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NEGRO SEGREGATION IN NEBRASKA SCHOOLS—1860 TO 1870

James A. Lake*
Richard Hansen**

During the October 1952 Term of the Supreme Court of the United States, the Court heard oral argument in five cases involving attacks under the Fourteenth Amendment upon the practice of segregating Negroes in public schools in various states. On June 8, 1953, the Supreme Court restored the cases to the docket and assigned them for reargument on October 12, 1953, which date was later extended to December 7, 1953, at the request of the Attorney General of the United States. The Court requested counsel to discuss particularly five questions.[1] The first two were:

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

In order to accomplish the large research task necessary to answer these questions, counsel for the Negro petitioners secured assistance from persons in each of the thirty-six states which ratified the Fourteenth Amendment. It was requested that the research cover such facts as: whether or not public schools existed in the state at the time the Amendment was ratified; what treatment was accorded Negroes under the statutes and constitutions at that time; what legislative history there was concerning the actual ratification of the Amendment by the state; and the situation with respect to Negroes immediately after the state ratified the Amendment. The writers undertook to

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[1] Brown v. Board of Education of Topeka, Kansas, 73 Sup. Ct. 1114 (1953); Briggs v. Elliott, 73 Sup. Ct. 1115 (1953); Davis v. County School Board of Prince Edward County, Virginia, 73 Sup. Ct. 1116 (1953); Bolling v. Sharpe, 73 Sup. Ct. 1117 (1953); Gebhart v. Belton, 73 Sup. Ct. 1118 (1953).

answer these questions for the State of Nebraska and the following is the result of their research.

Introduction

It is not surprising that during the period of 1863 to 1870 there is very little mention of the problem of Negroes attending public schools (either segregated or non-segregated) in either the official publications of the Nebraska Territory or the State of Nebraska or the unofficial publications such as the daily and weekly newspapers of the time. This almost total lack of discussion may be attributed to two factors: (1) The public school system was not yet very well established, and (2) there were only a small number of Negroes in the territory and the state.

In 1855, records show the opening of the first school in Omaha, a private school.[2] Omaha established its first public school in 1859,[3] but this system soon decayed, and the present Omaha system had its beginning in 1863, little more than three years before the Federal Congress passed the Fourteenth Amendment.[4]

"The census of 1860 reported only 82 Negroes residing in the Territory of Nebraska."[5] This number seems somewhat open to suspicion since many of the slaves of the bordering Kansas Territory and the slave state of Missouri found their way into the Nebraska Territory where they hoped to be free.[6] Most of them, however, went on to Iowa which was a free state and then on to Canada. In view of the doubtful status of a colored person in the Territory of Nebraska, it is understandable why they did not stand up and be counted by the census taker. There was no industry or other occupation in the territory which required the use of slaves for its existence and thus slave owners did not come to the area with their slaves. Furthermore, the territory was settled by northerners who sympathized with the cause of abolition and no slave owner would dare to run the risk of losing his "property" by coming to the territory. Especially was this true after January, 1861, when the Territorial Legislature passed a bill which prohibited slavery or involuntary servitude in the territory, even though it provided no penalty for a violation.[7]

[2] Newton, History of Education in Omaha, 3 Nebraska State Historical Soc'y Transactions and Reports 59 (1892).

[3] Ibid.

[4] See Nebraska Blue Book 365 (1952), for a chart showing the number of schools and school children in Nebraska during these early years.

[5] Preliminary Report on 8th (1860) Census 134 (G.P.O. 1862) (free colored, 67; slaves, 15: total, 82); see Hess, The Negro in Nebraska, Masters Thesis, University of Nebraska, (1932).

[6] Rich, Slavery in Nebraska, 2 Nebraska State Historical Soc'y Transactions and Reports 92; 96 (1887).

[7] Neb. Laws p. 43 (1861-1865).

Such were the conditions at the time Nebraska ratified the Fourteenth Amendment and at the time it became a state.

Ratification of the Fourteenth Amendment

The available published materials dealing with Nebraska's ratification of the Fourteenth Amendment give no clue as to what meaning the state officials gave the words it contained. Governor Butler recommended ratification in his message to an extra session of the State Legislature, May 17, 1867. In submitting the proposed amendment, the Governor stated:

> This proposed amendment, which if ratified will constitute the fourteenth article of the Constitution, embodies in a few short, but comprehensive sentences the essence of the lesson taught the American people during the terrible agony of civil war.
>
> In extending the right of citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," and prohibiting the denial of the equal protection of the laws to any such person, it accepts fully, and forever vindicates by the solemn pledge of a nation the idea that was the cornerstone of American Independence, but has been for a time rejected by the builders of the national superstructure.[8]

Governor Butler also mentioned the Amendment in his first inaugural address delivered July 6, 1866, as follows:

> The amendments to the Constitution of the United States, recently passed by Congress, and submitted to the action of the several States, to which I have already incidentally referred, should, in my opinion, be acted upon during your present session. It is the embodiment of the reconstruction policy of Congress, a policy long considered and carefully digested, and which is apparently the wisest, the most expedient, and the most conformable to the spirit of our free institutions of any that has been suggested, or that can be adopted. It gives a promise of an early solution of the main questions that have threatened the national life, and if fully carried out in letter and spirit, will, as I think, restore harmony and concord to the national counsels, and reaffirm in our Constitution the fundamental principles enunciated in the Declaration of Independence, that all men are created free and equal.[9]

On June 8, 1867, the House passed the resolution to ratify and on June 14, 1867, the Senate did likewise.[10] If there was any discussion of the intent of the drafters of the Amendment or any statement of the members of the state legislature as to what they understood the Amendment to mean, there is no official record of it. The unofficial

[8] Sen. Journal 57 (3d Prov. Sess. 1867); House Journal 74, 75 (3d Prov. Sess. 1867).

[9] Sen. Journal 13 (1st Prov. Sess. 1867); House Journal 15 (1st Prov. Sess. 1867).

[10] Sen. Journal 163 (3d Prov. Sess. 1867); House Journal 148, 149 (3d Prov. Sess. 1867).

sources such as newspapers likewise contain practically no discussion of the ratification of the Amendment. Neither the *Omaha Herald* nor the *Omaha Weekly Republican* make much more than passing reference to the fact that the Amendment was considered by the legislature. Since Omaha was then the seat of the state government it would seem that if any thing of importance was said on the floor of either the House or Senate at the time of the ratification these papers would have carried it.

Constitution of Nebraska

The history of the adoption of the Constitution of the State of Nebraska perhaps affords some indication of the tenor of the times and in turn possibly some inkling of what Congress and the state legislators thought the Fourteenth Amendment meant.

The territory of Nebraska was organized under an Organic Law which limited the suffrage to ". . . every free *white* male inhabitant above the age of twenty-one years."[11] In 1860 the question of organizing the territory as a state was submitted to the voters who defeated the proposal. In 1864 Congress, at the request of the Ninth Territorial Legislature, passed the Nebraska Enabling Act, and pursuant to this act a constitutional convention was held in June of 1864. The convention met, but after completing its organization adjourned *sine die* and no constitution was ever written. In 1866 the Eleventh Territorial Legislature passed a joint resolution calling for the preparation of a constitution. This constitution was prepared ". . . in a lawyer's office by a few self-appointed individuals."[12] The constitution limited the suffrage to "free *white* males" just as did the original Organic Act. Congress passed a bill admitting Nebraska under this constitution in July of 1866 but President Johnson allowed the bill to die by a pocket veto. In January of 1867 Congress, having reassembled, passed another bill admitting Nebraska but added the fundamental condition that Nebraska should amend her constitution so as to prevent the ". . . abridgement or denial of the exercise of the elective franchise or of any other right to any person by reason of race or color, excepting Indians not taxed." Congress was determined this time and although President Johnson again vetoed the bill, it was passed over his veto. Congress provided that the legislature of the territory should give its consent to the fundamental condition, and the territorial officials proceeded to get that consent.[13]

[11] 10 Stat. 277, 279 (1854) (italics added).

[12] Judge Crounse in Brittle v. People, 2 Neb. 198, 211 (1873).

[13] See Sheldon, Nebraska, The Land and the People, 364 (1931); State Historical Soc'y, Messages and Proclamations of the Governors of Nebraska 204 (1942).

The endorsement of the momentous third section of the bill was not a very palatable dose for some of the Nebraska legislators, even among the Republicans. Governor Saunders thought it advisable in his message to make a few soothing remarks in regard to it.
". . . That a great revolution or change in the minds of the people of our whole country, in regard to granting equal and exact justice to all men, irrespective of race or color, is in proof before us, not only by the action of Congress, but also by the action of the people themselves in a large majority of the states of the Union. My opinion is that this liberal spirit is rapidly on the increase among the people in our own territory, and if such should be your own belief, it would cause you to have much less hesitancy about accepting the conditions proposed than you might otherwise have."

The condition was, however, approved by the legislature on February 20, 1867, and on March 1, 1867, President Johnson proclaimed Nebraska a state. Thus Nebraska came into the Union with a provision in her own constitution prohibiting the state denial of the elective franchise "or any other right" to Negroes.

In *Brittle v. People*,[14] the Nebraska Supreme Court was faced with a case where a defendant convicted of burglary appealed contending that a Negro juror who took part in the trial was not a competent juror. The statutes stated that all free white males and none others were competent jurors in the state. The attorney for defendant contended that this statute was contrary to neither the Fourteenth Amendment nor the condition which had been attached to the Nebraska Constitution by Congress. The defendant's counsel agreed that by virtue of the Fourteenth Amendment Negroes were citizens, but contended that the rights which were protected by the Amendment were only the so-called "fundamental rights," such as those mentioned in the Bill of Rights, and not political rights, such as the right to vote and the right to serve on juries. And likewise he argued that the fundamental condition attached to the Nebraska Constitution did not encompass political rights but instead referred only to the fundamental rights—personal liberty, personal security, and the right of private property. The Nebraska Court held that the statute limiting jury service to white males contravened the fundamental condition attached to the Nebraska Constitution:

> The right to sit on the jury is not a natural right that can be demanded at the hands of the Court. What I contend for is, that there is no right to discriminate because of color. . . .
>
> Disguise it as we will, when we say that black men shall not sit upon juries, it is because they are black, and is an insult to the race. This is a clear violation of a political right which Congress secured to the colored man when we were admitted. Until you put him on an equality

[14] 2 Neb. 198 (1873).

in the race for honor, distinction, and preferment, we have infringed his rights.[15]

Thus the fundamental condition was a very far reaching provision in the Nebraska Constitution and secured to the colored person political rights as well as personal rights.

Although there is no mention of it in the literature of the day, it is possible that the reason there was so little discussion of the Fourteenth Amendment at the time of its ratification by the state was because all of provisions contained in it were already binding upon the the state because of their presence in the fundamental condition. Negroes were permitted to vote at the early elections and since that time there has never been any denial of the elective franchise because of color.

In his first inaugural message, Governor Butler seemed clearly to believe that the fundamental condition attached to the Nebraska Constitution had the same meaning as the Fourteenth Amendment:

> Another argument used against the Constitution was of a very different nature, and was found in the instrument itself, in the clause defining the extent of the elective franchise. But this vexed question seems now about to be placed beyond the reach of agitation by an amendment to the Constitution of the United States which has already passed Congress, and now awaits the ratification of two-thirds of the States, which will in due course of time permanently settle the political status of the African.[16]

The Fourteenth Amendment had been passed by Congress on June 14, 1866, just a short time before his message which was delivered on July 6, 1866.

School Laws

The best evidence as to what the state officials thought the Fourteenth Amendment accomplished may be found in the history of the school laws of the state and the inferences which may be drawn from the amendments made to them. From this history it may be concluded that during the year 1867, the year Nebraska ratified the Amendment, Nebraska officialdom decided that it was time that the school laws be changed to put a stop to the segregation which up to that time had been the practice in the state. Whether this change in attitude came about because it was felt that the Fourteenth Amendment required it, or because it was thought that the fundamental condition required it, or perhaps for some other reason, is impossible to tell. But it seems extremely relevant that during the same year in which the state

[15] Id. at 224.

[16] 1 State Historical Society, Messages and Proclamations of the Governors of Nebraska 263 (1942).

ratified the Fourteenth Amendment it changed its school laws so as to eliminate discrimination against Negroes in educational opportunity. The following summarizes the history of the change.

In 1855 the territorial statutes required the secretary of each district "... to make out and file in the office of the county superintendent, a report of the affairs of the district, containing: FIRST.—The number of *white* persons between the ages of five and twenty-one years."[17] Such a provision was also contained in the school law passed by the second Session of the Territorial Legislature.[18] The fifth Session of the Territorial Legislature in 1858 provided that:

> It shall be the duties of the directors ... to take ... an enumeration of all the unmarried *white* youths ... between the ages of five and twenty-one years.[19]

Section 60 of that same act provided:

> For the purpose of affording the advantage of a free education to all the youth of this territory, the territorial common school fund shall hereafter consist of such sum as will be produced by the annual levy and assessment of two mills upon the dollar valuation on the grand list of the taxable property of the territory....[20]

But the sixth Session of the Territorial Legislature amended this section to provide: "For the purpose of affording the advantage of a free education to all the *white* youth of the territory...."[21] The amendment concluded: "*Provided,* that all colored persons shall be exempted from taxation for school purposes."

Thus until the year 1867 negroes were not enumerated for school purposes—nor were they taxed for school purposes. Beginning in January of 1867 there is evidence that agitation started for a change in the school laws. The first meeting of the Educational Association (the predecessor of the teacher's organization) was held in Omaha on January 9, 1867. Newspaper reports of that meeting state:

> Mr. Harvey offered the following: "Resolved, That the Legislative Assembly of Nebraska ought to amend the School Laws so as to provide for the education of colored children in this Territory."
>
> Unanimously adopted without much discussion.[22]

Mr. Harvey soon followed up his own suggestion and introduced, on January 16, 1867, in the Territorial Legislature a "Bill to Remove all Distinctions on account of race or color in our public schools." [23] The

[17] Complete Neb. Sess. Laws, 1855 to 1865, 92 (1886) (italics added).
[18] Id. at 234.
[19] Id. at 560 (italics added).
[20] Id. at 567.
[21] Id. at 642 (italics added).
[22] Omaha Weekly Republican, Jan. 18, 1867, p. 4, col 1.
[23] House Journal 71 (12th Terr. Sess. 1867).

bill was referred and then brought back amended to the assembly with reports. The minority report was filed on January 23, 1867, and reasoned:

> The bill as referred to the committee provides for the education of colored youth. It gives them all the privileges and advantages of the common school system, the means of free education, and lays the foundation of their usefulness to the extent of their ability as humble members of the body politic. To the proposition of the original bill, authorizing the boards of education to provide separate schools for colored children, the undersigned agree, and will heartily concur in any action of the House which may adopt it.
>
> But the amendment proposed by the majority of the committee contemplates the admission of colored children to our schools on an equal footing with the white youth. This is reaching too far in advance of the age. The people of Nebraska are not yet ready to send white boys and white girls to school to sit on the same seats with negroes; they are not yet ready to endorse in this tacit manner the dogma of miscegenation; especially are they yet far from ready to degrade their offspring to a level with so inferior a race.
>
> The undersigned do not believe the intention of the majority of the committee can be carried out by the people; and we do not believe that the legislative assembly should force upon people a measure so obnoxious to their wishes and habits and the established principles of political equity.[24]

On February 6, 1867, the bill was made a special order of business in the council and the following transpired:

> Special Order taken up—Being H.B. to strike out the word "white" from the school laws.
>
> Wordell moved its indefinite postponement. Motion lost.
>
> Bates moved to strike out "white" and insert "black." Motion not seconded.
>
> Reeves offered to amend the bill thus: Provided, that nothing herein contained shall authorize the education of black children in the same room with white children.
>
> Presson moved to amend the amendment of Reeves by adding Where-ever there are two rooms in the school house.
>
> Presson's amendment lost.
>
> Reeves' amendment lost.
>
> Bill ordered to a third reading tomorrow.[25]

The bill eliminating segregation passed the House twenty-five to ten[26] and passed the Council by a vote of ten to three.[27] At the time, Territorial Secretary A. S. Paddock was acting governor in the absence of Governor Saunders from the territory and he vetoed the bill with the following message:

[24] House Journal 95 (12th Terr. Sess. 1867) (The majority report seems to be unavailable.).

[25] Council Journal 147 (12th Terr. Sess. 1867).

[26] House Journal 105 (12th Terr. Sess. 1867).

[27] House Journal 214 (12th Terr. Sess. 1867).

> The amendments to the present school law, provided for in this act, contemplate the enumeration of the colored youths and the taxation of colored persons in the Territory, for school purposes. I cannot think it was the design of the Legislative Assembly to accomplish only these things by this act. I am quite sure that it was intended to give to the children of colored persons who are to be taxed for school purposes the privilege of education at the public expense; yet the act itself does not sanction this.
>
> You will agree with me that all who are thus taxed should be allowed their proportion of the school fund for the education of their own children. Any other relief would be oppressive and unjust. I shall gladly unite with the Legislative Assembly in the enactment of a law providing for education of the colored youths of the Territory, as well as for the taxation of the colored persons for school purposes. Permit me, however, to suggest that better results could be expected in the education of both white and colored youths, if separate schools could be provided for each.
>
> Much as we may regret it, we cannot close our eyes to the fact that a strong prejudice exists in the public mind against the intimate association of the youths of the two races in the same public schools, which no amount of legislation can eradicate. It can not be otherwise, than that in the populous towns, contentions will arise between the two classes which must certainly retard the educational advancement of both.
>
> I think we should act wisely, if, in changing the law so that children of this unfortunate class of our fellow citizens who are now excluded are to receive education at public expense, we should provide for separate schools where the number of the scholars is large enough to warrant it. This should not be compulsory, but optional with the citizens of the locality specially interested.[29]

The House directed its sergeant-at-arms to return the bill to Mr. Paddock because Governor Saunders had returned to the territory on the date of the veto message, but Governor Saunders declined to interfere. The House made no attempt to override the veto. One author has stated the purpose of the bill and its defect as follows:

> The intent of the amendment plainly was to throw open the public schools to Negro children, but possibly Acting Governor Paddock was right in assuming that, though they were to be enumerated and the property of Negroes was to be taxed with that purpose in view, yet, without a positive provision in the law that these children should be admitted to the schools, they would be excluded.[29]

As soon as Nebraska was admitted Governor Butler called a special session of the State Legislature. In it he stated that one of the purposes in calling the session was to consider ". . . revision or amendment of the school law."[30] He then went on to state in his message to the special session:

[28] House Journal 253, 254 (12th Terr. Sess. 1867).
[29] 2 Morton, History of Nebraska 60 (1906).
[30] 2 Complete Neb. Sess. Laws, 1866 to 1877, 351 (1867).

> Your most earnest attention is therefore invoked, that no pains may be spared to render Nebraska second to no other state in the facilities offered to all her children, irrespective of sex or condition, to acquire, not only the rudiments of education, but to erect upon a broad foundation, a superstructure of solid attainments in art, literature and science.[31]

During that session of the legislature the school laws were amended so as to give colored children the right to attend public schools. The enumeration was to be "... of all the children ... between the ages of five and twenty-one years."[32] This language was again contained in the school laws passed in 1869 and the legislature at that time established a two mill tax "... for the purpose of affording the advantages of a free education to all the youth of this state. ..."[33] From that time on, the schools laws have contained no language discriminating against colored children.

During the fall of 1867 (after Nebraska had been admitted with the fundamental condition attached and after the state had ratified the Fourteenth Amendment but before Nebraska had removed all of the discrimination against colored children in the school laws) there is evidence that negroes were taken into non-segregated public schools along with white children in Nebraska City.[34] And there is some other evidence showing that negroes attended other public schools in the state even as early as 1865:

> As early as 1865 Negroes enrolled in the Public Schools of Omaha. The first Negroes to graduate from Omaha High Schools were Harry Curry and Comfort Baker, in 1880.[35]

Conclusion

Although there is nothing directly tending to show the thoughts in the minds of the state legislators at the time they ratified the Fourteenth Amendment, the evidence would seem to indicate that the temper of the time (the year 1867) was to modify the school laws of the state so as to eliminate segregation. Since this was done during the same year that Nebraska became a state and the same year that it ratified the Amendment, such evidence is an indication that the words of the Amendment were in accord with the steps being taken in the state to modify the school laws.

[31] Sen. Journal 52, 53 (3d Prov. Sess. 1867).

[32] 2 Complete Neb. Sess. Laws, 1866 to 1877, 385 (1867).

[33] Id at 451, 453.

[34] Nebraska City News, Aug. 26, 1867, p. 3, col. 1; Nebraska City News, Sept. 4, 1867, p. 3, col. 1.

[35] Omaha Urban League, The Negroes of Nebraska 33 (1940) (no documentation given).