 7 Nev. 342 (1872). In 1883, Dibble moved to San Francisco, where he was still residing in 1905. Very successful there, he served for several terms in the California legislature as a Republican. An excellent orator, he also published at least one romantic western novel. See Leigh H. Irvine, *A History of the New California*, 2 vols. (New York: Lewis, 1905), II, 718–20; Dale Somers, "Black and White in New Orleans: A Study in Urban Race Relations, 1865–1900," *Journal of Southern History* 40 (1974), 27; *New Orleans Republican*, Dec. 19, 1874, 2.
11. Born in Ohio in 1830 of New York forebearers, Valentine moved to Kansas in 1859 and lived in Ottawa from 1860 to 1875. Son of a restless farmer, Valentine had only a common school education. A staunch Republican, he served in the state House, 1862; the Senate, 1863; on the district court bench, 1865–69; and the supreme court, 1869–93. Henry Inman, "The Supreme Court of Kansas," *The Green Bag* 4 (1892) 338; Howard D. Berrett, *Who's Who in Topeka* (Topeka: Adams Bros., 1905), 124; 3 Kan. L.J. 353 (1886). The other member of the majority in *Tinmon*, Chief Justice Albert H. Horton, was born in Brookfield, New York in 1837, and came to Atchison, Kansas, in 1859. Like Valentine, he sat in both houses of the legislature and on the district bench before being appointed to the high court in 1877. Son of a physician, he attended the University of Michigan. Horton was much more deeply involved in partisan politics than Valentine was, editing a newspaper during the Civil War, serving as a presidential elector for Grant in 1868, becoming federal district attorney from 1869 to 1873, and almost being elected to the U.S. Senate in 1885. Inman, "Supreme Court of Kansas," 333–35; *Topeka Daily Capital*, Sept. 3, 1902, 1–2, Sept. 4, 1902, 4.
12. 26 Kans. 1 (1881).
13. Herbert Hovenkamp, "Social Science and Segregation before Brown," Duke L.J. (1985) 641–42. Similarly, in his *Government By Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard Univ. Press, 1977), 10, Berger states: "The key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents rather than by abolitionist ideology."

14. That Radical Republicans, white and black, northern and southern, shared a common ideology is suggested by the parallel sentiments of Robert H. Isabelle in the Louisiana legislature in 1870: "I want to see the children of the state educated together. I want to see them play together; to be amalgamated (laughter). I want to see them play together, to study together and when they grow up to be men they will love each other, and be ready, if any force comes against the flag of the United States, to take up arms and defend it together." Quoted in John W. Blassingame, *Black New Orleans, 1860–1880* (Chicago: Univ. of Chicago Press, 1973), 112.
15. 26 Kans. 1, 18–19, 21–23.
16. *Ibid.*, 18–19, 21–23.
17. *Roberts v. City of Boston*, 5 Cush. 198 (1849); *Plessy v. Ferguson*, 163 U.S. 537 (1896). On these and other case on segregation in the nineteenth century see J. Morgan Kousser, *Dead End: The Development Of Nineteenth-Century Litigation On Racial Discrimination In Schools* (Fair Lawn, N. J.: Oxford Univ. Press, 1986); Kousser, "'The Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment," *Northwestern Univ. Law Review* (1988), forthcoming.
18. 26 Kans. 1, 24 (1881).
19. *Ibid.* The judges of the supreme court, of course, were elected by voters throughout the state. On Brewer, see Arnold Paul, "David J. Brewer," Leon Friedman and Fred Israel, eds., *The Justices of The U.S. Supreme Court, 1789–1969: Their Lives and Major Opinions* (New York: Chelsea House, 1969), II, 1516; John Semonche, *Charting The Future — The Supreme Court Responds To A Changing Society, 1890–1920* (Westport, Ct.: Greenwood Press, 1978), 15, 21; Albert H. Horton, "Brewer, David Josiah," *The Green Bag* 2 (1890) 1; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass.: Harvard Univ. Press, 1977), 366; *Leavenworth Times*, August 22, 1865, 3; August 29, 1866, 2. Paul terms Brewer "An outspoken and doctrinaire conservative, who made little pretense of 'judicial self-restraint'. . ." *Tinnon* was the only one of 130 cases in 26 Kans. in which there was a dissent.
20. 16 Sup. Ct. 1138–43. On this finesse, see Kousser, *Dead End*, 26–27, 54.
21. Interestingly, a Radical Republican school board had voted to integrate the Ottawa schools in 1870, claiming that separate schools were too expensive and that black children made much quicker progress if integrated with white kids. "[T]here is little room now to doubt," a board committee wrote, "that by virtue of the [13th and 14th] constitutional amendments, the laws of Kansas, and the decisions of the courts, the black man has equal rights with the white man in schools which he is taxed alike to support . . . the cry of 'negro equality' is a bug-bear only calculated to frighten timorous aristocrats . . ." Judge Stephens's judicial position was merely the party line of the Radicals. *Washington D.C. New National Era*, Oct. 20, 1870, 1; March 2, 1871, 3.

22. *Slaughter House Cases*, 16 Wall. 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Washington, Alexandria, and Georgetown Railroad Co. v. Brown*, 17 Howard 445 (1873). Stephens's opinion is in *Ottawa Daily Republican*, Jan. 19, 1881, 2. Rejecting the disingenuous contention that the school board's action was racially neutral because whites were barred from black schools, as well as the reverse, Stephens read the discriminatory motive of the school board's action on the face of its policy. "It is evident as to the purpose of the rule," he announced, without extended consideration.
23. William J. Brennan, Jr., "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," in Norman Dorsen, ed., *The Evolving Constitution: Essays On the Bill of Rights And The U.S. Supreme Court* (Middletown, Ct.: Wesleyan Univ. Press, 1987), 254; Bradley D. McGraw, ed., *Developments In State Constitutional Law* (St. Paul, Mn.: West Pub. Co., 1983).
24. Perhaps this feeling reflects only my lack of training as a lawyer. If I were properly socialized, it might be that I would better appreciate, for instance, the profound differences between state and federal equal rights clauses, instead of seeing such distinctions as fundamentally trivial.
25. James Madison, et al., *The Federalist*, Jacob E. Cooke, ed. (Cleveland: World Publ. Co., 1961), 56–65.
26. The foremost pessimists about race relations on the left are Joel Williamson, *The Crucible of Race* (New York: Oxford Univ. Press, 1985); and Leon F. Litwack, *North of Slavery: The Negro In The Free States, 1790–1860* (Chicago: Univ. of Chicago Press, 1961), and *Been In The Storm So Long: The Emergence of Black Freedom In the South* (New York: Alfred A. Knopf, 1979). Sharing their pessimism and drawing on Litwack's scholarship, but deducing much less liberal policy conclusions, is Berger, *Government By Judiciary*. The classic expression of this viewpoint is Ulrich B. Phillips, "The Central Theme of Southern History", *Am. Hist. Rev.* 34 (1928) 30–43.
27. J. Willard Hurst, *Law and The Conditions of Freedom in the Nineteenth Century United States* (Madison, WI.: Univ. of Wisconsin Press, 1960); Morton Horwitz, *The Transformation of American Law, 1790–1860* (Cambridge, Mass: Harvard Univ. Press, 1977). Although there are exceptions, scholarship in constitutional history continues to be predominantly "internalist," to borrow a phrase from the history of science.
28. Thus, none of the numerous books and articles on Louisiana history during this period mentions the unpublished *Joubert* or *Dellande* cases, or the Louisiana supreme court's opinion in *Trévigne*, and no one has treated the *Isabelle* or *Bertonneau* cases in any depth. Published discussions of the Kansas case are fragmentary at best, and Thomas C. Cox, *Blacks in Topeka, Kansas, 1865–1915, A Social History* (Princeton, N.J.: Princeton Univ. Press, 1982), 113 misses the date of the *Reynolds* case by 13 years! The lawyer who appeared for the state before the U. S. Supreme Court in *Brown v. Board of Education* seriously misunderstood the succession of laws on school segregation in the 1860s and 1870s. See Paul E. Wilson, "Brown v. Board of Education Revisited," 12. *U. of Kans. L. Rev.* 509–13.

29. When as a member of the 1868 Louisiana legislature, John Ray, a "scalawag" who later represented Arnold Bertonneau in his attempt to prevent the resegregation of the New Orleans schools, voted for a public accommodations statute, he was marked for death by the *New Orleans Daily Picayune*—no empty threat in a state where, according to *House Misc. Docs.*, 41st Cong., 2d Sess., No. 154, Pt. 1, at 161–62, over 1000 Republicans, white as well as black, were assassinated during 1868 alone. "DOOM FOR THE TRAITOR," the widely circulated paper titled its editorial. Ray was "this degenerate white man . . . a great social criminal" because he had voted against "God's eternal decree of separation of the white and black races." *Picayne*, September 20, 1868, quoted in Frank J. Wetta, "The Louisiana Scalawags" (unpub. Ph.D. thesis: Louisiana State Univ., 1977), 336–337.

T. H. Harris, the state superintendent of education in Louisiana from 1908 to 1940, asserted in his Orwellian history that school integration never took place in New Orleans! See Harris, *The Story of Public Education in Louisiana* (New Orleans: The Author, 1924), 30–31. Similarly, the Democratic *New Orleans Times*, Oct. 3, 1877, 4, misremembered recent events: "In the darkest hours of the Radical regime there never were mixed schools except in theory." Evidently an 1874 riot against such schools had been a chimera. On the riot, see *New Orleans Weekly Louisianian*, Feb. 13, 1875, 1.

Two men who were involved on the other side of segregation cases, Robert H. Marr and Benjamin F. Jonas, who were among the leaders of the violent White League revolution against the legally constituted government of the state in 1874, were rewarded with places on the state supreme court and in the U.S. Senate, respectively, and receive celebratory treatment in older state histories. See, e.g., *Biographical and Historical Memoirs of Louisiana* (Chicago: Goodspeed Pub. Co., 1892), 201–202, hereafter referred to as *Biographical Memoirs*.

30. Fischer, *Segregation Struggle*, 13–14. Interestingly, the state legislature in 1854 allocated \$2000 to the school in which Trévigne taught. H. E. Sterkx, *The Free Negro In Antebellum Louisiana* (Rutherford, N.J.: Fairleigh Dickinson Univ. Press, 1972), 269.
31. Peyton McCrary, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J.: Princeton Univ. Press, 1978), 264–65; Fischer, *Segregation Struggle*, 28–30.
32. Donald Everett, "Free Persons of Color in New Orleans, 1803–1865," (unpubl. Ph.D. thesis, Tulane Univ., 1952), 348–49; William F. Messner, "Black Education in Louisiana, 1863–1865," *22 Civil War History* (1976), 54–55; *Debates in the Convention* (New Orleans: W.R. Fish, 1864), 476, 499–502, 547–48.
33. Fischer, *Segregation Struggle*, 25–26; *Debates, 1864*, 575, 601. Messner, "Black Education," 54–55. Article 141 of the 1864 constitution stated simply: "The legislature shall provide for the education of all children of the State, between the ages of six and eighteen years, by maintenance of free public schools by taxation or otherwise." Thorpe, *Federal and State Constitutions III*, 1446.
34. Fischer, *Segregation Struggle*, 27.

35. *Ibid.*, 43. Paul Trévigne and Arnold Bertonneau were among the editors of the *Tribune* and its predecessor, *L' Union*. In this case, as well as in many places in the north that had relatively sparse black populations, the struggle for an end to exclusion and an end to segregation largely coincided. The different pattern that Howard N. Rabinowitz, *Race Relations In The Urban South, 1865–1890* (New York: Oxford Univ. Press, 1978), 331–2 and *passim*, found in five other southern cities was by no means universal.
36. On the struggle for the provision, see Fischer, *Segregation Struggle*, 43–52. Article 135, quoted above, n. 2, was adopted by 61–12. The vote, in which Belden joined with Bertonneau and Isabelle, is given in *Journal of The Convention* (1868), 201. The same three men joined 55 others in adopting article 13, which banned segregation in public accommodations. There were only 16 dissenters on this article. *Ibid.*, 121–25. A Unionist during the war, Belden was Speaker of the state house of representatives in 1864. A native of New Orleans, he taught in the black Straight University law school (from which Robert Isabelle graduated) during Reconstruction. Ted Tunnell, *Crucible of Reconstruction: War, Radicalism, & Race in Louisiana, 1862–1877* (Baton Rouge, La.: Louisiana State Univ. Press, 1984), 21, 27, 98, 115 has Belden being born in both Massachusetts and "The South," and for unstated reasons calls him a "conservative," but the 1880 census and Belden's obituary notice in the *New Orleans Daily Picayune*, Dec. 4, 1906 put his birth in Louisiana. Other facts are from Blassingame, *Black New Orleans*, 127.
37. Act 121, *Louisiana Laws* (1869). Fischer, *Segregation Struggle*, 91–109, contains the best discussion of segregation outside New Orleans, finding evidence of scattered integration. See also *Washington (D.C.) New National Era*, June 11, 1874, 3. Earlier histories, in Ministry of Truth fashion, denied that whites in the rural parishes had ever attended integrated schools. See Edwin Whitfield Fay, *The History of Education in Louisiana* (Washington, D.C.: G.P.O., 1898), 101.
38. Act #23, *Louisiana Laws* (1877), 28–39; Act #70, *Louisiana Laws* (1882), 90–93; Act #81, *Louisiana Laws* (1888), 91–109.
39. On the reasons for their actions, see Harris, *Story of Public Education*, 52; Fischer, *Segregation Struggle*, 144–45.
40. Act #23, *Louisiana Laws* (1877), 28–39; Harris, *Story of Public Education*, 52.
41. *New Orleans Times*, July 4, 1877, 1, 8; *New Orleans Picayune*, July 4, 1877, 8. *New Orleans Democrat*, Sept. 27, 1877, 8. About 300 people of (light) color reportedly entered "white" schools in New Orleans that fall, forcing officials to examine many pedigrees. By December, all but two of the schools had been segregated. In those two, authorities knew that some students were "colored," while others were "white," but were unable on the basis of appearance to tell members of one group from the other. Records of the Orleans Parish School Board, IX (1877–78) 186, unpublished, in offices of Orleans Parish School Board. This was not the first such difficulty at the Bayou Road school. In 1868, before the Radical constitution went into effect, 28 "colored" girls who appeared white were admitted to the "white" school, unbeknownst to the teacher, a Mrs. Bigot. Fischer, *Segregation Struggle*, 111, 138–39; *Hartford (Ct.) Courant*, May 29, 1868, 3. Similarly, during the 1874 anti-integration riots, the white mob ejected as "colored" one female student whose father was a leading member of the White League. *New Orleans Weekly Louisianian*, Feb. 13, 1875, 1.

42. Eugene H. Berwanger, *The Frontier Against Slavery: Western Anti-Negro Prejudice and the Slavery Extension Controversy* (Urbana, Ill.: Univ. of Ill. Press, 1967), 97–118; Wilson, "Brown v. Board," 509.
43. Wilson, "Brown v. Board" 509–13. Berwanger, who lavishes attention on anti-black sentiment in 1854 and 1855, *Frontier Against Slavery*, 97–115, spends but three pages on its apparent rapid waning, which he does not attempt to explain.
44. *Proceedings and Debates in the Kansas Constitutional Convention of 1859* (reprint ed., Topeka, Ks.: Kansas State Printing Plant, 1920), 170–82, 191–95, 465, hereafter referred to as *Debates, 1859*.
45. *Debates, 1859*, 14, 176–77.
46. The pertinent clause of the 1861 law (*Kans. Laws*, ch. 76, sec. 1, clause 10, p. 261) gave school district meetings the power "To make such order as they deem proper for the separate education of white and colored children, securing to them equal educational advantages. . ." Article 4, section 6, p. 266 of chapter 76 bears the marks of an apparent compromise on its face. District schools, the law stated, were to be "equally free and accessible to all the children resident therein" (which might be read to prohibit excluding pupils from nearby schools because of race), but then added an escape clause, "subject to such regulations as the district board in each may prescribe" (which obviously allowed segregation by race, sex, and perhaps ethnicity). Unfortunately for the historian, the 1861–65 legislative journals are not indexed, nor are bill titles informative, making following a bill's course or locating roll calls on it exceptionally difficult.
47. On the teachers' actions, see Wilson, "Brown v. Board," 509–13. Peter McVicar, *Report of Kansas Superintendent of Public Instruction* (1867), 49–51.
48. *Kans. Laws* (1867) ch. 123, sec. 1, clause 10, 207; *ibid.*, ch. 125, sec. 1, 211. Clyde Lyndon King, "The Kansas School System—Its History and Tendencies," *Kansas State Historical Society Collections* (1909–10) 11, 427–28 misreads ch. 125 as a pure integration law.
49. Thus in 1869, McVicar, a minister and temperance crusader, remarked: "Separate schools in nearly every case are bad economy, as well as a disgrace to republican institutions. If colored persons are human, treat them as humanity deserves. Why close the school room against a child because he is of darker hue than his fellows? Why waste funds in supporting a separate school for a handful of colored children? The time will come when such a course will be looked on as both foolishness and barbaric injustice combined." McVicar, *Report of Kansas Superintendent of Public Instruction* (1870), 2–3. Similarly, see McVicar, *Report of Kansas Superintendent of Public Instruction* (1869), 3–4.
50. H.B. 247 read: "Section 1. That the owners, agents, trustees or managers in charge of any public inn, hotel or boarding house, or any place of amusement or entertainment for which a license is required by any of the municipal authorities, or the owners or persons in charge of any stage coach, railroad or other means of public carriage for passengers or freight; or the members of any school board, or the directors, clerk or trustees of, or other persons in charge of any of the public schools within this state, who shall make any distinction on account of race, color, or previous condition of servitude, he or they shall be deemed guilty

of a misdemeanor, and upon conviction thereof shall be fined in any sum not more than \$500, and shall be liable for damages in any court of competent jurisdiction to the person injured thereby.

"Sec. 2 That any acts or parts of acts that conflict with this act the same be and are hereby repealed."

The (Republican) *Topeka Daily Commonwealth* Feb. 19, 1873, 2, remarked of the bill that "it is only simple justice [a phrase used repeatedly in the nineteenth century in similar contexts, long before Richard Kluger's book of that name on the *Brown* case] that is asked for. The freedmen are citizens now, and voters; and there is neither right nor logic in longer denying them the ordinary privileges of citizens merely because of their color. This proposed law covers the whole ground, and its adoption will but redeem a pledge of the [R]epublican party of Kansas to these people, and place the state on the high ground of equal and exact justice to all citizens. Let no [R]epublican vote against it."

51. *Topeka Daily Commonwealth*, Feb. 18, 1873, 4; Feb. 20, 1873, 4. The repeal of the segregative power of second class cities was accomplished by omitting the clause of the 1872 law that had provided the segregation power. This repeal was not accomplished by subterfuge, for the bill had been referred in the Senate to a special committee of all the Senators whose districts contained second-class cities, who amended the bill to drop the power to make racial distinctions. After the amended bill passed the Senate, it went to a joint conference committee (as many bills did) before final passage by both houses. The point is that representatives from Wichita, Ft. Scott, and other small cities approved the changes. The story may be pieced together in the *Kansas House Journal* (1873), 99, 105, 508, 614, 642, 952–3; *Kansas Senate Journal* (1873), 406, 434, 436–7. Unfortunately, reports on the legislature in the *Topeka Daily Commonwealth* were uninformative about H.B. 39 and H.B. 247, explaining neither why the legislature almost unanimously reversed its 1872 stand on segregation in second class cities nor why the Senate apparently did not consider H.B. 247. For consideration of H.B. 247 in the House, see *Kansas House Journal* (1873), 385, 387–88, 548, 941, 980–81.
52. The bill raised the maximum fine from \$500 to \$1000, and, more important, set a minimum fine of \$10. It was not unusual in the 19th century for a jury to convict a white of a state civil rights law violation, but then to fine him 1¢ or some similarly nominal amount. The progress of the bill and a companion, S.B. 34, which appears to have been consolidated with H.B. 1, may be followed in *Kansas House Journal* (1874), 58, 107–08, 280, 411, 662–63; *Kansas Senate Journal* (1874), 30, 43, 123, 163, 165, 172, 174, 198–99, 204, 313, 331. Scholars such as Wilson, "Brown v. Board," and Daniel Glenn Neuenswander, "A Legal History of Segregation in the Kansas Public Schools From Statehood to 1970" (unpub. Ed.D thesis: Univ. of Kansas, 1973), appear to have overlooked this bill entirely.
53. See Kousser, *Dead End*, 42–43, n. 41.
54. Charles Lofgren, *The Plessy Case: A Legal–Historical Interpretation* (New York: Oxford Univ. Press, 1987), 133; Alexander M. Bickel and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910–1921* (New York: Macmillan, 1984), 757.
55. Neuenswander, "Legal History," 35; Wilson, "Brown v. Board," 513.

56. *Kansas House Journal* (1876), 1058, 1386–89; *Kansas Senate Journal* (1876), 100, 307, 312, 335, 567, 694, 698–701, 822. Born in Mt. Gilead, Ohio in 1825 of abolitionist Quaker parents whose home was a recognized station on the underground railroad, Sam Wood became chairman of the county's Liberty party at the age of 19 and a delegate to the 1848 national Free Soil Convention at 23. When Kansas became the chief battleground in the slavery conflict, Wood moved to Lawrence to take part in the battles. A delegate to the Republican National Convention in 1856 and an editor of a series of Kansas newspapers from 1855 on, he served in the legislature repeatedly and was speaker of the House in 1877. After he was shot and killed in 1891 as a result of a feud over the location of the county seat of Stevens county, his obituary notice called him "an extremist in everything he did" and a black newspaper called him a "staunch friend of the negro" whose death would be mourned by all "Afro-American citizens of Kansas." *Baxter Springs Southern Argus*, July 2, 1891, 7, 8; Margaret L. Wood, *Memorial of Samuel N. Wood* (Kansas City: Hudson-Kimberly Publishing Co., 1892), 10–115.
57. *Topeka Daily Commonwealth*, Feb. 17, 1876, 2. A black statewide meeting to push for school integration was held in the legislative chamber. *Ibid.*, Feb. 19, 1876, 1. For other legislative actions, see *ibid.*, Feb. 23, 1876, 1; Feb. 27, 1876, 2; Mar. 3, 1876, 2.
58. It seems probable that differences of opinion in the more numerous second-class cities prevented them from imposing segregation successfully. Lawrence and Atchison, for instance, always allowed blacks to attend common schools, and Wichita and Ft. Scott wavered. See *Leavenworth Advocate*, April 5, 1890, 2; February 21, 1891, 2.
59. *Topeka Daily Commonwealth*, March 3, 1876, 1; similarly, see *Topeka Capital-Commonwealth*, Feb. 24, 1889, 3; March 1, 1889, 3.
60. *Topeka Tribune*, December 25, 1880, 3; *Topeka Daily Commonwealth*, March 2, 1881, 3; *Ottawa Daily Republican*, March 4, 1881, 1.
61. *Topeka American Citizen*, January 25, 1889, 4; February 1, 1889, 1, 4; February 8, 1889, 4; February 15, 1889, 4; February 22, 1889, 4. *Kansas House Journal* (1889), 442-43, 713, 1187; *Kansas Senate Journal* (1889), 99, 153, 179, 221, 243, 263, 388, 452, 474, 475, 528, 922, 970; Cox, *Blacks in Topeka*, 123; *Leavenworth Advocate*, May 11, 1889, 2.
62. *Topeka American Citizen*, February 22, 1889, 4, said the Topeka Board of Education had threatened to fire every black teacher if the integration bill passed. One prominent black teacher in Topeka lobbied the legislature to preserve segregation (and his job, since teacher integration was much more controversial among whites than student integration was). See *Leavenworth Advocate*, February 7, 1891, 2, 3; February 14, 1891, 3; February 21, 1891, 2. *Topeka American Citizen*, March 15, 1889, 1, charged that the general education bill was torpedoed not over taxes, but through covert action by men from Topeka and Leavenworth, who acted out of antipathy to integration.
63. Cox, *Blacks in Topeka*, 167.
64. *Blanc F. Joubert v. Sacred Heart Academy* (unpublished) case #21761, 6th District, Orleans Parish, in Orleans Parish Public Library. I happened on a reference to this case, heretofore unmentioned by Louisiana historians, in the *Hartford (Connecticut) Times*, May 2, 1868, 3. The 1868 state constitution was ratified April 17. Joe Gray Taylor, *Louisiana*

- Reconstructed, 1863-1877* (Baton Rouge, La.: Louisiana State Univ. Press, 1974), 158. The Fourteenth Amendment to the federal constitution went into effect on July 28. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (5th ed. New York: W. W. Norton, 1976), 1066,
65. Joubert was a member of the Republican state central committee from at least 1878 through 1880, and probably earlier. See *New Orleans Republican*, October 2, 1878, 1; *New Orleans Louisianian*, October 25, 1879, 2; March 20, 1880, 3. Educated in France, Joubert was a member of the New Orleans Common Council during the Civil War, the first man of color to hold a judicial position in the south, presidential elector on the Grant ticket in 1868, and a federal office holder. *San Francisco Elevator*, May 7, 1869, 1. Born free, he was a "gentleman of handsome fortune . . . so nearly white that one could scarcely take him to be colored," and, allegedly, a slaveholder before the War. *Cleveland Gazette*, September 22, 1883.
 66. Article 13 of the Radical Constitution, adopted March 13, 1868, stated: "All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of public character, and shall be opened to the accomodation and patronage of all persons, without distinction or discrimination on account of race or color." Thorpe, *Federal and State Constitutions*, III, 1450. Joubert's petition was filed at an unspecified date in April. The judgment was rendered on April 28. On Field, see Taylor, *Louisiana Reconstructed*, 55; *New Orleans Republican*, August 20, 1876, 5.
 67. Duplantier was vice president of the parish Republican central committee in 1867. See *Buffalo (N. Y.) Commercial Advertiser*, January 12, 1867, 1. Other than the fact that his family had been in Louisiana for at least two generations, I have been able to learn very little about Duplantier.
 68. Among the tactics blacks used against the 1875 movement to resegregate the schools was a threat to expose the "mixed" ancestry of older citizens who were now considered "white." See *New Orleans Louisianian*, September 18, 1875, 2. In "Beyond the Realm of Social Consensus: New Meanings of Reconstruction for American History," *Journal of American History*, 68 (1981), 294, Armistead L. Robinson elevates evanescent tactical differences into enduring class-based factional alignments within the New Orleans black community. The closer one looks, however, the less clear any such divisions seem. The partisan course of the leading black politician in New Orleans, P.B.S. Pinchback, for instance, shifted repeatedly, but he remained committed to integration. He and other members of the so-called "colored aristocracy" correctly predicted how the Democrats would treat Jim Crow schools, and they did everything they could to prevent it. Their struggle deserves more respect, and divisions within the black community, less attention than they sometimes get.
 69. On "Redemption," see Taylor, *Louisiana Reconstructed*, 480-505. On Pinchback, see Charles Vincent, "Louisiana's Black Governor: Aspects of His National Significance," *Negro History Bulletin* 42 (1979) 34; Emma Lou Thornbrough, "Pickney Benton Stewart Pinchback," in Rayford W. Logan and Michael R. Winston, *Dictionary of American Negro Biography* (New York: Norton, 1982), 493; William Simmons, *Men of Mark: Eminent, Progressive and Rising* (1887, reprint ed., New York: Arno Press, 1968), 759-75. On the

failure of black efforts to sustain integration by tactical compromises with the Redeemers, see Harris, *Story of Public Education*, 58; Rodolphe Lucien Desdunes, *Our People and Our History*, Sr. Dorothea O. McCants, ed., & trans., (reprint ed., Baton Rouge, La.: Louisiana State Univ. Press, 1973), 135–38; *New Orleans Louisianian*, Sept. 29, 1877, 2; *New Orleans Daily Picayune*, June 27, 1877, 1, July 4, 1877, 8.

70. When blacks held a meeting to collect contributions to finance the Trévigne case—Pinchback contributed the sizable sum of \$50—the *New Orleans Daily Picayune*, September 28, 1877, 1, accused them of a desire "to make a political issue out of the question." Of course, the Democrats never considered turning the school integration issue to political purposes.
71. Born free in 1824, son of a veteran of the Battle of New Orleans, Trévigne was an active politician, serving on the Republican state committee in 1867 and in a steady federal patronage job from at least 1880 through 1884. Author of the first historical sketch of blacks in Louisiana, he wrote for four successive black newspapers in New Orleans and was very active in the struggle to overturn the Jim Crow railroad law in the 1890s, a six-year campaign doomed to lead to *Plessy*. The ever temperate *New Orleans Democrat*, Sept. 28, 1877, 4, termed Trévigne's suit an effort to gain "cheap notoriety" by a "haughty descendent of Ham," whose attempt to substitute "African supremacy" for "civilization and christianity" endangered any white support for the education of "African ignorance and savagery." The constitution, this organ of "conservatism" asserted, "is not binding." On Trévigne, see Edward Larocque Tinker, *Les Ecrits De Langue Française En Louisiane Aux XIX Siècle* (Paris: Librairie Ancienne Honoré Champion, 1932), 475; William P. O'Connor, "Reconstruction Rebels: The New Orleans Tribune in Post-War Louisiana," *Louisiana History* 21 (1980) 159; Vincent, *Black Legislators*, 24; Dorothea Olga McCants, "Paul Trévigne," in Logan and Winston, *American Negro Biography*, 601-02; Everett, "Free Negro," 241, 330, 362, 364; Records of the Orleans Parish School Board, VIII (1876-77), 151, 159, in Orleans parish school board offices; Otto H. Olsen, ed., *The Thin Disguise: Turning Point in Negro History: Plessy v. Ferguson: A Documentary Presentation, 1864–1896* (New York: Humanities Press, 1967), 47–67; Jean-Charles Houzeau, *My Passage at the New Orleans Tribune*, David C. Rankin, ed., (Baton Rouge, La.: Louisiana State Univ. Press, 1984), 71, n. 6. On the replacement of Republicans with Democrats, see *New Orleans Daily Picayune*, April 6, 1877, 8.
72. *Trévigne v. Board of Education of Orleans Parish* (unpublished) case #9545, in Orleans Parish Public Library, hereafter referred to as Trévigne Case File. A briefer form of the petition appeared in *New Orleans Democrat*, September 27, 1877, 8. Among the three men who guaranteed the \$1000 bond that had to be filed in order to bring the case was Blanc F. Joubert.
73. It is worth noting that Trévigne's counsel did not raise equal protection or due process claims, presumably because they believed that even after the Supreme Court's decision in *Slaughter-House* [16 Wall. 36 (1873)], the privileges or immunities clause retained considerable vigor. Of course, raising issues of the national constitution before a state court in which they must have known that they would probably lose indicates an intention to appeal an adverse judgment to the federal courts.

74. Obviously patterned partly on the Fourteenth Amendment, Article 2 stated: "All persons, without regard to race, color, or previous condition, born or naturalized in the United States, and subject to the jurisdiction thereof, and residents of this state for one year, are citizens of this state. . . . They shall enjoy the same civil, political, and public rights and privileges, and be subject to the same pains and penalties." Thorpe, *Federal and State Constitutions*, III, 1449.
75. Belden was surely aware of the U. S. Supreme Court's decision in *Slaughter–House*, for as state attorney general, he had argued one of the three cases later consolidated under the name *Slaughter–House* in the state court. Charles Fairman, *Reconstruction and Reunion, 1864–88* (New York: Macmillan, 1971), 1326. Perhaps he ignored Justice Samuel Miller's ruling that the rights Americans claimed as national citizens were ludicrously limited, while those they enjoyed as state citizens were not protected under the privileges or immunities clause because he hoped that 5-4 decision might be reversed by the time it considered *Trévigne*, if the case were appealed that far. Or perhaps he hoped that the Court might give the clause a more expansive reading if black rights were involved, as Miller's "one pervading purpose" language might lead one to believe. *Slaughter–House Cases*, 16 Wall. 36, 74 (1873).
76. Blacks used the same argument in less formal contexts. *Trévigne* and the *Tribune* editors declared that they favored the 1869 state civil rights bill not so much because they wished to attend the opera or saloon with whites, or even because they wanted to be able to ride on streetcars, boats, and trains freely, but because "under the present order of things our manhood is sacrificed. . . the broad stamp of inferiority is put upon us." *New Orleans Tribune*, Feb. 7, 1869, quoted in Philip M. Mabe, "Racial Ideology In the New Orleans Press, 1862–1877" (unpub. Ph.D. thesis: Univ. of Southwestern Louisiana, 1977), 131–2.
77. *Trévigne*'s lawyers also speculated that segregation would cause the school board to violate article 118 of the 1868 constitution, which provided that "Taxation shall be equal and uniform throughout the State." Thorpe, *Federal and State Constitutions*, III, 1464. Their reasoning was that segregated schools would cost more and therefore require either unequal tax rates from parish to parish or "the closing of the avenues of [e]ducation to [p]etitioner's [s]on and the entire colored population. . . ." Unwieldy as a legal argument, it was all too accurate as a factual prediction. *Trévigne Case File*.
78. Born in Kentucky and raised in Quincy, Illinois, Jonas moved to Louisiana in 1853. Like his father, who had served in the legislatures of both Kentucky and Illinois, B. F. Jonas became a Whig politician. Although a prominent Unionist in 1860, he went with the Confederacy, serving throughout the War as a lowly private. Unlike his fellow Whig John Ray, Jonas became a Democrat in 1865, serving in the legislature, 1865-68, and being nominated by the Democrats for Lieutenant Governor in 1872. The city attorney of New Orleans, 1874-78, he was simultaneously the Democratic floor leader in the legislative in 1877. After a term in the U. S. Senate, he was appointed Collector of the Port of New Orleans. A longtime member of the Democratic state committee, he was a prominent leader of the White League revolt in September, 1874. He became law partner of E. H. Farrar in 1887. *Biographical Memoirs*, 201–02, 495-98; Alcée Fortier, *Louisiana* (Atlanta: Southern Historical Assn., 1909), 627–28. Long actively involved in the school segregation campaign, Jonas had at a white mass meeting in 1870 promised violence if school integration took place. See *New Orleans Daily Picayune*, February 13, 1870, at 1.

79. A native Louisianian born in 1849, Farrar graduated from the University of Virginia and practiced law in Louisiana from 1872 on. He was elected New Orleans city attorney in 1880, and subsequently served as president of the American Bar Association. An anti-lottery, Gold Democratic "reformer," he framed the article on taxation in the 1913 state constitutional convention. *Biographical Memoirs*, 481–82; *New Orleans Times–Picayune*, January 7, 1922, 1, 3.
80. Trévigne Case File. Farrar tendered his services free to the cause of white supremacy, Records of the Orleans Parish School Board, IX (1876–77), 110, 113, in Orleans parish school board offices.
81. Because of infighting on the Orleans parish school board, the public schools did not open for the fall until October 22, 1877. *New Orleans Daily Picayune*, October 23, 1877, 1.
82. Born in Louisiana, Rightor, though a Catholic, attended Wesleyan College in Connecticut before returning south to practice law. A Colonel in the Confederacy, Rightor, in the biased phrases of the *New Orleans Daily Picayune*, August 12, 1900, "was among the first to take up arms for the liberation of the state from radical rule, and was in command of one of the companies of the White League on the memorable 14th of September [1874]." On that date, the White Leaguers' attempted *coup d'état* against the state government had to be put down by federal troops. For his efforts, he was appointed judge in 1877. See also *New Orleans Daily States*, August 12, 1900; *New Orleans Times–Democrat*, August 12, 1900.
83. Rightor's opinion is printed in full in the *New Orleans Daily Picayune*, October 24, 1877, 2.
84. The opinion of the court, in manuscript, is in the files of the Louisiana Supreme Court in New Orleans. *Paul Trévigne v. School Board and William O. Rogers*, case #6832 (1879). It appears to have escaped the attention of previous historians.
85. De Blanc, a native Louisianian, was a Confederate officer and "one of the leading spirits in the organization of the White League. . . ." Fortier, *Louisiana*, 339. The other justices were Thomas Courtland Manning, a member of the state secession convention and Confederate General, and "the highest type of the lordly Anglo-Saxon . . ."; Robert H. Marr, another leading White Leaguer; William B. Spencer, a plantation–born Confederate captain and Democratic Congressman; and William B. Egan. *Ibid.*, 93, 487; Lamar C. Quintero, "The Supreme Court of Louisiana," *The Green Bag*, 3 (1891) 113; *National Cyclopedia of American Biography*, IV, 344; *Biographical Directory of the American Congress, 1789–1971* (Washington, D.C.: G.P.O., 1971), 1736.
86. On the merging of the two "extraordinary remedies," see J. Morgan Kousser, "Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools," *Journal of Southern History* 46 (1980), 29–30.
87. *State of Louisiana ex rel. Josephine Harper v. Mrs. M. A. Wickes, Principal of the Live Oak School*, 6th District Court, Orleans parish, case file in Orleans Parish Public Library, asked for a mandamus to compel Mrs. Wickes to admit Frances and Mary Ardene Harper and Josephine Harper's niece, Ida Sawler, who lived with them. The girls had first been admitted to the school, then ejected solely on account of color. Although a hearing was set for later in November, 1877 before Judge Rightor, there is no evidence in the case file or

the newspapers that the case went any farther. The petition, which is summarized in *New Orleans Daily Picayune*, Nov. 11, 1877, 2, does not mention the constitutional or statutory grounds of the suit.

88. These developments may be followed in *New Orleans Daily Picayune*, Nov. 10, 1877, 1; Nov. 13, 1877, 2; Jan. 15, 1878, 2; Jan. 29, 1878, 3; Feb. 19, 1878, 3. The case files are in the Louisiana Supreme Court, New Orleans, case #7500 (1881), hereafter referred to as Dellande Case File. Less prominent than Isabelle, Joubert, Trévigne, or Bertonneau, Dellande was a cigar manufacturer who owned \$9000 worth of property in 1879, according to the New Orleans City Directories for the period and case no. 10763, 6th District Court, Orleans parish (1879) in Orleans Parish Public Library. I find no mention of him or of Mrs. Harper in the newspapers of the time, except in connection with their court cases.

89. *Josephine Decuir v. John G. Benson*, 27 La. Ann. 1 (1875); *C. S. Sauvinet v. Joseph A. Walker*, 27 La. Ann. 14 (1875); *Washington, Alexandria, & Georgetown Railroad Co. v. Brown*, 17 How. 445 (1873). In the lower court, Judge Henry Dibble awarded black sheriff C. S. Sauvinet \$1000 damages under the state's 1869 civil rights law and articles 2 and 13 of the 1868 constitution. Fischer, *Segregation Struggle*, 69–70. Mrs. Decuir was awarded a like sum when the owner of a steamboat denied her first-class accommodations as she was travelling from New Orleans to her upcountry plantation. The then–Republican–dominated state supreme court upheld both verdicts, though the U.S. Supreme Court overturned Decuir [*Hall v. DeCuir*, 95 U.S. 547 (1878)] on interstate commerce grounds a month before Dellande was filed. The fact that Jones and Farrar did not even bother to mention this reversal or to cite Justice Nathan Clifford's concurrence, in which this last Buchanan appointee on the Court argued that segregation was constitutional, indicates how little attention they paid to constitutional issues. The *Brown* case ruled that separate but equal violated the federal charter granted to the railroad, but Justice David Davis's language was more expansive than the bare ruling implies.

90. The local court decision was printed in full in *New Orleans Daily Picayune*, May 21, 1878, 1.

91. Dellande Case File. In an attempt to demonstrate the arbitrariness of the caste system in Louisiana, Belden asked Dellande during the trial whether it could "be ascertained that your children are colored, by their appearance, without being told?" Dellande replied: "No—The children are as white in color as anybody." In his lower court opinion, Rightor briefly toyed with the idea of denying Dellande standing to sue, because, the judge remarked, he "does not belong exclusively to any separate race. . ." It would have been interesting to watch the judge's contortions if he had ruled that Dellande was "colored" for the purposes of the schools, but not for the purposes of the courts.

92. *State ex rel. U. Dellande v. New Orleans School Board*, 13 La. Ann. 1469 (1881).

93. Thorpe, *Federal and State Constitutions*, III, p. 1508, art. 224. It was not until the disfranchising convention of 1898 that the state constitution mentioned school segregation. *Ibid.*, III, p. 1575, art. 248.

94. *Biographical Memoirs*, 314–16. His "one object" during Reconstruction, this biographical sketch asserts, was to "starve out" the Republicans in his home parish, and he also attended all the state and national Democratic conventions during the era and canvassed southwestern Louisiana extensively. Poché was one of the founders of the American Bar Association. Other justices were Edward E. Bermudez, a "cooperationist" member of the Louisiana secession convention and Confederate soldier who was removed from local office in 1867 as "an impediment to Reconstruction"; Charles E. Fenner, another active secessionist, a Confederate major, and leader in the effort to unseat the state's Republican governor in 1876–77; William M. Levy, a native of Virginia, Confederate, and Congressman; and Robert B. Todd. Fortier, *Louisiana*, 65, 84; Quintero, "Louisiana Supreme Court," 113–38; *Dictionary of American Biography*, II, (1929), 220, 323.
95. Italics supplied. The handwritten opinion is in Dellande Case File.
96. *New Orleans Daily Picayune*, Dec. 23, 1877, 4.
97. Bertonneau's children were denied entry to the Fillmore school (the same school to which Dellande applied) on Nov. 13, 1878, three days after the Dellande case was filed. *Bertonneau* was filed on Nov. 28. See the case file of *Arnold Bertonneau v. Board of Directors of the City Schools*, case #8306, Fifth Circuit and District of Louisiana, in Federal Records Center, Fort Worth, Texas, R.G. 21, Eastern District, Louisiana, New Orleans Division, General Records, Case Files, 1837–1911, hereafter referred to as Bertonneau Case File.
98. A member of both houses of the Louisiana legislature in the prewar era, twice Whig nominee for Lieutenant Governor on tickets during the 1850s, elected to the U.S. House in 1865 and the Senate in 1873 (though not seated by Congress), the man who singlehandedly codified the laws of the state during Reconstruction, Ray deserves more favorable mention than he has gotten from the state's historians. For instance, the leading historian of Louisiana Reconstruction, Joe Gray Taylor, omits Ray, as well as the other Louisiana- and border state-born white Republican lawyers in the other school segregation cases, from a list of the only three whites in the state at the time "who seem honestly to have believed that all men were created equal." Taylor does not enunciate a criterion for determining subjective honesty, and he mistakenly lists Paul Trévigne as one of the three whites. See Joe Gray Taylor, "Louisiana—An Impossible Task," in Otto H. Olsen, ed., *Reconstruction and Redemption in the South* (Baton Rouge, La.: Louisiana State Univ. Press, 1980), 222. A Unionist during the War, Ray attracted national attention as counsel to the Republican state returning board in 1876–77, the actions of which allowed Rutherford B. Hayes to become president. Although allegedly involved in certain shady deals himself, he served as a competent special prosecutor in the "Whiskey Ring" cases, which involved corrupt actions by government officials. Assessed for \$70,000 worth of property in 1870, and said to have a "thriving law practice" in New Orleans after 1877, Ray almost certainly did not take on *Bertonneau* because he needed the fee. In view of the facts that as state senator in 1868, he had been the floor manager of the Fourteenth Amendment and had voted for state integration laws, and that during the 1870s, he was a member of the "Louisiana Club," a largely black social and political group, it seems likely that Ray represented Bertonneau because he believed in racial equality. Biographical sources on Ray include James G. Wilson and John Fiske, eds., *Appleton's Cyclopaedia of American Biography*, V (1888), 192; Wetta, "Louisiana Scalawags," 80–82, 354–55; Wetta, "'Bulldozing the Scalawags': Some Examples of the Persecution of Southern White Republicans in Louisiana During

- Reconstruction," *Louisiana History* 21 (1980) 53–54; *Louisiana Senate Journal* (1868), 13, 21, 183–84; (1869), 98; (1870), 290; Joe Gray Taylor, *Louisiana Reconstructed*, 194, 197–98; *New York Herald*, Feb. 14, 1873, 5, Mar. 27, 1873, 7; *New Orleans Daily Picayune*, Aug. 2, 1877; Jan 23, 27, 28, Feb. 8, 1878; *Herringshaw's Encyclopedia of American Biography of the 19th Century* (1898), 773; *New Orleans Louisianian*, Nov. 2, 1872, 1, Jan. 30, 1875,
3. The *Topeka Daily Commonwealth*, Jan. 23, 1873, 2, called Ray "a prudent and able legislator" whose "private character is irreproachable."
99. Son of a French-born father and a Cuban mother, Bertonneau was light enough to have been termed "white" in the 1880 census and on his death certificate in Pasadena, California, where he moved and "passed" sometime between 1890 and 1912. Owner of \$1800 worth of real estate in the 1879 city tax records, he worked at a variety of jobs — wine merchant, cigar store owner, dry goods store owner, and U.S. customs employee. An officer in the Native Guards during the War, he carried a petition for black suffrage to President Lincoln in 1864 and was afterwards feted in Boston at a public dinner hosted by Massachusetts governor John A. Andrew and attended by William Lloyd Garrison, Wendell Phillips, and Frederick Douglass. Responding to a toast at that meeting, Bertonneau promised to carry the message that Boston blacks enjoyed integration in streetcars and schools back to Louisiana, which he did as a member of the 1868 state constitutional convention. David Rankin, "The Impact of the Civil War on the Free Colored Community of New Orleans," *Perspectives in American History* 11 (1977–78) 400 ; McCrary, *Lincoln and Reconstruction*, 256; James M. McPherson, *The Negro's Civil War* (New York: Vintage Books, 1965), 278–280; *New Orleans Louisianian*, Oct. 25, 1879, 1, 4, Mar. 20, 1880, 3; Desdunes, *Our People*, 131; Everett, "Free Negro," 362, 364, 379; *Washington (D.C.) People's Advocate*, Feb. 18, 1882, 1. I want to thank David C. Rankin for sending me Bertonneau's death certificate.
100. Ray also charged a violation of section 1979, U.S. Revised Statutes, which read in pertinent part: "Every person who under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in chancery, or other proper proceeding for redress." He also contended that the action violated section 1977 (the 1866 Civil Rights Bill, reenacted in 1870, after the passage of the Fourteenth Amendment, to clear up any doubts about its constitutionality): "All persons within the jurisdiction of the United States shall have the same right in every state and Territory . . . to the full and equal benefit of all laws and provisions for the security of persons and property as is enjoyed by white citizens . . ." Quoted in original complaint and supplementary briefs, Bertonneau Case File.
101. *Ibid.*
102. *Ibid.* They even failed to point out the "good faith" that the school board had so ostentatiously paraded in its segregation resolution: "Whereas this Board in the performance of its paramount duty which is to give the best education possible within the means at its disposal to the whole population without regard to race color or previous condition is assured that this end can be best attained by educating the different races in separate schools." *Ibid.*

103. *Dred Scott v. Sandford*, 19 How. 393 (1857). Ray replied to the jurisdictional point by citing an Act of Congress dated March 3, 1875, ch. 137, p. 470, which provided for federal court jurisdiction, "concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity when the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the Constitution or laws of the United States" Supplementary briefs, in Bertonneau Case File.
104. *Bertonneau v. New Orleans*, 3 Fed. Cas. 294 (1878), hereafter referred as *Bertonneau*.
105. Louis Filler, "William B. Woods," in Friedman and Israel, *Justices of the U.S. Supreme Court*, II, 1327; Harold Chase et al., *Biographical Dictionary of the Federal Judiciary* (Detroit: Gale Research Co., 1976), 309; Whitelaw Reid, *Ohio in the War* (Cincinnati: Moore, Wilstach, & Baldwin, 1868) I, 863–64; *Cincinnati Commercial*, Dec. 23, 1880, 5; Dec. 24, 1880, 1; Dec. 31, 1880, 4.
106. *Bertonneau*, 296.
107. *Workman v. Detroit*, 18 Mich. 400 (1869), *Clark v. Muscatine*, 24 Iowa 266 (1868); *Garnes v. McCann*, 21 Oh. State 198 (1871), *Hall v. DeCuir*, 95 U.S. 485 (1878). Woods also cited *Stoutmeyer v. Duffy*, 7 Nev. 342 (1872), in which, as in *Garnes and Hall*, judges had gone well out of their way to declare segregation constitutional under the Fourteenth Amendment. A strict construction of each opinion would have treated the approbations of segregation as *dicta*. On Clifford, see the excellent sketch by William Gillette in Friedman and Israel, *Justices of the U.S. Supreme Court*, II, 963–75.
108. The phrases that I italicized and that subsequent legal commentaries quoted endlessly, derive from *Garnes*, 207; and *Hall*, 503.
109. *Bertonneau*, 296.
110. In *Slaughter–House*, 16 Wall 36, 73–77 (1873), Justice Miller distinguished the broad rights that a person enjoyed as a "state citizen" and what he asserted were the very limited ones that he held as a "national citizen." He put heavy emphasis on the fact that the privileges or immunities clause referred explicitly to rights held as "citizens of the United States," but did not mention, and therefore, he asserted, offered no national protection for, the rights people held as state citizens.
111. *New Orleans Daily Picayune*, Feb. 21, 1879, 1.
112. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and The Establishment of the One–Party South, 1880–1910* (New Haven, Ct.: Yale Univ. Press, 1974), 55. In 1887, according to the *New Orleans Pelican*, Jan. 8, 15, 1887, 2, there were so few schools provided for blacks in New Orleans that 10, 000 children were unable to enroll. The vice–president of a committee established to agitate for more schools was Homer A. Plessy, and the president, a son of Blanc Joubert.
113. Bond for Appeal, in Bertonneau Case File. The first such case, so far as I know, in which plaintiffs instituted an appeal — which was dropped for financial reasons — was *Cory v. Carter*, 48 Ind. 327 (1874).

114. F. W. Giles, *Thirty Years in Topeka: A Historical Sketch* (Topeka, Kans.: George W. Crane & Co., 1886), 371.
115. *Topeka Colored Citizen*, Sept. 20, 1878, 4; Randall Bennett Woods, *A Black Odyssey: John Lewis Waller and The Promise of American Life, 1878–1900* (Lawrence, Ks.: Univ. of Kansas Press, 1981), 56–57. The *Ottawa Daily Republican*, Oct. 30, 1880, 1, reported that Judge Stephens of the district court had delayed his decision in *Tinnon* because another school segregation "was known to be pending in the supreme court," which all the Ottawa parties hoped would settle the question. No such decision was ever reported.
116. *Topeka State Journal*, Oct. 28, 1880, 4; *Ottawa Daily Republican*, Nov. 1, 1880, at 4; *Topeka Daily Commonwealth*, Nov. 2, 9, 1880, 4. Ignoring *Phillips*, Nell Irvin Painter, *Exodusters* (New York: Alfred A. Knopf, 1977), 50, presents Topeka blacks as reluctantly accepting school segregation in the fall of 1880.
117. *Topeka Daily Commonwealth*, Jan. 4, 1881, 4; *Topeka State Journal*, Oct. 9, 1880, 4; *Topeka Tribune*, Dec. 25, 1880, 3.
118. Woods, *Black Odyssey*, 57, n. 48. It is not presently clear whether Phillips's lawyers, one of whom, John H. Stuart, was black, challenged segregation as contrary to the Fourteenth Amendment. The case does not seem to have been appealed to the Kansas supreme court, and the local court no longer holds any records on the case. In the fall of 1881, Topeka blacks were again said to be "greatly exercised because their children were refused admission to the white schools." *Ottawa Daily Republican*, Oct. 24, 1881, 3.
119. D.S. Spear, "The Law of Extradition," *The Independent* (May 11, 1882). Discussing *Tinnon*, Spear hoped that a similar case would be appealed to the U.S. Supreme Court and declared that "there cannot be much doubt," in light of its past decisions, that it would strike down exclusion from any particular school because of race. *Slaughter-House* emasculated the privileges or immunities clause, but left equal protection unscathed and highlighted the concentration of the framers on the reform of race relations. Justice William Strong's opinion in *Strauder* seemed to offer broad protection against statutory or administrative discrimination on account of race. And while *The Civil Rights Cases* overturned a Congressional ban on discrimination by "private" citizens, it did not limit the protection of the Fourteenth Amendment against official state discrimination.
120. *Columbus Daniel et al. v. Board of Education of South Topeka et al.*, 4 Kans. L. J. 329 (1886–87).
121. Born in Topeka in 1860, Curtis was one-eighth to one-fourth Indian. Orphaned early, he was raised by his grandmother. His minority-group heritage and underprivileged boyhood may have given him a special feeling for those who suffered discrimination. Unable to afford college, he read law with Aderial Hebard Case, with whom he formed the partnership that represented Columbus Daniel. As Shawnee county attorney, he might have been expected to have represented the school board, but he did not. The picture of an aspiring politician, he apparently did not believe that being associated with school integration would hurt his career, and it did not. Beginning in 1893, he served in the U.S. House of Representatives for seven terms, moving to the Senate in 1907. Well respected in Congress, he was party whip from 1915 to 1924 and majority leader from 1924 until he descended to the Vice-Presidency in 1929. Case, his law partner and senior by 32 years,

- was born in Pennsylvania and moved to Topeka the year Curtis was born. A Republican officeholder during the War, he became a Democrat thereafter and specialized in murder trials. It seems likely that Curtis carried most of the burden in *Daniel*. James L. King, ed., *History of Shawnee County, Kansas and Representative Citizens* (Chicago: Richmond & Arnold, 1905), 279–80; Berrett, *Who's Who in Topeka*, 18, 27; Frank Blackmar, ed., *Kansas, A Cyclopaedia*, 3 vols. (Chicago: Standard Pub. Co., 1912), 3, 20–22; *The United States Biographical Dictionary: Kansas Volume* (Chicago & Kansas City: S. Lewis & Co., 1879), 641–42; *History of the State of Kansas* (Chicago: A.T. Andreas, 1883), 557, 559; *Topeka Daily Capital*, Sept. 14, 1902, 11; *Biographical Directory of Congress*, 814–15.
122. Born and raised in Logansport, Indiana, Guthrie had been a member of the first Topeka school board in 1867, a board that continued the segregated black school, which had been established in 1865. He was elected to the board in 1879, and may have served continuously. A captain in the War and later Kansas state commander of the Grand Army of the Republic, Guthrie was a prominent Republican. After serving in the state house, 1868–70, he was a presidential elector in 1872, chairman of the Republican state committee in 1872 and 1876, a prominent candidate for his party's nomination for governor in 1876, district court judge from 1884 to 1892, and postmaster of Topeka from 1898 through at least 1905. Oxymoronically, he was an anti-temperance Presbyterian whose father had been born in Scotland. *History of Kansas* (Andreas), 545, 564; *U.S. Biographical Dictionary* (Lewis), 333–34; Berrett, *Who's Who in Topeka*, 50; *Topeka Colored Citizen*, April 5, 1879; *Topeka Daily Commonwealth*, July 19, 1881, 4.
123. *Daniel v. South Topeka*. There was a similar district court decision, much less fully reported, in the *Fort Scott Weekly Monitor*, Oct. 13, 1887, 6, in the case of *Georgianna Reeves v. Board of Education of Fort Scott*.
124. *Gracie Jones et al. v. B.E. McProud*, 64 Pac. 602 (1901). Blacks had been trying to enter the high school in Oskaloosa for several years before they brought a case. See *Topeka Colored Citizen*, Oct. 12, 1898, 1; Sept. 21, 1900, 1.
125. Robert Crozier, the judge who decided in favor of the black students in Tonganoxie, a small town near Leavenworth, was born in Cadiz, Ohio in 1827 and came to Leavenworth in 1856, where he established and was editor of the *Times*. A member of the territorial legislatures in 1857 and 1858, he served as U.S. District Attorney from 1861 to 1864 and chief justice of the Kansas Supreme court for a few months during 1873–74. From 1877 to 1893, he was judge of the district court in Leavenworth. Despite that city's Democratic majority, Judge Crozier was a consistent Republican. Henry Miles Moore, *Early History of Leavenworth* (Leavenworth, Kans: Samuel Dodsworth Book Co., 1906), 306; *Biographical Directory of Congress*, 807–08.
126. Born in Butler County, Ohio, in 1828, Judge John T. Burris had switched parties often. In 1890, he was a Democrat. Raised in Ohio, Kentucky, and Iowa, he came to Olathe, Kansas in 1858 after serving in the Mexican War. Up to that time, he'd been a Whig, but he shifted to become an anti-Leocompton Democrat and won a seat in the 1859 state constitutional convention, where he staunchly backed the compromise that allowed later legislatures and school boards to decide whether or not to segregate blacks in schools. Appointed U.S. District Attorney for Kansas by Lincoln in 1861, he shortly resigned to become a Lt. Colonel in the state troops during the Civil War. By 1865, when he was Speaker of the state House, he had become a Republican. County attorney of Johnson

- county from 1866 to 1869 and for a few years during the 1870s, he was judge of the district court from 1869 to 1870, and again from 1879 through at least 1890. He became a Democrat again, in either 1872 or 1878, depending on which source one believes. *Leavenworth Advocate*, May 3, 1890, 2; *Topeka Capital-Commonwealth*, Jan. 8, 1889, 3; Ed Blair, *History of Johnson County, Kans.* (Lawrence, Kans.: Standard Publishing Co., 1915), 113–14, 229–32; William E. Connelley, *A Standard History of Kansas and Kansans*, 5 vols. (Chicago: Lewis Publishing Co., 1918), III, 1303; *Debates, 1859*, 192–95.
127. _____ v. *Toganoxie School Board*, quoted in *Leavenworth Advocate*, Nov. 16, 1889, 2; *Luella Johnson v. Olathe School Board*, quoted in *ibid*, April 26, 1890, 2.
128. *Bertha Knox et al. v. Independence School Board*, 25 Pac. 616 (1891). Horton did stress that Independence had attendance zones and that the "white" school in the ward had empty seats. Although he did not cite *Daniel*, he must have been aware of it and may have been seeking to distinguish it.
129. Price was manumitted and "adopted" by a white man, J.C. Price (perhaps his father) in 1861. Trained by a tutor in Cairo, Illinois, he migrated to Texas, where he taught school, edited three newspapers — two of which were "white" — and served as county attorney and county judge during Reconstruction. Moving to Kansas in 1877, he successively became a law partner of several leading black figures and wrote the pro-integration speech that Alfred Fairfax, the first black state legislator in Kansas, delivered in the Kansas house in 1889. *Topeka American Citizen*, March 1, 1889, 1; Woods, *A Black Odyssey*, 58. Thomas was born in Boone county, Missouri, apparently of free black parents, in 1860. A graduate of Lincoln Institute, in Jefferson City, Missouri, and of the University of Michigan Law School, he practiced in Topeka from 1887 through at least 1905. *Cleveland Gazette*, Nov. 5, 1887; Berrett, *Who's Who in Topeka*, 120; *Topeka Kansas State Ledger*, Jan. 20, 1903.
130. *Eva Cartwright v. Board of Education of Coffeetown*, 84 Pac 382 (1906). *Cartwright* involved segregated classrooms within the same school building. The court banned them.
131. *Fannie S. Rowles v. Board of Education of Wichita*, 91 Pac 88 (1907). As noted above, the Kansas legislature passed a special act in 1889 banning segregation in Wichita, a first-class city. The legal question in *Rowles* was whether a subsequent 1905 act authorizing segregation in first-class cities generally was meant to overturn the specific Wichita act. Upholding the *Tinnon* line, the supreme court ruled that any exceptions to the integrationist state policy must be explicit. For the background of *Rowles*, see Sondra Van Meeter, "Black Resistance to Segregation in the Wichita Public Schools, 1870–1912," *Midwest Quarterly*, 20 (1978), 64–77.
132. *Doc A. Williams v. School Board of Parsons*, 99 Pac 217 (1908). When his four children were transferred from the common school in his ward and assigned to a segregated school a mile and a half and one railroad switching yard with 16 constantly used tracks away, Mr. Williams protested, then sued. The court agreed that this was a breach of the school board's admitted discretion. It is instructive to note that the Supreme Court's unanimous opinion was penned by Alfred W. Benson, who had been mayor of Ottawa during the *Tinnon* case and who as a state senator in 1881 had voted to end the exclusion of blacks from common schools in first-class cities. Born in Chatauqua county, New York of New England Congregationalist parents, Benson was a leading prohibitionist politician who

filled numerous county and state offices and was appointed to the U.S. Senate in 1906–7. Blackmar, *Kansas, A Cyclopaedia*, I, 59–61; *Ottawa Daily Republican*, Feb. 17, 1881, 2; March 4, 1881, 2; *Ottawa Journal and Triumph*, Nov. 29, 1877, 3.

133. *Buford Crawford v. Board of Education of Ft. Scott*, was an original action for a *mandamus* in the Kansas Supreme Court. Unreported, the case was merely noted as dismissed in the *Topeka Daily Capital–Commonwealth*, March 6, 1889, 4, and the *Ft. Scott Daily Monitor*, March 11, 1889, 4. In the *Reeves* case, counsel had applied for an injunction, over which district courts had original jurisdiction. Instead of appealing *Reeves*, the lawyers for the blacks sought a quicker decision by the Kansas Supreme Court by applying for a *mandamus*. See *Ft. Scott Weekly Monitor*, Nov. 4, 1887, 3. It is unclear at this time why Justices Horton, Valentine, and William A. Johnston (who had replaced Brewer when Brewer was appointed to the U.S. Circuit Court in 1884) held up the decision for 16 months, during which time the booming Ft. Scott gained enough population to become a first class city and therefore undermined the chief argument — *Tinnon* — made in the plaintiff's brief. Nor is it now evident why the justices did not ask for supplementary briefs in light of the changed legal status of the city. Perhaps they hoped that the attempt to repeal the authorization for segregation in first class cities would succeed in the 1889 legislature. The plaintiff's brief is summarized in *ibid.* Ft. Scott was proclaimed a first class city on May 30. *Ibid.*, May 31, 1888, 1.
- Infuriated local blacks coalesced with Democrats in a "Citizens' Party" in the 1889 Fort Scott municipal elections and swept the Republican party out of the local offices. Rev. C.C. Goins, a black leader, became president of the school board in 1890. *New York Age*, May 4, 1889, 2; *Ft. Scott Weekly Monitor*, Aug. 16, 1888, 8; Aug. 23, 1888, 7; *Ft. Scott Daily Monitor*, Mar. 19, 1888, 4; Mar. 21, 1889, 2; April 6, 1889, 4; April 9, 1889, 2; James C. Malin, *Doctors, Devils, and the Woman Question: Ft. Scott, Kansas, 1870–1890* (Lawrence, Kans.: Coronado Press, 1975), 120.
134. *William A. Reynolds v. Board of Education of Topeka*, 72 Pac 274 (1903), hereafter referred to as *Reynolds*. Materials in the case file for *Reynolds*, in the Kansas State Historical Society, will be referred to as Reynolds Case File.
135. School board brief, depositions of Clarence Long, A.T. Allen, William Reynolds, all in Reynolds Case File. *Topeka Daily Capital*, Feb. 6, 1902, 6; Feb 13, 1902, 5; Feb. 15, 1902, 5; Mar. 4, 1902, 6; Mar. 7, 1902, 4.
136. *Topeka Daily Capital*, Feb. 2, 1902, 9; Feb. 5, 1902, 5; Feb. 25, 1902, 2; Mar. 5, 1902, 1,2;; March 6, 1902, 5; March 7, 1902, 6; March 15, 1902, 3; March 15, 1902, 8; March 27, 1902, 6; Sept. 11, 1902, 8; Oct. 11, 1902, 5; April 12, 1903, 9.
137. *Topeka Colored Citizen*, June 15, 1900, 1; Aug. 31, 1900, 4; *Topeka Kansas State Ledger*, March 20, 1900, 1.
138. King, *History of Shawnee County*, 626–27; Walter T.K. Nugent, *The Tolerant Populists: Kansas Populism and Nativism* (Chicago: Univ. of Chicago Press, 1963), 135–36; *Topeka Daily Capital*, Feb. 9, 1902, 6; Feb. 11, 1902, 6; March 9, 1902, 7; March 11, 1902, 6; May 27, 1902, 2; August 23, 1902, 6; Oct. 14, 1902, 4; Oct. 22, 1902, 8

139. Blackmar, *Kansas, A Cyclopaedia*, III, 670–72; Berrett, *Who's Who in Topeka*, 45–46; *Topeka Colored Citizen*, Feb. 10, 1898, 3. Gleed was so often disloyal to the Republican party that the *Topeka Daily Capital*, Oct. 29, 1902, 3, reported that when he asked a party loyalist for his support, claiming to have voted Republican before the worker had been born, the worker refused, replying, "That may be true, but the trouble is that you have never voted it since."
140. Contrasting the Ministerial Union's activism in favor of coerced *Bible*-reading with its actions on segregation, Clemens asked rhetorically, "[H]as the Ministerial union passed any resolutions about this attempt to exclude part of God's children from the best schools because God was so thoughtless as to give them dark skins? . . . It is so much easier and safer to denounce saloons than to run counter to a strong popular prejudice. . . I rebel against this entire spirit. The Pharisees must go." *Topeka Daily Capital*, March 5, 1902, 1, 2.
141. Reynolds depositions, in Reynolds Case File.
142. The first sentence of Section 2 of the Bill of Rights read: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Article 6, section 2 commanded the legislature to "encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate and university departments." Thorpe, *Federal and State Constitutions*, II, 1242, 1252.
143. These technical issues are treated in *Reynolds*, 275–76.
144. *Topeka Daily Capital*, May 25, 1902, 8.
145. The seven justices, all Republicans, who sat in *Reynolds* were Rosseau A. Burch, born in rural Indiana in 1862 and a graduate of the University of Michigan Law School; Edwin W. Cunningham, born in 1842 in rural north central Ohio and a longtime resident of Emporia, Kansas; Adrian L. Greene, born in the tiny Mississippi river town of Canton, Missouri, in 1848, who practiced in the metropolis of Newton, Kansas for 31 years before his appointment to the supreme court; William A. Johnston, Canadian-born of Scotch-Irish immigrant parents, a member of the Kansas house and then senate in 1876 to 1880, state attorney general from 1880 to 1884, and justice of the supreme court since then; Henry F. Mason, born in Racine, Wisconsin in 1860, a newspaper editor, lawyer, county attorney, and state legislator who happened to be chairman of the judiciary committee when four vacancies on the supreme court opened up; John C. Pollock, born in eastern Ohio near Wheeling, West Virginia in 1857, who moved successively to Iowa, Missouri, and Kansas and primarily represented railroads, banks, and other corporations; and William R. Smith, born in rural northern Illinois in 1853, another Michigan Law School graduate who practiced in Atchison. See *Topeka Daily Capital*, May 25, 1902, 8; Inman, "Supreme Court of Kansas," 321–42; Berrett, *Who's Who in Topeka*, 15, 48, 64, 82; Blackmar, *Cyclopaedia of Kansas*, II, 36; 76 Kans. vi – x (1908).

146. After first construing "common schools" to be merely elementary schools, he allowed for the purpose of argument that the phrase might be interpreted as "common to all students." *Reynolds*, 277.
147. Burch quoted extensively from *Cory v. Carter*, 48 Ind. 327 (1874). The extremely racist 1851 Indiana document, which banned blacks from further entry into the state, required the legislature "to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide by law for a general and uniform system of commons schools, wherein tuition shall be without charge, and equally open to all." Thorpe, *Federal and State Constitutions*, III, Art. 7, section 1, p. 1086. Compare the 1859 Kansas constitution, Art. 6, section 2, in *ibid.*, III, 1252.
148. *Reynolds*, 277.
149. *Tinnon*, 23; *Reynolds*, 278–79, quoting from *Roberts v. Boston*, 5 Cush. 198 (1849).
150. *Reynolds*, 279–80, quoting from *Garnes v. McCann*, 21 Ohio St. 198 (1871); *King v. Gallagher*, 93 N.Y. 438 (1883); *Ward v. Flood*, 48 Cal. 36 (1874).
151. On arguments from silence, see my "Expert Witnesses, Rational Choice, and the Search for Intent," *Constitutional Commentary* (forthcoming, summer, 1988), and references cited therein. In at least three instances — *Cory v. Carter*, *Bertonneau*, and *Gazaway v. Springfield, Oh.* (C.C.S.D. Ohio, 1882, case no. 3200, unpublished) — blacks began efforts to appeal to the U.S. Supreme Court, but abandoned them. In *Gazaway*, the explicit reason for abandonment was financial. See my *Dead End*, 50, n. 70.
152. *Reynolds*, 281, quoting *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).
153. *Reynolds*, 281.
154. This was hardly the end of the struggle in Kansas. Besides the cases cited in table 2, blacks won *Woolridge v. Galena*, 157 Pac 1184 (1916), and *Ulysses A. Graham v. Topeka*, 114 Pac 2nd 337 (1941). It is interesting to note that the lead lawyer in *Graham*, J. L. Hunt, had assisted Gleed in *Reynolds*, nearly forty years earlier. There were no doubt other cases that I have missed or that were not reported.
155. Brennan, "Bill of Rights and the States," 266.