PROTECTING WHITE PRIVILEGE: A LEGAL HISTORICAL ANALYSIS OF DESEGREGATION IN KANSAS, 1881-1951

by

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(Under the Direction of Ronald E. Butchart)

ABSTRACT

This legal history of desegregation in Kansas traced how a social movement working toward the attainment of equal educational opportunities was replaced by a discourse of desegregation. It addressed the following research questions. (1) How were educational practices and policies related to the schooling of African Americans produced in Kansas from 1850-1949? (2) How was a social movement working toward the attainment of equal educational opportunities replaced by a discourse of desegregation? (3) How did legal discursive practices protect white privilege in the struggle to desegregate education? This study found that the simplification of the struggle for equality of educational opportunity into the issue of desegregation neglected the contingent foundations on which the legitimization of power is constructed and failed to take into account the shifting and contested terrain of the ideological battle regarding identity politics in the United States. Additionally, legal discursive practices operated in ways that controlled the parameters of the Kansas Supreme Court decisions as a result protected white privilege. The legal "both/and" space created by the *Brown II* decision provided a mechanism through which the hegemonic practices of white privilege could be reinvented in ways that both satisfied the legal mandates of desegregation, and protected "white" power and privilege. Finally, the discourse of desegregation protected

white privilege by allowing it to sidestep how race, class and gender intersect and impact equal educational opportunities and focus on numbers , not quality of education. As a result, many impoverished children and children of color are left behind pleading for an equal education.

INDEX WORDS: African American Education, Segregation, Desegregation, Legal History, Kansas History

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Dedicated to

Joseph Theodore Surber, II
My Nephew

September 12, 1983 - November 28, 2002

I'll always remember when you were three and I taught you to pronounce "Joseph"; the weekend bike treks to various locations on many sunny afternoons; all the times you insisted on calling me, "mom", instead of aunt; the times I was there to keep you out of trouble, and the time I wasn't. You always brought a smile to my face. Now, you've taught me life is fragile and not to take tomorrow for granted. I shed a tear for you every day. You're my inspiration for complicating notions of whiteness.

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CHAPTER ONE

INTRODUCTION

The issue of segregation was to be regarded as an important part of the problem, but it was not to be regarded as the whole of the problem, nor even as the central issue. Even if, by some miracle, every school in the country could be desegregated overnight, the basic problem...would still remain. This basic problem is that of providing equality of educational opportunity.[1]

May 17, 2004 marked the fiftieth anniversary of the United States Supreme Court decision in *Brown v. Board of Education of Topeka, Kansas* (1954), which held that separate, but equal schools were inherently inferior.[2] The *Brown* decision, as well as the enactment of the 1964 Civil Rights Act, bolstered efforts to dismantle inequality in educational opportunity through the desegregation of public schools. However, many scholars have addressed the inadequacies of desegregation practices, which rely on measures that quantify efforts to integrate education, such as racially balanced schools, rather than efforts that focus on the quality of the education received in said schools.[3] Gary Orfield asserted, "we are clearly in a period when policymakers, courts and opinion makers assume that desegregation is no longer necessary.... Polls show that most white Americans believe that equal educational opportunity is being provided."[4] However, a report issued in 2001 by the Civil Rights Project of Harvard University

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[1] Archibald W. Anderson, Forward, pp. ix-xiv. In Virgil A. Clift, Archibald W. Anderson and H. Gordon Hullfish, eds., *Negro Education in America: Its Adequacy, Problems, and Needs* (New York: Harper & Brothers Publishers, 1962), pp. x-xi.

[2] *Brown v. Board of Education of Topeka, Kansas*, 98 F. Supp. 797 (1951), 347 U.S. 483 (1954), 349 U.S. 294 (1955).

[3] Derrick A. Bell, "*Brown v. Board of Education* and the interest convergence dilemma," *Harvard Law Review* 93: 518-533; Carl A. Grant, "Reflections on the promise of *Brown* and multicultural education," *Teachers College Record* 96(4), pp. 706-721, 1996. M. J. Shujaa, Ed. *Beyond Desegregation: The politics of quality in African American schools* (Thousand Oaks, CA: Corwin Press, 1996); Gary Orfield and Susan E. Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (New York: The New Press, 1996).

[4] Gary Orfield, *Resegregation in American Schools* (New York: The New Press, 1999), p. 21.

indicated that public schools during the 1990s were growing more segregated.[5] Current desegregation practices are lacking particularly in their effectiveness as a means of rectifying the legacy of *Plessy v. Ferguson* (1896), which legitimated the structure of inherent inferiority by pronouncing that the provision of separate, but equal facilities did not violate the Fourteenth Amendment's equal protection clause.[6]

This interdisciplinary study explores how a social movement working toward the attainment of equal educational opportunities was replaced by a discourse of desegregation. It accomplishes this goal by examining how segregated education, rather than unequal educational opportunities, came under the gaze of the legal and educational fields as a social problem by considering the following research questions:

(1) How were educational practices and policies related to the schooling of African Americans produced in Kansas from 1850-1949?
(2) How was a social movement working toward the attainment of equal educational opportunities replaced by a discourse of desegregation?
(3) How did legal discursive practices protect white privilege in the struggle to desegregate education?

Drawing from the disciplinary fields of history, law, and philosophy to consider the complex issue of equal educational opportunities, this interdisciplinary approach allows consideration of the tensions created by the intersections of a democratic political structure and a capitalist economic structure.

Tracing how segregated education was constructed as a social problem troubles current discussions of the sociopolitical and historical contexts of education for marginalized groups. I argue that the simplification of the struggle for equality of educational opportunity into the issue of desegregation of education neglects the contingent foundations on which the legitimization of

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[5] Gary Orfield, "Schools More Separate: Consequences of a Decade of Resegregation," *Rethinking Schools* Vol. 16(no. 1, 2001):14-18.
[6] *Plessy v. Ferguson*, 163 US 537 (1896).

power is constructed and fails to take into account the shifting and contested terrain of the ideological battle about identity politics in the United States. Understanding how an issue becomes constructed as a problem is important because it influences not only the questions asked, but also the remedies that can be crafted as solutions. Framing the issue as one that was primarily concerned with the separation and isolation of the races, allowed the power elite to craft remedies that were palatable to and consistent with the goals of whiteness.[7] This also allowed the power elite to define the problem as one related to the politics of socialization and the need to dismantle Jim Crow laws that legitimated segregation. This narrow definition of the issue allowed the power elite to subvert attention from the consideration of additional underlying political and economic factors related to the allocation of power and economic resources, such as the existence of second class citizenship status and an economic structure dependent on a class of workers who provide a cheap labor force.

While legally sanctioned segregation was a serious problem that needed to be addressed, I argue that, in the context of educational practices, the treatment of segregation as the primary problem has resulted in many communities still pleading for an equal education. As the discourse of desegregation became permeated with the discourse of whiteness, the initial plea for equal education was transcended into a plea for integration and assimilation. By examining how segregated education was constructed as a problem in Kansas, this study provides insights into why desegregation policies focus on issues such as racially identifiable schools, rather than the quality of education that children receive within schools. It also examines why desegregation

[7] For lack of a better term, I use "whiteness" throughout this work to refer to a theoretical concept, which constructs, maintains and reinvents the positions of power and privilege occupied by the "white" power elite. By deploying whiteness in this manner, I attempt to complicate current research conducted through the use of a critical whiteness theoretical frame, a relatively new frame for inquiry that traces its roots to critical legal theory and critical race theory.

provided a mechanism through which the existing power structure could reinvent itself in ways that enabled it to maintain power and privilege.

This study challenges readers to consider that which it is impossible to think in a nation built on notions of democracy, equality, liberty and justice for all - that systemic and structural inequalities exist. I revisit the propositions raised by Gunnar Myrdal in *The American Dilemma*, that pointed to the nation's inability to acknowledge that the political and economic structures of the United States created, legitimized, and reinvented inequalities, which were, and still are, imbedded within the intersections of capitalism with race, class, caste, and gender. The roots of these inequalities can be traced to both the legal documents that gave rise to the birth of this nation, such as the Declaration of Independence and the United States Constitution, as well as the economic structures, such as slavery and capitalism, which promoted the financial growth of our nation. In the following section, I provide a discussion of whiteness as used in this study and describe its role in creating and perpetuating the fallacy of equality.

Whiteness and the Fallacy of Equality

Historically, legal discursive practices developed within a system of whiteness; a structure that maintained and protected the interests of the power elite. "Whiteness" refers to a normalizing system that constructs, maintains, and reinvents the positions of power and privilege occupied by the "white" power elite. It also refers to a theoretical frame for inquiry that traces its roots to critical legal theory and critical race theory. In my study, I draw from the work of Roedigger and others who are beginning to look at the shifting sites and fluid constructions of whiteness.[8] By deploying whiteness in this manner, I attempt to complicate current research

[8] David Roedigger, *The Wages of Whiteness: Race and the Making of the American Working Class, Revised Edition* (London: Verso, 1999); Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 1995); Matt Wray and Annalee Newitz, Eds. *White Trash: Race and Class in*

conducted through the use of a critical whiteness theoretical frame, by adopting a stance that attempts to de-center, de-stabilize and de-naturalize whiteness by rejecting the essentialization of whiteness. When whiteness is essentialized, the complexity of whiteness is neglected, resulting in a failure to capture the ways power is implicated in constructions of whiteness. It fails to consider both the ways that one can lose his/her "whiteness" and the ways that those who are not white in identity may in certain contexts act white and benefit from and become a part of the power elite. For example, within the George W. Bush regime, Condelezza Rice, Rod Paige, and Colin Powell are examples of individuals who have act white. Sociologists Signithia Fordham and John Ogbu studied the youth culture's recognition of the phenomenon of people of color acting "white" and the impact this has on educational opportunities. Some youth reject the culture of school to avoid being perceived by their peers as acting white.[9]

It is important to understand whiteness as a normalizing system because, in addition to being an identity category, whiteness has served as a social structure that produces and perpetuates oppressive norms. Equally important to this theoretical perspective is an understanding of the complexity or layers of whiteness, for this provides insights into the power elite that legitimatizes and polices, those who reap the most benefits from the social structure. While I acknowledge that all "whites" benefit from institutionalized privilege, I also recognize the privileges of whiteness are not shared on an equal basis by all white people. One's ability to fully share in the power and privilege associated with whiteness is complicated by the other identity positions one occupies with regard to class, gender, and sexual orientation.

America (New York: Routledge, 1997); George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (Philadelphia: Temple University Press, 1998); Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, Massachusetts: Harvard University Press, 1998).

[9] Signithia Fordham and John Ogbu, "Black students' school success: Coping with the Burden of Acting White," *The Urban Review* 18(3), pp. 1-31, 1986.

The essentialization of whiteness precludes the examination of the hegemonic practices undergirding the legitimacy of the power elite. The term hegemony refers to a means of social control that "exists in the form of social consensus created by dominant groups who control socializing institutions...[that] prevent alternative views from gaining an audience or establishing their legitimacy."[10] The following represents three of the hegemonic tenets of whiteness: (1) meritocracy and the myth of power and privilege, (2) the coalition of color, and (3) the perpetuation of prejudice and racism.

Meritocracy and the myth of power and privilege is a mechanism used to create social consensus. The hegemonic discourse of meritocracy equates success with hard work. Alternative views about systemic factors that may lead to success, such as the life chances which privilege may bestow upon the upper and middle class, are prevented from entering into the discourse. Growing up white, one is led to believe that through hard work one will gain access to power and privilege.[11]

The coalition of color is a mechanism of control used by the power elite to control all whites by creating the color bind. Through the messages received from the family and the community, white children are taught to believe in and adhere to the color bind; the notion that because of your skin color, "you are one of us." The coalition of color is used to divert attention away from the power elite's economic and political exploitation of poor and working class whites by stressing the importance of being white over the alternative, "being one of them."[12]

The power elite has a vested interest in maintaining and perpetuating prejuduce and racism, particularly among poor and working class whites, for two reasons. First, prejudice and

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[10]Kathleen deMarrais, and Margaret LeCompte. *The Way Schools Work: A Sociological Analysis of Education, 3rd edition* (New York: Longman, 1999), p. 319.
[11] Roedigger, pp. 43-60.
[12] Roedigger, pp. 23-26.

racism are used to maintain control and reinforce the social order. They serve as the mechanism through which the minority – the power elite – is able to maintain its dominion over the majority. As such, prejudice and racism are used to discipline poor and working class whites. The second reason for perpetuating prejudice and racism relates to the role they play in serving as a wedge that keeps whites and people of color from forging coalitions around common economic and political issues.[13]

The infiltration of the United States legal system by women and people of color is a recent occurrence. Thus, historically, the legal system has performed the task of pronouncing rules and establishing precedents that have protected white privilege. The United States Constitution has beenused to legitimate white supremacy by conferring second-class citizenship status on the basis of race, class, gender and sexual orientation due to the parameters and limitations it placed on citizenship. Initially, the United States Constitution's definition of citizen was limited to white, propertied males. Women, men who did not own property, Native Americans, and enslaved Africans were denied suffrage rights, and therefore could not exercise or exert political power. The first naturalization laws allowed only white immigrants to become citizens. The perceived racial inferiority of enslaved Africans was expressed in the provisions of the Constitution specifying that they constituted three-fifths of a person.[14]

The fallacy of equality is rooted within the discourse of colonial times and is based on assimilation to the status quo. The language of the Declaration of Independence pronounced this "self evident truth" by declaring that "all men are created equal." Since colonial times, the measure of equality has been based on how one compares to the privileged class. Even the Bill of

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[13] Roedigger, p. 31-36.
[14] Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

Rights, which was enacted to protect minority rights, have been upheld in such a way as to limit access to their enjoyment to those individuals within the minority who are willing to accommodate or assimilate to the norms of whiteness.

Equality then became equated with "middle class" ideals and values. To be equal in the United States and entitled to enjoy the rights and status afforded to the privileged class (i.e., straight, white, middle class males), one must be willing to align with and adopt the norms and values of the status quo.[15] The parameters around equality have been further delineated through federal legislation and judicial decisions. I now turn to a discussion of the legal discursive practices that served to enable this process of naming and defining the issue in ways that benefited the interests of whiteness.

Legal Discursive Practices

In this section, I provide a discussion of the discursive practices of the United States' legal system to highlight the ways that the structural aspects of law – the norms and rules, which govern its practice – define, legitimate, and perpetuate whiteness. These practices will be drawn on throughout this volume as a way to explain how the legal structure was both utilized and circumvented to maintain white privilege.

The United States government is based on the principle of federalism, which is the division of power between the nation and the states. While both federal and state governmental bodies can pass and enforce laws, levy taxes, and maintain courts, federal and state governments' authority to infringe on the regulatory power of the other is restricted. The Constitution of the United States is the legal document that specifies the powers and rights of the federal and state governments.

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[15] Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay & Lesbian Liberation* (New York: Anchor Books, 1995), p. 203.

The national-supremacy clause found in Article VI of the Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land*; and the judges in every state shall be bound thereby, and anything in the constitution or Laws of any state to the contrary notwithstanding [italics added].

This declaration of the supremacy of the federal government's authority acknowledges the powers vested in federal and state governments to administer their own affairs, but establishes the authority and superiority of the federal government as related to the powers vested in the federal government. Therefore, when a conflict arises between the constitution and laws of the states and the Constitution and laws of the federal government, the supremacy clause provides that the Constitution and laws of the federal government supercede those of the states and are controlling.

The Constitution also delineates those powers provided to the federal government and limits the federal government to the powers expressly granted to it in the U.S. Constitution. The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people."[16] The judicial system follows a similar scheme of supremacy, with the decisions of the United States Supreme Court carrying precedential weight in both lower level federal courts and state courts.

Perhaps of equal importance to the federal supremacy when considering the judicial system is the doctrine of *stare decisis*, which provides that "once a point of law has been established by a court, that point of law will, generally, be followed by the same court and all courts of lower rank in all subsequent cases where the same legal issue is raised."[17] This

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[16] Thirteenth Amendment, United States Constitution

[17] Appellate Courts, 5 *American Jurisprudence, 2d*, sec. 599 (Lawyers Cooperative Publishing: Danvers, MA 1995), , p. 294.

doctrine is governed by the legal principle that courts, in the absence of "powerful countervailing considerations,"[18] should reach the same conclusions and issue consistent rulings when deciding cases that involve similar facts and legal issues. Within legal practice, the doctrine of *stare decisis* serves the function of ensuring "the evenhanded, predictable, and consistent development of legal principles; fosters reliance on judicial decision; and contributes to the actual or perceived integrity of the judicial process."[19]

The principle of *stare decisis* also "is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system."[20] Generally, it is presumed that appellate courts will follow precedents established by higher courts and will depart from the stated precedent only if there exists a "compelling and urgent reason … that destroys or completely overshadows the policy or purpose established by the precedent."[21] Precedents receive further protection from the practice of appellate courts to dispose of the case on other grounds, if they exist, which alleviates the need to overrule the controlling precedent. However, the principle of *stare decisis* is not absolute, and courts take into consideration both the historical context of the prior case, as well as the similarity of the legal issues involved in the current case.

United States Supreme Court decisions are binding on Federal Courts of Appeal, "even though the judges of the Court of Appeals feel that a decision of the Supreme Court is unsound, or in error."[22] Courts of Appeal are "bound by the decisions of the Supreme Court until such

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[18] Appellate Courts, p. 294.
[19] Appellate Courts, p. 294
[20] Courts, 20 *American Jurisprudence, 2d*, sec. 147 (Lawyers Cooperative Publishing: Danvers, MA May, 2003 Supplement), citing *State Oil Co. v. Khan*, 118, S.Ct. 275, 139 L.Ed. 2d 199, (U.S. 1997, p. 68.
[21] Appellate Courts, p. 294
[22] Appellate Courts, p. 296

time as the Supreme Court informs it that the rule of the decision has been changed."[23] "A United States Supreme Court decision regarding a question of the construction or application of the Federal Constitution binds all state courts in interpreting and applying federal constitutional law."[24] Since courts apply precedents as *stare decisis* only if a judicial opinion has been rendered on a point of law,[25] dictum and dissenting opinions of Supreme Court Judges are not binding on the lower courts.[26] Likewise, Courts of Appeal are bound by their own precedents, but not by the decisions of other Courts of Appeal. Yet these decisions may serve as persuasive authority, particularly when the legal issue has not been decided by that particular court or jurisdiction. The court's jurisdiction, as well as the type of court making a judgment, impacts whether a judicial opinion constitutes binding authority or merely persuasive authority.

It is to several of the pertinent pieces of federal legislation, the 1793 Fugitive Slave Act, the 1850 Fugitive Slave Act, the Missouri Compromise, and the Kansas-Nebraska Act of 1854, and United States Supreme Court decisions in *Dred Scott* and *Plessy v. Ferguson*, that I now turn my attention. These statutes and laws are considered because of the insights they provide about the role they played in protecting white privilege as reflected in the prevailing racial ideologies of the United States.

Protecting White Privilege: Preserving Property Rights

The 1793 Fugitive Slave Act provided slaveowners with the ability to reclaim fugitive slaves through the following process. The slaveowner, or someone acting on behalf of the

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[23] Appellate Courts, p. 296.
[24] Courts, 20 American Jurisprudence, 2d, sec. 170 (Lawyers Cooperative Publishing: Danvers, MA 1995) , p. 452; *Trinkle v. Hand*, 184 Kan. 577, 337 P.2d. 665, cert den 361 U.S. 846, 4 L.Ed. 2d 85, 80 S. Ct. 81 (1959).
[25] Courts, p. 449.
[26] *United States ex. rel. Goldsby v. Harpole*, 263 F.2d 71, cert den 361 US 838, 4 L.Ed.2d 78, 80 S.Ct. 58 and cert den 361 US 850, 4 L Ed. 2d 89, 80 S. Ct. 109 (1959).

slaveowner, was "empowered to seize or arrest such fugitive."[27] The fugitive slave would then be brought before a United States District or Circuit Court judge in the state in which the fugitive slave was captured and the slaveowner or his agent had to prove his ownership "to the satisfaction of [the] judge or magistrate"[28] either through oral testimony or by affidavit. On proof of ownership, the judge issued a certificate that entitled the slaveowner to remove the individual from the state. Persons who "knowingly and willfully" obstructed the recovery of the slave or assisted in the captured slaves escape were subject to a penalty of $500.00. The judicial authority for this legislation was derived from provisions in the United States Constitution governing the return of persons owing labor or service to the individual to whom they owed the labor or service.

> It is historically well known that the clause…was to secure to citizens of the slaveholding states the complete right and title of ownership in their slaves as property…. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and indeed was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.[29]

This compromise measure ensured the perpetuation and preservation of the slave labor force on which the Southern economy was based and created a political climate that allowed a young democracy to continue to thrive. It also served as a mechanism through which federalism, national supremacy, and *stare decisis* could be used by white southern aristocrats to protect white privilege. By ensuring access to federal remedies, the interests of slavery could be protected even in state jurisdictions unsympathetic to slavery.

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[27] An act respecting fugitives from justice, and persons escaping from the service of their masters, Second Congress. Session II, Chap. 7, 1 United States Statutes At Large 302 (1793). Hereinafter referred to as the 1793 Fugitive Slave Act.
[28] 1793 Fugitive Slave Act, p. 303
[29] *Prigg v. Commonwealth of Pennsylvania*, 16 Peters 539 (1842).

Although the 1793 act mandated that states assist slaveholders in recapturing fugitive slaves, white resistance occurred in many Northern states. These states established "procedural shields against unscrupulous slave catchers, who often seized any person vaguely resembling the fugitive allegedly being sought."[30] The 1850 Fugitive Slave Act curtailed resistance to the 1793 Fugitive Slave Act efforts by many anti-slavery advocates.[31] The 1850 act was passed along with other pieces of legislation, known collectively as the Compromise Resolutions of 1849, and was introduced in Congress by Henry Clay. These measures were meant to allay the tensions that arose as a result of the massive acquisition of land by the United States after the Mexican American war. Because a majority of this land would have become free territory, the political power held by the South was threatened. The entire conglomerate of legislation resulted in the following enactments:

> the admission of California as a free state; the organization of the other Mexican acquisitions, divided into the New Mexico and Utah territories, without reference to slavery, leaving the issue to 'popular sovereignty' in those territories; resolution of disputed boundaries between New Mexico and Texas; abolition of the slave trade, but not slavery, in the District of Columbia; and adoption of a horrifically Kafkaesque Fugitive Slave Act.[32]

The 1850 fugitive slave act authorized the appointment of federal commissioners by United States District Courts and granted them absolute authority to decide fugitive slave cases. Thus, the procedural safeguards, which many states had enacted to circumvent the 1793 Fugitive Slave Act, could be bypassed based on the supremacy clause. An additional measure that

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[30] Smith, p. 261.

[31] According to John Blunt, A Kansas Wyandotte Constitutional Convention delegate, the Supreme Court of Wisconsin was the first judicial body to intervene protect freemen from the 1850 Fugitive Slave Act. Ariel E. Drapier, *Proceedings and Debates Embracing the Secretary's Journal of the Kansas Constitutional Convention, Convened at Wyandot* (sic)*, July 5, 1859, Under the Act of the Territorial Legislature Entitled An Act Providing For the Formation of A State Government For the State of Kansas* (Wyandot, Kansas: S.D. MacDonald, Printer to the Convention, 1859), p. 279.

[32] Smith, p. 262.

ensured the rights of slave-holders to recover their property was the ability of "courts in slave states…[to] issue certificates verifying the claims of … slaveholders, … [which] the federal commissioners had to accept … as unimpeachable evidence that the claimant was legitimately in pursuit of a runaway slave."[33] This certificate alleviated the need for any type of evidentiary hearing by courts in the states in which the individual was captured. A further blow to the procedural protections previously provided to fugitive slaves by the states was delivered by the measure that prohibited alleged fugitives from testifying on their own behalf.

Protecting White Privilege: Preserving the Institution of Slavery

In his *Oxford History of the United States,* Samuel Eliot Morrison describes the strategy of anti-slavery efforts from the beginning of the U.S. Government to 1831 as one in which "slavery was to be removed gradually, and with compensation to the owners of the slaves who might be emancipated."[34] The viability of this laissez faire attitude toward the institution of slavery, while threatened by the potential shift in power in favor of Southern racial ideologies due to the Louisiana Purchase, was reinforced by the enactment of the Missouri Compromise. Passed on March 6, 1820, Section 8 of the Missouri Compromise banned slavery in that portion of the "territory ceded by France to the United States, under the name of Louisiana, which lies north 36˚30' of north latitude, not included within the limits of the state contemplated by this act (i.e., Missouri)."[35] However, the enactment of the 1850 Fugitive Slave Act laid the groundwork

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[33] Smith, p. 262.
[34] Samuel Eliot Morrison, *The Oxford History of the United States* (Oxford: Oxford University Press, 1927), p. 223.
[35] *An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government and for the Admission of the State on an Equal Footing with the Original States, and To Prohibit Slavery in Certain Areas*. United States Statutes At Large, Vol. 3. p. 548 (Boston: Charles C. Little and James Brown, 1850).

for the dissolution of the Missouri Compromise, as effectuated by the enactment of the Kansas-Nebraska Act of 1854.

On May 30, 1854 the United States Congress enacted the Kansas-Nebraska Act, which repealed the Missouri Compromise.[36] This legislation was significant because it provided the people who would inhabit the territory with the ability to determine whether the new states of Kansas and Nebraska would permit slavery to exist within their boundaries. Prior to the passage of this law, the federal government had determined that both Kansas and Nebraska would be free states because these territories were north of 36˚, 3' north latitude, the boundary set by the Missouri Compromise. The federal government attempted to maintain the appearance of neutrality about slavery. The Kansas-Nebraska Act stated,

> it being the true intent and meaning of this act not to legislate slavery, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States.: *Provided*, that nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of sixth of March, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery.[37]

However, the Kansas-Nebraska Act expressly declared that the 1850 Fugitive Slave Act was in effect in the territory and its provisions were enforceable. When viewed within the larger political terrain in which the federal government was dominated by the Slave Power, the stripping away of the due process rights of fugitive slaves and the removal of the designation of these areas as "free," served as mechanisms through which to open spaces for slavery and white privilege to thrive and prosper. Suffrage rights were granted to every "free white male inhabitant above the age of twenty-one years, who shall be an actual resident of said Territory and shall

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[36] *Kansas-Nebraska Act of 1854*, United States Statutes At Large, Vol. 10. United States Statutes At Large, Vol. 3. pp. 285-290 (Boston: Charles C. Little and James Brown, 1855). Hereinafter referred to as Kansas-Nebraska Act of 1854.

[37] Kansas-Nebraska Act of 1854, p. 289.

possess the qualifications hereinafter prescribed."[38] The additional qualifications required that the men must also be citizens of the United States and take an oath of loyalty to United States and to the Kansas-Nebraska Act, implicit in which was a pledge of loyalty to the 1850 Fugitive Slave Act. So, while the "people" could determine whether the territory was to be "free" or "slave," they were still compelled to acquiesce to the desires of the institution of slavery and protect white privilege by vowing to return individuals escaping the bonds of slavery.

Protecting White Privilege: Preserving Citizenship

In 1856, the United States Supreme Court legitimated second class citizenship and protected white privilege through the decision it rendered in *Dred Scott v. Sandford*. Dred Scott, an enslaved African, sued his master, John Sandford, for his own freedom as well as that of his wife, Harriet, and their two daughters, Eliza and Lizzie. John Sandford had purchased the Scotts from Dr. Emerson. The Scotts claimed they became free during the time that Dr. Emerson owned them by virtue of Illinois law and the Missouri Compromise. In 1834, Emerson took Scott to the military post at Rock Island in Illinois. At the time, Illinois had a law prohibiting slavery. Scott lived with Emerson as a slave in Illinois until Emerson moved to Fort Snelling in Upper Louisiana in 1836. The anti-slavery provisions of the Missouri Compromise governed Upper Louisiana. While living at Fort Snelling, Dred Scott and Harriet married and had two children, Eliza and Lizzie. In 1838, Emerson moved back to Missouri, which allowed slavery, and brought the Scotts with him as his slaves.

The issue presented to the United States Supreme Court was

> can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the

[38] Kansas-Nebraska Act of 1854, p. 285.

> citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[39]

The United States Supreme Court determined that the Circuit Court had erred when it failed to question its jurisdiction because Scott was not a citizen of the State of Missouri. While the Court held that enslaved Africans and their descendents could not become citizens of the United States, it also limited its opinion to "that class only."[40]

The Court's judgment was premised on the determination that membership in the political body of the United States as embodied by one's inclusion in the terms "people of the United States and citizen"[41] was never meant to include enslaved Africans or those descended from enslaved Africans. The Court argued that membership in the political family was an inherited right,

> and the rights and privileges guarantied [sic] to citizens of this new sovereignty were intended to embrace only those who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the United States Constitution.[42]

The Court then went on to specify that the only way one could obtain membership other than by birthright was through the naturalization process, which "confine[d] the right of becoming a citizen to aliens being free white persons."[43]

Support for this position was based first on the prevailing racial ideologies, which established "a perpetual and impassable barrier … erected between the white race and the one which they had reduced to slavery,"[44] as evidenced by the laws of several of the colonies with regard to citizenship and intermarriage. For example, in Connecticut, one of the first states to

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[39] *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1856). Hereinafter *Dred Scott*.
[40] *Dred Scott*, p, 403.
[41] *Dred Scott*, p. 404.
[42] *Dred Scott*, p. 406.
[43] *Dred Scott*, p. 419.
[44] *Dred Scott*, p. 409

abolish slavery, the Supreme Court pointed out that this law was "passed with reference altogether to the interest and convenience of the white race,"[45] rather than as the result of changing racial beliefs. The productivity of the enslaved African was tied to the utility of the economics of slavery. Because their value to white privilege was economic in nature, not political or social, when the economic utility of slavery waned, enslaved Africans were viewed by most white citizens as no longer serving a purpose in their communities. Additionally, within the economic structure of these states, the utility of "slavery had worn out."[46] The climate and means of production in these areas of the country led to the demise of slavery because "the labor of the negro race was found to be unsuited to the climate and unprofitable to the master."[47] The impact of the influx of cheap immigrant labor on white wages, as well as the patriarchy of slavery, made slave labor an inefficient means of production. An employer's obligation to a white worker was limited to the work day and ended when the employee, whether as a result of injury or age, was no longer able to work. A slaveowner was responsible for providing food, clothing and shelter to an enslaved worker for life, unless the slaveowner sold or manumitted the enslaved African.[48]

After making its determination on jurisdiction and the citizenry of Scott, the court then proceeded to address the issue of whether Scott was entitled to freedom. The court held that Scott's status as a slave did not change when Emerson took him first to Illinois and then to Upper Louisiana. The Supreme Court determined that the U.S. Congress lacked the constitutional authority to abolish slavery in Upper Louisiana and declared the Missouri Compromise void. Chief Justice Taney, who wrote the majority opinion, stated,

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[45] *Dred Scott*, p. 415.
[46] *Dred Scott*, p. 413.
[47] *Dred Scott*, p. 412.
[48] Roedigger.

> the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress, which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.[49]

By the time the United States Supreme Court heard the Scott case, the U.S. Congress had already repealed the Missouri Compromise; by voiding the statute on Constitutional grounds, the Supreme Court precluded any claims to rights that might have been acquired by individuals while the statute was in effect.

Protecting White Privilege: Defining Civil Rights

After the Civil War, the enactment and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments presumably marked the beginning of the legal protection of the civil rights of African Americans and eventually other dominated peoples.[50] However, the protections encompassed by the term "civil rights," as viewed today, are rights that have evolved over time. Through the decisions of the United States Supreme Court, the boundaries of the rights conferred by these amendments have been defined, restricted, and expanded. The first case to define the boundaries of the Fourteenth Amendment was *Butcher's Benevolent Association of New Orleans v. Cresent City Livestock Landing and Slaughter-House Co*.[51] This

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[49] *Dred Scott*, p. 450.

[50] The Thirteenth Amendment abolished slavery and provides as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Thirteenth Amendment was passed by Congress in January 1865 and was ratified twenty-seven states in ten months. The Fourteenth Amendment was ratified in 1868. The Fifteenth Amendment was ratified in 1870.

[51] *Butcher's Benevolent Association of New Orleans v. Cresent City Livestock Landing and Slaughter-House Co.*, 16 Wallace 36 (1873).

decision is often referred to as the "Dual Citizenship" case because of the Court's interpretation of the privilege and immunities clause of the Fourteenth Amendment. The pertinent parts of the Fourteenth Amendment provide as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

The Court held that the Fourteenth Amendment protected only the privileges and immunities associated with federal citizenship, and was inapplicable to issues concerned with state citizenship. Justice Samuel F. Miller wrote, "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other and which depend on different characteristics or circumstances in the individual."[52] This case is important to cases on segregated education because it sets up a distinction between state and federal citizenship rights. During the 1870s, federal citizenship rights were generally interpreted as including the rights

> to come to the seat of the government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions...of free access to its seaports...to demand the care and protection of the Federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government...the writ of habeas corpus...to use the navigable waters of the United States, however they may penetrate the territory of several states...the rights of the citizen guaranteed by the Federal Constitution...the rights to peaceable assembly and petition for redress of grievances.[53]

Because education falls under the domain of state law, education is not a privilege afforded to individuals by virtue of their federal citizenship rights.

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[52] *Butcher's Benevolent Association*, p. 74.
[53] *Butcher's Benevolent Association*, pp. 73-75.

The boundaries of the voting rights guaranteed by the Fifteenth Amendment were addressed for the first time in *United States v. Cruikshank*.[54] The Fifteenth Amendment provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The ruling in *Cruikshank* provided a limitation on the guarantees of the Fifteenth and the Fourteenth Amendment.[55] In this case, a political rally by blacks in Louisiana had been broken up by a group of white rioters. The Supreme Court held that there had been no violation of federal citizenship rights and that the Fourteenth Amendment prohibited only State actions, not those of citizen against citizen.

The suffrage rights of African Americans took another devastating blow when they were all but nullified by the decision in *United States v. Reese*.[56] In his opinion, Chief Justice Waite wrote that suffrage rights were conferred by states. Once conferred, the Fifteenth Amendment prohibited states from abridging these rights on the basis of race. "The Negro who had been turned away at the polls had to prove that he had been prevented from voting specifically because of his race."[57] This decision placed the burden of proof on individuals claiming a violation of their suffrage rights. *Cruikshank* and *Reese* are important to segregated education because they reinforced the earlier decision requiring the assertion of a violation of a federal citizenship right and introduced a narrow definition of state action -- a definition that did not include a state's failure to intervene in actions between citizens that infringed on the rights of

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[54] *United States v. Cruikshank*, 92 U.S. 542 (1875).
[55] *Cruikshank*.
[56] *United States v. Reese*, 92 U.S. 214 (1876).
[57] Richard Kluger, *Simple Justice* (Vintage Books: Random House, 1975), p. 60.

others. These decisions also placed the burden of proof on the shoulders of those who continued to be oppressed by the structure of white supremacy.

Protecting White Privilege: Preserving Equality

In 1896, the United States Supreme Court established a precedent that would take fifty-eight years to abolish. The roots of the legal emphasis on and legitimation of separate education can be traced to what has become commonly known as the separate, but equal doctrine announced by the Supreme Court in *Plessy v. Ferguson*. On June 7, 1892, Homer Plessy, who was seven-eighths white, boarded a white car on the East Louisiana Railway headed to Covington from New Orleans. When he refused to vacate his seat, Homer Plessy was arrested. Plessy contested his arrest before the Criminal District Court for the Parish of New Orleans on the grounds that Louisiana's statute requiring separate cars for blacks and whites violated the Fourteenth Amendment. The state court found no violation of the Fourteenth Amendment had occurred and this decision was upheld by the United States Supreme Court. Richard Kluger, among other scholars, has pointed out the legal insufficiency of the majority opinion of the court. "Justice Brown and seven of his brethren had tortured truth to make the shoe fit….To reach [their] conclusion [the separate railcar accommodations were not discriminatory], the Court had to indulge in a willful reading of human nature and to abuse case law, common law, and common sense."[58]

However, little attention has been paid to how the discursive practices of the legal system were diverted to allow a dissenting opinion to pronounce a legal doctrine, which became the binding legal precedent for determining the constitutionality of segregation. On a close

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[58] Kluger, p. 81; *Plessy v. Ferguson;* Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court Decision that Legalized Racism*, (New York: Carroll & Graf Publishers, 2004).

examination of the majority opinion, one does not find the phrase "**separate, but equal**." The precedent pronounced by the Supreme Court was that the Louisiana statute that required "all railway companies carrying passengers in their coaches in this state, … [to] provide **equal, but separate** accommodations [emphasis added]" did not violate the 14th Amendment of the Constitution. Thus the majority opinion upheld **equal, but separate** facilities.[59]

The only place that the phrase, "separate, but equal" is found in the Court's opinion is in the dissent written by Justice Harlan. As already discussed, the doctrine of *stare decisis* does not apply to dissenting opinions. Yet, in this case, the phrase found in Justice Harlan dissenting opinion became the binding legal doctrine. This turning of the phrase was important because it determined the standard on which the constitutionality of segregated facilities and segregated practices were to be judged. One could argue that the majority opinion by declaring Louisiana's statute constitutional was upholding the actual wording of the statute and the practice of providing "equal, but separate" facilities. The application of the equal, but separate doctrine would have placed primary emphasis on equality, and courts would have been forced to consider at the first instance whether a segregated school was equal. Conversely, the application of the separate, but equal doctrine often resulted in courts placing primary emphasis on the permissibility of separate facilities. While at first glance this may seem to be simply a matter of semantics, the doctrine announced in Harlan's dissenting opinion was much more palatable to prevailing racial ideologies, which advocated for keeping the races separate. As is discussed more thoroughly in Chapter Two, one belief that found favor with individuals on both sides of the slavery issue was that of keeping the races separate. Most white Americans were still not ready to admit the races were equal and that any differences that existed were due to the power

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[59] *Plessy*.

structures that had denied access to political, social, and economic privileges that afford one power. The turning of the phrase allowed white America to sidestep the issue of equality and "to manufacture a legal fiction; the legal term for this trick in the social field, expressed or implied in most of the Jim Crow statutes is, 'separate, but equal."[60]

After *Plessy*, three distinct precedents arose at the state level. The first line of precedent was in states where state laws required segregated education. The second line of precedent held that boards of education could segregate education without the benefit of a legislative enactment. The third precedent, which required that the state legislature grant to boards of education the authority to segregate education, was followed in Kansas, along with California, Illinois, Iowa, and New Jersey.

Situating Kansas

In the remainder of this chapter, I describe the context for this study by introducing Kansas as the site of exploration. Kansas provides a unique site from which to examine segregated education because of its distinctive legal history and demographic characteristics. While the events that transpired in Kansas cannot be considered in isolation from the ideological beliefs prevalent during the mid-nineteenth century, they do provide a "line of flight"[61] to examine the social, political, and economic factors impacting racial politics and ideologies. The mid-1850s constituted a time in which the globalization of white privilege occurred. The power elites of Britain and the United States sought ways to protect and expand their privileged status whether by the forced famine of the Irish, oppressive working conditions for the working class, enslavement of Africans and Indians, colonization, or forced removal of first nations people to

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[60] Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy, Volume II* (Harper Torchbooks: New York, 1944), p. 581.
[61] Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987).

subvert the growing unrest among the disenfranchised. Formal education became a mechanism through which to enforce political and economic initiatives aimed toward preserving the privileged status of the white power elite in Great Britain and the United States. According to Kathleen deMarrais and Margaret LeCompte, "Schools play...an important role in maintaining existing patterns of domination. They perpetuate a middle class ideology which states that status and mobility in American society are based upon merit, earned competitively and facilitated by schooling."[62] The culture of power is reflected in the power that controls schools. "Success in...schools...is predicated upon acquisition of the culture of those who are in power...The culture of the school is based on the culture of the upper and middle classes - of those in power."[63] Just as the establishment of common schools served as a way to discipline poor and working class whites and western European immigrants and preserved white privilege, segregated education provided a mechanism through which to preserve white privilege and to perpetuate the hegemonic practice of whiteness.

Kansas provides a venue for a more complex understanding of the intersection of the divergent ideologies of the North and South. The following factors make Kansas unique: (1) the power conferred to the early settlers of the territory to determine whether Kansas would be a free state or a slave state; (2) the heterogenous nature of its population; (3) a segregated education law that was permissive; (4) an extensive line of state legal decisions on segregated education; and (5) the unique role that the Topeka case, *Brown v. Board of Education of Topeka. Kansas*, played in constructing the legal issue considered by the Supreme Court in the five cases that have collectively come to be known as *Brown*.

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[62] deMarrais and Lecompte, p. 175.
[63] Lisa Delpit, "The Silenced Dialogue: Power and Pedagogy in Educating Other People's Children," *Harvard Educational Review* 58 (1988): 283.

The first factor contributing to the groundwork for later legal decisions and precedents was the Kansas-Nebraska Act, which has already been discussed. This act provided the people of the Kansas territory with the power to determine if slavery would be permitted in their state. A second factor that impacted segregated educational practices in Kansas was the heterogeneous nature of the state's population. Soon after the territory was opened to invasion by non-indigenous peoples, on May 30, 1854, antislavery activists, abolitionists, and slaveholders from northern and southern states mounted organized efforts to inhabit the Kansas territory.[64] After the Civil War, the population growth centered around the urban centers of the state. Many Southern African Americans migrated to northern and border states during the period of the late 1870s through the 1930s, seeking to escape the social, economic, and political oppression of the South.[65] Ninety percent of the African American population in the United States lived in the South in 1860; by 1940 that percentage had dropped to seventy.[66] In many instances, they found the oppression to be inescapable as they confronted overt and covert racism. In Kansas, the 1879 migration of the Exodusters, formerly enslaved Africans, not only led to an increase in the African American population, particularly in the urban areas, but also resulted in the establishment of more clearly delineated caste positions within the black populace based on

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[64] New England sponsored Free State immigrants and the slave states sponsored their own settlers. Paul E. Wilson, *A Time to Lose: Representing Kansas in Brown v. Board of Education* (Lawrence, Kansas: University of Kansas Press, 1995); Kluger.

[65] Walter Stephan, "A Brief Historical Overview of School Desegregation." In *School Desegregation: Past, Present, and Future*, Walter G. Stephan and Joe R. Feagin, eds. (New York: Plenum Press, 1980), pp. 3-24.

[66] Amy Stuart Wells and Robert L. Crain, *Stepping Over the Color Line: African-American Students in White Suburban Schools* (New Haven: Yale University Press, 1997). Wells and Crain also note the rural to urban migration that occurred. In 1880, eighty percent of the African American population lived in rural areas and were sharecroppers. By 1981, only one percent worked in rural farming areas.

whether one was an indigenous black or a descendant of a formerly enslaved African.[67] In Topeka, the indigenous blacks (i.e., those who could trace their roots to Kansas prior to the Civil War and the Exodusters) held a higher position on the social strata than Southern blacks who descended from slaves.[68] This mixture of northern and southern white settlers and blacks descended from both free and formerly enslaved Africans led to the development of complex social and economic relations.

The third factor impacting the legal cases and precedents in Kansas on segregated education was that Kansas was one of only four states that had enacted a permissive segregation law.[69] The segregated education law was permissive in that segregation was not required -- the local school districts could choose to segregate on the basis of race. The law was also restrictive in that it allowed only cities of a certain size to segregate education by race. In March 1861, the first Kansas legislature granted local school districts the power to establish separate education as long as the provisions secured "equal educational advantages."[70] In 1879, the legislature amended the school code and granted school boards in first class cities the "power...to organize and maintain separate schools for the education of white and colored children, except in high school, where no discrimination shall be made on account of color."[71] While segregated education was permitted only in certain locales, Jim Crow laws in Kansas allowed segregated

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[67] Nell Irvin Painter, *Exodusters: Black Migration to Kansas After Reconstruction* (New York: W.W. Norton & Company, 1976/1986); Thomas C. Cox, *Blacks in Topeka Kansas, 1865-1915: A Social History*. (Baton Rouge: Louisiana State University Press, 1982).
[68] Cox.
[69] The other three states with permissive statutes were Wyoming, New Mexico, and Arizona. Paul E. Wilson, The Genesis of *Brown v. Board of Education. The Kansas Journal of Law & Public Policy* 4 (No. 1, 1996): 7-21.
[70] Wilson, 1995, p. 36. This is perhaps one of the positions that makes Kansas unique. It strictly adhered to the mandate for equality.
[71] Wilson, 1995.

public facilities, such as restaurants, parks and theatres. Public transportation was generally not segregated.[72]

The fourth factor that impacted segregated education in Kansas is the extensive line of state legal precedent addressing segregated education. The first case in Kansas to address segregated education was in 1881. In all, the Kansas Supreme Court considered eleven cases between 1881 and 1949. A majority of these decisions restricted rather than expanded the scope of segregated education and placed legal parameters on school districts that sought to circumvent the law through the use of school policies, such as separate classrooms and gerrymandering attendance zones. The court also strictly adhered to the legislative mandate for equality. This adherence to equality makes Kansas' legal history unique compared to the legal practices of other states with regard to *de jure* segregation.

The final factor of significance for segregated education in Kansas is related to the role that the Topeka case played in what has become known collectively as *Brown v. Board of Education*. "Among the [five] state cases, only in Topeka was there a finding of no substantial inequality. Only in the Kansas case was the record not cluttered with issues of the inferiority of the Negro schools. If *Brown* had not been on the Supreme Court's docket, a decision favoring the plaintiffs might have been based on inequality, and the constitutionality of segregation per se left undetermined."[73] *Brown*'s uniqueness on the national level is paradoxical because at the level of state law in Kansas the issue had always centered around equality. At the state level, its uniqueness is derived from how it shifted the focus toward segregation. For Kansas, *Brown* case represented a move away from concerns about equal educational opportunities.

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[72] Kluger.
[73] Wilson, p. 21.

In Chapter Two, I provide a more in-depth look at Kansas and introduce the mixture of political and racial ideologies present during its ascendancy to statehood. As can be seen, these ideologies impacted the ways that segregated education in Kansas was defined, restricted, and enforced. In Chapter Three, I examine the Kansas legal decisions from second-class cities. The legal decisions from first-class cities are examined in Chapter Four. In Chapter Five, I examine Kansas within the national context and discuss the role Kansas played in the five cases that have collectively become known as *Brown v. Board of Education*, I argue that the Kansas case was central in the construction of the problem as the separation of the races, as opposed to equality of educational opportunities. This chapter also addresses the implications of this study for educational policy and future research.

CHAPTER TWO

KANSAS: AN IDEOLOGICAL BORDERLAND

Traditionally, the struggle to obtain power and control over the Kansas territory has been simplified and polarized into a contest between two unified and coherent factions, the Free Staters versus Pro-Slavery. For example, a recent article by Julie Courtwright, which appeared in *Kansas History: A Journal of the Central Plains*, characterized the events that transpired in Kansas as "guerilla warfare [in a] mini-civil war between free-state "Jayhawkers" and pro-slave "Border Ruffians."[74] Michael Hardt, a literary scholar, and Antonio Negri, a political scientist, proposed that the issue of slavery played a central role in galvanizing the ideological beliefs and power constructs put into place in the new western territories, including Kansas, because implicated within this struggle was a coming to terms with the internal conflict between a nation founded on ideals of equality and the vestiges of racial ideologies, influenced to a great extent by economic utility, that excluded indigenous peoples and included enslaved Africans. The challenge presented by the westward expansion was how to redefine these "open spaces" in ways that re-envisioned the term community with a more inclusive manner. Hardt and Negri said,

> what was in play was a redefinition of the *space* of the nation. What was at stake was the question whether the free exodus of a multitude, unified in a plural community could continue to develop, perfect itself, and realize a new configuration of public space.[75]

While the Kansas and Nebraska territories were settled prior to the Civil War, these spaces, by relying on popular sovereignty, provided a place where these new notions of "community" could be gauged against the political, social, and economic contexts of the mid-1850s. Robert

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[74] Julie Courtwright, " 'The Goblin That Drives Her Insane:' Sara Robinson and the History Wars of Kansas, 1894 – 1911," *Kansas History: A Journal of the Central Plains* 25 (Summer 2002): 104.

[75] Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000), p. 172.

Richmond proposed that, for the new western territories of Kansas and Nebraska, the issue of slavery posed not only moral issues, but also economic ones.[76] Kenneth S. Davis likewise acknowledged that the events that transpired in Kansas were

> *not* purely local. It was…a *national* question and could finally be answered only by a total unequivocal national decision. Every event on Kansas' soil from 1854 onward had had immense national political repercussions. Even before the Kansas-Nebraska bill was passed, the existing two-party system was being broken up by 'the hell of the storm' Douglas had raised.[77]

In this chapter, I complicate traditional notions of the ideological battle by introducing three groups who settled the Kansas territory: the Free White State Advocates, the Abolition of Slavery Advocates, and the Pro-Slavery Advocates. I discuss various factions within each group to capture the fluid nature of their ideological beliefs. Next, I examine the four territorial constitutional conventions to highlight how the ideological beliefs and political philosophies of the "free-state" Republicans, the Abolition of Slavery Advocates, and the "Pro-Slavery" Democrats, rather than being unified and transparent along party lines, were shifting, divergent, overlapping, and oppositional. Then I provide a closer examination of the political philosophies and racial ideologies of the Wyandotte Constitutional Convention, which resulted in the admission of Kansas as a state. This examination introduces the various political philosophies and racial ideologies at play in Kansas and is drawn on in later chapters as I discuss how the issue of separateness, rather than equality, gained primacy of importance for black education.

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[76] Robert Richmond, *Kansas: A Pictorial History* (Lawrence: University Press of Kansas, 1992).
[77] Kenneth S. Davis, *Kansas: A Bicentennial History* (New York: W.W. Norton & Company, Inc, 1976), p. 65

The White Settlement of the Kansas Territory: Free White Staters, Abolitionists, and Pro-Slavery Advocates

Racial segregation in Kansas began in 1854 when Congress enacted the Kansas-Nebraska Act, which repealed the Missouri Compromise.[78] As discussed in Chapter One, the Kansas-Nebraska Act, under the guise of popular sovereignty, provided the territory with the authority to determine whether it would be a free or slave state.[79] Soon after the territory was opened to invasion by nonindigenous peoples, on May 30, 1854, it became an ideological battleground between the North and the South. Kansas was settled by free white staters, white abolitionists, and white slaveholders, who struggled to obtain control of the territory.[80] Although whites divided over the issue of slavery, white privilege shaped the beliefs and ideals of those who came to live in Kansas. At stake was a struggle over whether and how white privilege would be defined and deployed in this new space of democracy and capitalism.

Free White State Advocates: The Economics of Slavery

One group that sought control over Kansas was the Free White State Advocates.[81] While this group opposed slavery and sought to establish a free space, they were equally concerned with creating a place that would be white. The philosophy of this faction of the larger group commonly referred to as the Free Staters was based on the belief that free labor, as opposed to slave labor, was the most efficient means of promoting the wealth and prosperity of the settlers

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[78] Passed on March 6, 1820, Section 8 of the Missouri Compromise banned slavery.
[79] Carol Dark Ayres, *Lincoln and Kansas: Partnership for Freedom* (Manhattan, Kansas: Sunflower University Press, 2001), p. 4.
[80] New England sponsored Free State immigrants and the slave states sponsored their own settlers. Paul E. Wilson, *A Time to Lose: Representing Kansas in Brown v. Board of Education* (Lawrence: University of Kansas Press, 1995); Richard Kluger, *Simple Justice* (Vintage Books: Random House, 1975).
[81] This term was used in the *Kansas Herald* in reference to one group of the Free-soil Party. Charles Robinson, *The Kansas Conflict*. (Freeport, New York: Books For Library Press, 1892, 1972), p. 114.

of Kansas. This philosophy was evident in the report on Platforms this group adopted prior to the Topeka Constitutional Convention in 1855, which stated,

> Resolved that our true interests socially, morally and pecuniarily require that Kansas should be a FREE STATE; that free labor will best promote the happiness, the rapid population, the prosperity and wealth of our people; that slave labor is a curse to the master and the community, if not to the slave; that our country is unsuited to it, and that we devote our energies as a party to exclude the institution and to secure for Kansas the Constitution of a free State.[82]

However, this interest in slowing down the progression of slavery could not be equated with a belief in the equality of the races. It was common for most anti-slavery advocates to refute the equality of blacks, whether free or enslaved, as well as to argue for exclusionary policies. According to Reginald Horsman, in spite of increasing racial discrimination, the social movement to prevent slavery from expanding its territorial grounds gained momentum in many northern states during the 1840 and early 1850s.

> Although the Republican party contained many who defended Negro rights, its general political appeal depended upon separating the attack on slave expansion from the equality issue. Debates on slave expansion in the 1850s revolved as much around the issue of preventing blacks from degrading new white areas as they did around the issue of the evils of slavery.[83]

This split in the Republican party was evident in the political debates that transpired in Kansas. For example, William McDowell, a Wyandotte constitutional convention delegate, stated in the proceedings that,

> Geographically, we are situated upon the margin of the slave states, that are gradually emancipating their slaves, and, very naturally, this Territory becomes the receptacle of their free negroes. Now, I propose to make this not only a free State, but a free white state…. It is idle to talk about the two races becoming common, or extending social privileges. They are not, by their constitution, our equals. We cannot legislate them up

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[82] *Proceedings of Constitutional Convention, Topeka,* Kansas Constitutional Conventions, (Topeka: Kansas State Historical Society, 1855), p. 3. Hereinafter referred to as Topeka Proceedings.

[83] Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, Massachusetts: Harvard University Press, 1981), p. 275.

> to our standard. I propose to prevent the agitation of the questions, by excluding them entirely. The black race should not be allowed to live in this Territory, as we do not propose to have slavery in the new State of Kansas.[84]

One of the early emigrant aid societies associated with this faction was the Massachusetts Emigrant Aid Society, which later became the New England Emigrant Aid Society. Eli Thayer founded this society prior to the enactment of the Kansas-Nebraska Act. Thayer, a New England businessman, chartered a corporation that would further the cause of freedom. However, Thayer sought to shift the contest away from the political arena that at the national level was controlled by the interests of slavery and cast it into the realm of economics. He proposed "to move the scene of the contest from Congress to the prairies, where the system of free labor will meet the system of slave labor face to face."[85] This shift from slave labor to free labor was central to the globalization of white privilege and capitalism because it served as a means by which to maximize profits.

Free labor, rather than political action, was seen as the instrument to effectuate Thayer's "Plan of Freedom."[86] Slavery

> would be removed…*not* through the anguish of moral choice, *not* through any direct effortful attack upon moral wrong, *not* through political action of any kind in Washington, but through the automatic beneficence (as a kind of side-effect) of economic competition in a free market – the automatic beneficence, in other words, of an uninhibited operation of 'natural' economic laws.[87]

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[84] *Proceedings of Constitutional Convention, Wyandotte*, Kansas Constitutional Conventions, (Topeka, Kansas: Kansas State Historical Society, 1859), p. 178. Hereinafter referred to as Wyandotte Proceedings.
[85] Conversation between Eli Thayer and Horace Greeley, editor of the *New York Tribune* as re-counted by Eli Thayer in *A History of the Kansas Crusade: Its Friends and Foes* (New York: Harper & Brothers, 1889), p. 44.
[86] This was phrase used by Horace Greeley in reference to Thayer's plan. Thayer, p. 47.
[87] Davis, p. 39-40.

With the assistance of the New England Aid Society, "something like a modern travel agency,"[88] individuals from New England settled Topeka and Lawrence. In addition to the benevolent purposes of this aid society, it was intended to be a money-making proposition. "[Eli] Thayer wrote in his plan of organization…that in two or three years all the original capital, plus profit, would be recovered through the sale of 'property in the territory first occupied,' enabling the company 'to attempt the same adventure elsewhere.'"[89] Thayer's intent to colonize the South for freedom; through the purchase of cheap land and use of cheap white labor, the white colonizers would develop the land to a higher economic use, resulting in an increase in the value of the land. They would then sell the land for a profit and use the profits to purchase additional cheap land in the southern states. Free white labor was cheaper than slave labor because the employer's only obligation was to pay wages to the white laborer, and this obligation ended once the employment relationship ended. In the system of slavery, the slaveowner was responsible for providing food, clothing, and shelter to the enslaved African, and this relationship was for life, unless the enslaved African was sold or manumitted.[90]

Charles Robinson, one of the early territorial leaders of Kansas, was supported by the Massachusetts Emigrant Aid Society. According to Julie Courtwright,

> Charles Robinson believed that the slavery question in the territory could have been settled by constitutional means. He wanted to avoid violence if at all possible. Robinson believed that the radicals (i.e., the abolition advocates) whose passionate and impulsive natures frequently invited violence, triggered the events that led to the numerous attacks on Lawrence.[91]

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[88] Robert W. Richmond, *Kansas: A Land of Contrasts,* 3rd edition. (Arlington Heights, Illinois: Forum Press, Inc., 1989), p. 69.
[89] Davis, p. 39.
[90] David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class, Revised Edition* (London: Verso, 1999), pp. 65-87.
[91] Courtwright, p. 110.

Other Free White State Advocates shared Robinson's beliefs that the Kansas climate and soil conditions were not conducive to the economic system of slavery and that free labor was the most efficient means of production.

Abolition of Slavery Advocates: The Ethics of Slavery

Whereas economics served as the primary motivation for contesting slavery for the free white state advocates, the abolition of slavery advocates were motivated by the ethics of slavery. According to Kenneth S. Davis, this group of New Englanders who emigrated to Kansas were "passionately opposed to human slavery, and passionately enamored of human freedom."[92] Davis proposed that their primary motivation for emigrating was tied to the abolition of slavery, with economic interests serving as a secondary motivation. The Connecticut Kansas Colony, which arose out of New Haven, Connecticut, was affiliated with the Abolition Advocates. Individuals from this group settled Wabaunsee, also known as the "Beecher Bible and Rifle Colony."[93] This group was led by C.B. Lines, a minister of a Congregational church, and received support from Henry Ward Beecher, an abolitionist preacher.

Two other well-known members of this group were James Lane and John Brown. Noble Prentis, in his school history, identified three factors that contributed to making Kansas free: James Lane, the arrival of John Brown, and the receipt of a shipment of Sharp's Rifles, particularly good rifles imported into Kansas by some northern groups. James Lane arrived in Kansas from Indiana, intent on forming the National Democratic party. He was the son of a Jacksonian Democrat. Soon after his arrival in Lawrence, Lane "reportedly repeated as his own conviction Douglas' assertion that the slavery question in Kansas would and should be answered

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[92] Davis, p. 37.
[93] Richmond, 1989, p. 70.

by soil and climatic conditions."[94] In addition to his abolitionist stance, Ayres suggested "Lane [was] motivated by political power."[95] James Lane was affiliated with the more radical portion of the Free State movement.[96]

John Brown was a Calvinist and "the ruling passion of his life, by middle age, was a hatred of slavery and slaveholder; to this was subordinated…, a love of the Negro race."[97] The role that John Brown played in the early history of Kansas has been the subject of much debate. His radicalism, as well as that of James Lane, has been viewed as a blight on the history of Kansas. For example, Robinson and G.W. Brown, another early territorial leader, argued that killing proslavery neighbors and sponsoring raids into Missouri only invited retaliations such as the infamous Quantrill Raid of 1863.[98] Courtwright attributes the opposition Lane received from the conservative element of the free staters as related to the philosophical differences between these groups, especially their direct opposition to Charles Robinson's philosophy on how best to liberate Kansas.[99]

Pro-Slavery Advocates: The Institution of Slavery

For southerners, the Kansas-Nebraska Act marked a victory for slavery because it was presumed the North would inhabit and possess Nebraska, and Kansas would belong to the South. Pro-slavery advocates from Missouri entered the territory and staked their claims on the fertile lands, often ignoring the rights of the indigenous peoples to the land, which had been conferred via treaties establishing reservations. Additionally, in response to the emigrant aid societies, many Missourians organized secret societies, known as "Blue Lodges," "Social Bands," and

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[94] Davis, p. 49.
[95] Ayres, 39.
[96] Courtwright, p. 106. Lane committed suicide in 1866.
[97] Davis, p. 55.
[98] Courtwright, p. 108.
[99] Courtwright, p. 110.

"Friendly Societies."[100] The secret societies were established to support pro-slavery emigrants to Kansas, and as I discuss later in this chapter they also supported subversive acts, such as invading the Kansas territory on election day to ensure pro-slavery victories. Individuals from western Missouri who were sympathetic to slavery established two cities in Kansas, Atchison and Leavenworth. Gladstone, an English journalist who was in Kansas in 1855, described two pro-slavery factions, those who were interested in using the constitutional process to legitimate slavery in the state and those who resorted to violence and intimidation as a means to gain control of the state. The free-staters generally used the term "border ruffians" to refer to the second faction. The border ruffians provide an example of the complexity of whiteness. Although white in skin color, it is evident from the following description published in *The New York Tribune* that with regard to white privilege, they occupied a place on the social strata akin to that of the Irish and other eastern European immigrants.

> They are a queer looking set, slightly resembling human beings, but more closely allied, in general appearance, to wild beasts. An old rickety straw hat, ragged shirt, buttonless corduroys with a leather belt and a coarse pair of mud-covered boots constitute a "full dress." They never shave or comb their hair, and their chief occupation is loafing around whiskey shops, squirting tobacco juice and whittling with a dull jack knife. They drink whiskey for a living and sleep on dry goods boxes…and delight in robbing hen-roosts, and pilfering from Free-State men. They generally carry a huge bowie knife and a greasy pack of cards, and expatiate at length on their exploits in Kansas among the d---d Abolitionists. They are generally about six feet high, spindle shanked and slab sided. It would be an insult to the brute creation to call them brutes although it be confessed that there seems to be no congeniality between them and the porkers, so much so, indeed that they frequently spend the night in close proximity, in some convenient mud hole…They are "down on" schools, churches, printing offices, and revel in ignorance and filth. After visiting them, one cannot feel the truth of the doctrine of total depravity, so far as it applies to parts of the human family.[101]

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[100] William Frank Zornow, *Kansas: A History of the Jayhawk State* (Norman: University of Oklahoma, 1957), p. 68.
[101] *New York Tribune*, April 23, 1857.

While both factions of the pro-slavery advocates stood to lose were Kansas admitted as a free state, the loss to the white aristocracy was primarily economic. The border ruffians stood to lose ground socially as well.

As I discuss later in this chapter, a system of white patronage was used to support the border ruffians. These men served as the foot soldiers for white privilege in the struggle for Kansas' statehood. They were "hired" to protect the interests of slaveholders in much the same way they would be paid to fight for slavery in the Civil War. The Missouri slaveholders could stay in Missouri and operate their plantations, while the border ruffians crossed over to the Kansas territory and, through violence and fraud, won control over territorial politics for the political elite they served.

The pro-slavery advocates viewed winning control over Kansas as essential to the preservation of slavery. D.R. Atchison, a pro-slavery advocate, supported the use of the legal process established by the Kansas-Nebraska Act. Atchison urged pro-slavery advocates to counter the colonization efforts of the North by developing pro-slavery organizations that would support the settlement of Kansas. He believed that the way to win the territory to slavery was by meeting the northern "philanthropic knaves at the ballot-box and out-voting them. If we cannot do this it is an omen that the institution of slavery must fall in this [Missouri] and other Southern states."[102] Missourians, in particular, viewed themselves as vulnerable. Atchison said, "If Kansas is abolitionized, all men who love peace and quiet will leave us, and all emigration from the slave States will cease."[103] It was feared that Kansas abolitionists would cross the border between the two states and steal slaves from their owners. Atchison urged that "in a hybrid state we cannot live; we cannot be in a constant state of suspicion of our neighbors…. It was not

[102] D.R. Atchison as reported in the Platt *Argus* and quoted in Robinson, p. 94
[103] Robinson, p. 94

sufficient for the South to talk, but to act; to go peaceably and inhabit the Territory and peaceably to vote and settle the question according to the principles of the Douglas bill [i.e., the Kansas-Nebraska Act]."[104] Given the sense of urgency felt by both sides to gain control over the territory of Kansas, it is not surprising that life in the Kansas territory in 1854 through 1856 was turbulent. This turbulence carried over into the politics of the territory with both sides viewing the acquisition of control over the government as the first step toward settling the question of whether Kansas would be free or slave. In the following section, I discuss the contested sovereignty of the Kansas territory.

Contested Sovereignty: The Kansas State Constitutional Conventions

The issue of race relations permeated the discourse and lives of the early settlers in Kansas. This on-going debate spilled over into the legislative bodies of the territory and was a significant issue in all four of the territory's Constitutional Conventions. Territorial politics between 1855 and 1859 was marked by allegations of fraud and treason and by protests against the legitimacy of the elected legislature and elected officials. Popular sovereignty turned into a race to reach Washington and obtain legitimacy through a congressional proclamation of statehood. T.H. Gladstone, a journalist, described the situation; "a double legislature, a double judiciary, a double set of civil appointments throughout each claiming sole prerogative, the State Legislature calling the Territorial a fraud and the Territorial calling the State Legislature a sham; such a political condition appeared strangely anomalous."[105] On November 29, 1854, an election to select the territorial delegate to Congress was held and resulted in the election of Whitfield, the pro-slavery candidate. The free staters claimed pro-slavery's victory was due to election

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[104] Robinson, p. 94.
[105] T.H. Gladstone, *The Englishman in Kansas or Squatter Life and Border Warfare* (Miller & Company: New York, 1857), p. 5.

fraud, which occurred when the border ruffians crossed over into the Kansas territory on election day to ensure a pro-slavery victory. The border ruffians used the same strategy of invading the Kansas territory on March 30, 1855, when the election for the territorial legislature was held. The United States Congress appointed a congressional committee to investigate the allegations of fraud. The majority report of the committee stated,

> Before any election was or could be held in the Territory, a secret political society was formed in the State of Missouri. It was known by different names, such as 'Social Band,' 'Friends' Society,' 'Blue Lodge,' 'The Sons of the South.' Its members were bound together by secret oaths, and they had pass-words, signs and grips, by which they were known to each other; penalties were imposed for violating the rules and secrets of the order; written minutes were kept of the proceedings of the lodges; and the different lodges were connected together by an effective organization. It embraced great numbers of the citizens of Missouri, and was extended into the Territory. Its avowed purpose was to extend slavery not only into Kansas, but also into other Territories of the United States, and to form a union of all the friends of that institution [slavery]. Its plan of operation was to organize and send men to vote at elections in the Territory, to collect money to pay their expenses, and, if necessary, to protect them in voting. It also proposed to induce pro-slavery men to emigrate into the Territory, to aid and sustain them while there, and to elect none to office but those friendly to their view.[106]

In spite of the finding of fraudulent voting for territorial delegates to the United States Congress, after setting aside the fraudulent votes, the committee found that Whitfield was still victorious. Robinson attributed the pro-slavery victory in the Whitfield election to the fact that, with the exception of Lawrence and its immediate vicinity, the other territorial settlements were proslavery. However, by the time of the election for the territorial legislature, five free state towns had been established: Lawrence, Topeka, Manhattan, Wabaunsee, and Osawatomie.

The territorial legislature, referred to as the "Bogus Legislature" by those opposed to slavery, adopted Missouri's civil and criminal laws in toto, thus officially sanctioning slavery in

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[106] *Kansas Affairs, Special Committee Appointed to Investigate the Troubles in the Territory of Kansas,* 34th Congress, 1st Session, 1856, H. Rept. 200, as quoted in Robinson, p. 93.

Kansas.[107] The slave code also "provided severe penalties for those who freed slaves or who spoke out against slave holding."[108] The laws enacted by the legislature contained the following provisions:

> Any person who raised a 'rebellion or insurrection of slaves, free negros, or mulattoes' in the territory was to suffer death. Any person who aided or abetted such rebellion or insurrection was to suffer death. Any person who by 'speaking, writing or printing' advised or persuaded or induced slaves to rebel was to suffer death or imprisonment at hard labor for not less than ten years. Any person who knowingly introduced into the territory any printed material that, by argument or statement of opinion, might 'produce a disorderly, dangerous or rebellious disaffection among slaves' was to be imprisoned at hard labor for not less than five years. It was a felony, punishable by imprisonment of not less than two years at hard labor, to maintain 'by speaking or writing…that persons have not the right to hold slave' in the territory or to introduce into the territory 'any book, paper, magazine, pamphlet or circular containing any denial of the right of persons to hold slaves' there. It was further provided that 'no person who is conscientiously opposed to holding slaves, or who does not admit the right to hold slaves in this Territory, shall sit as a juror on the trial of any prosecution for violating any of the sections of this act.'[109]

The territorial legislature also established a white-only public educational system.

Although the free-staters and other settlers in the territory refused to recognize the legislature's authority, the United States Congress acknowledged it as the legitimate governmental body of the territory. According to T. Dwight Thacher, one of the early territorial leaders, "the overthrow of popular sovereignty … left to the people two courses to take: either to condone the immeasurable outrage by acquiescing in the result and conceding the validity of the bogus Territorial Legislature, or to indignantly repudiate the whole thing."[110] Having first sent a request to Eli Thayer for the procurement of one hundred Sharp's rifles for use as protection against the pro-slavery forces, not against federal troops sent by the United States government,

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[107] Ayres, p. 41.
[108] Richmond, 1989, p. 73.
[109] Davis, pp. 50-51.
[110] T. Dwight Thacher, *The Rejected Constitutions,* Kansas Historical Collections, Vol. 3 (Topeka: Kansas Historical Society, 1886), p. 436. Hereinafter referred to as Thacher, 1886.

the Free White State Advocates took the latter course and repudiated the validity of the new territorial government.

Remaining true to their philosophy of using legal means to produce change, the Free White State Advocates proceeded to make use of the territorial judicial process to contest the legitimacy of the territorial legislature. That failing, they appealed to the President of the United States, who upheld the authority of the legislature. Confronted with the fact that, if left unchallenged, the territorial legislature would remain in power until the next election, which was two years away, the Free White State Advocates decided to convene a constitutional convention with the intent of adopting a state constitution. This convention was held without the benefit of an enabling act from the United States Congress, which would have given it federal legitimacy. If the Free White State Advocates succeeded in establishing Kansas as a free white state, a state legislature could be elected to replace the territorial legislature.

Another territorial delegate election was slated for October 1, 1855. However, according to Robinson, the Free White State Advocates established a separate election date of October 9, 1855, in resistance to what they considered to be the illegitimate government established to preserve the interests of the minority pro-slavery territorial residents. On the October 9th election day, the Free White State Advocates, in addition to electing a territorial delegate, voted for delegates to a territorial constitutional convention. The dual elections resulted in the Kansas territory having two individuals claiming the right to occupy the single congressional seat provided to the territory. At the October 1st election, Whitfield was re-elected as the congressional delegate. On October 9th, the free staters elected Governor Reeder as the congressional delegate.

The Topeka Constitutional Convention of 1855

The first Constitutional Convention was held in Topeka in late October, 1855. Both the Free White State Advocates and the Abolition of Slavery Advocates were represented at the Topeka Constitutional Convention. The state constitution drafted at this convention called for Kansas to be admitted as a Free State. However, it also expressly excluded free Negroes from settling the State. The delegates enacted a resolution, originally suggested by James Lane, stating,

> the best interests of Kansas require a population of free white men, and that in the State organization we are in favor of stringent laws excluding all Negroes, bond or free, from the Territory. That nevertheless such measures shall not be regarded as a text of party orthodoxy.[111]

Eli Thayer argued the delegates voted to exclude all enslaved and free Africans from Kansas in order to sway the votes of many of the southern emigrants, who while they were not slaveowners, like most individuals of the time, likewise did not wish to associate with blacks According to Eli Thayer, "if there were to be no free negroes in Kansas; they [southerners] were Free-State men; if there were to be free negroes there they were slave-State men."[112] This stance was also appealing to the Free State Advocates who did not consider themselves abolitionists and vowed to return runaway slaves to their owners. Robinson explained that while many of the free staters disagreed with the fugitive slave law and were sympathetic to the abolition of slavery,

> many Western and Southern Free-State men did care for these things, and as these were not the issue before the people, they were willing to accept the platform [to establish a

[111] Topeka Proceedings, Report on Platforms, p. 3. Davis suggested that Lane actually backed down from the inclusion of this black law in the Topeka constitution because he believed it would preclude Kansas' admission into the Union.
[112] Thayer, p. 90.

> free white state] without opposition. It would be time enough to attend to these matters when the absorbing question of a free State should be settled.[113]

While the Topeka constitution did not include the word "negro," it did limit franchise rights to "whites" and "civilized Indians."[114]

The election to adopt the Topeka Constitution held on December 15, 1855, presented two questions to the people. The first was to vote to accept the Constitution, which resulted in 1,731 votes for adoption and 46 votes against. The second question presented to the people dealt with whether to exclude free blacks from the territory. A majority of the voting populace (1, 287) voted for the exclusion of free blacks and 453 voted to allow them to inhabit the territory. According to Charles Robinson, "this vote on free negroes was to be construed as instructions to the Legislature to exclude them by Kansas law. If not so included, the constitutional provision would be inoperative. This little manoeurve [sic] was to catch both Eastern and Western congressional votes for admission into the Union."[115] Robinson gave James Lane the credit for this political strategy.

After the territory ratified the Constitution, James Lane headed to Washington, DC, to advocate for the admission of Kansas as a State. In addition to considering the admission of Kansas as a state, when it convened in December of 1855, the United States Congress had to decide who was entitled to serve as the territorial delegate, Whitfield or Reeder. When no agreement could be reached, a Congressional committee composed of William A. Howard, Mordecai Oliver and John Sherman were sent to Kansas to investigate the allegations of election fraud. The committee arrived in Lecompton on April 18, 1856 and gathered evidence…at

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[113] Robinson, p. 174.
[114] Davis, p. 54. While Robinson voted in favor of an amendment that would have deleted the word "white" from the constitution, Lane voted against the amendment.
[115] Robinson, p. 219-220.

several territorial towns.[116] Issued in July, 1855, the 1,338 page majority report of the committee declared the election invalid. As a result, the House declared the seat vacant and refused to admit Whitfield or Reeder to the seat. The Kansas Constitution and request for admission as a state did not fare much better. While the U.S. House voted on July 3, 1856, to admit Kansas to the Union, the measure failed to pass in the Senate.[117]

Meanwhile, as a countermeasure to discredit the efforts of the ad hoc Topeka Convention, the Territorial Legislature indicted the central figures of the movement for treason. When initial efforts to arrest the men who had been indicted failed, United States Marshall I. B. Donalson issued "A Proclamation to the People of the Kansas Territory," on May 11, 1856, which served as "the Proslavery call to arms."[118] The proclamation directed "law-abiding citizens" to assemble in Lecompton. On May 21, 1856, pro-slavery forces, reinforced by the presence of federal troops, destroyed a large portion of the city of Lawrence and placed several members of the Topeka Constitutional Convention under arrest for treason.[119] Much to the chagrin of the Free White State Adovcates, who followed Robinson's strategy for freedom, John Brown, an abolitionist, retaliated against the violent acts of this group of pro-slavery supporters. On May 24, 1856, five pro-slavery men were brutally murdered in what has become known as the "Pottawatomie Massacre."[120]

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[116] Zornow, p. 72.
[117] Robinson, p. 228.
[118] Tod Roberts, "Notes of the Proslavery March Against Lawrence," *Kansas Historical Quarterly* 11(No. 1, 1999): 45.
[119] Davis, p. 57.
[120] Courtwright, p. 108.

The Lecompton Constitutional Convention of 1857

In January 1857, the pro-slavery "bogus" legislature provided "for taking of a census and the election of delegates to frame a constitution."[121] The delegates were to convene on the first Monday of September, 1857. Immigrants who arrived in the territory in the spring were excluded from the election. These individuals would have been primarily Free-State sympathizers sponsored by the New England Emigrant Aid Society. In April 1857, the census was taken. However, in 19 of the thirty-four counties, no census was taken. "The disfranchised counties were mainly occupied by Free-State settlers."[122] Sheriffs took the census and then submitted it to probate judges for affirmation by the governor of the territory. All the sheriffs and judges had been appointed by the Pro-Slavery legislature; therefore, none of the officials were Free Staters. Even though a majority of the inhabitants of the territory were antislavery, fraudulent election returns had been used to elect Pro-Slavery officers to the convention. When the election of delegates was held on June 15, 1857, the Free State men refused to vote. Although the territory's male population was approximately 50,000, only 2, 071 men voted.

The next challenge for the Free State advocates was the election of a new territorial legislature. Held on October 5th and 6th, 1857, this election was critical because it provided the free staters with an opportunity to gain control of the territory's legislative body. This was a plausible option for the free staters because the territorial governor, Robert J. Walker, had vowed to ensure a legitimate election. On election day, Governor Walker "stationed federal troops in the fourteen precincts where Missourians were likely to vote."[123] In spite of this, the pro-slavery advocates managed to use their tactic of invading the territory on election day in two of the

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[121] Thacher, 1886, p. 442.
[122] Thacher, 1886, p. 443.
[123] Alice Nichols, *Bleeding Kansas* (New York: Oxford University Press, 1954), p. 197.

places that had been left unattended. Federal troops were not sent to McGee County and the community of Oxford because very few whites inhabited McGee County, which was considered to be Cherokee country, and Oxford was small in size; "including stores and barns, only eleven buildings" were located there.[124] When the election returns for these two areas were delivered to Governor Walker, 1,226 votes had been cast in McGee County, a county in which only 14 votes had been cast in June, 1857. "Oxford had a record turnout for any eleven-building town anytime, anywhere, with 1,628 votes cast."[125] A Southern Democrat, Governor Walker faced the dilemma of remaining true to his "southern" roots or remaining true to his vow to preserve the integrity of the election. Walker declared the McGee and Oxford returns void, and the free staters gained control of the territorial legislature. Charles Robinson asserted that, by gaining control of the territorial legislature, "the principal battery of the enemy had been captured and they had but one hope left, namely to get admitted to the Union under the Lecompton Constitution."[126]

Although the pro-slavery advocates in the Kansas territory were in the minority, the political climate at the national governmental level was favorable to maintaining the institution of slavery.

> The only problem for the constitution framers, then, was how to perpetuate the status quo in such adroit phrases that anti-slavery voters would be trapped, should their constitution be referred to the people…. This was the only concern of the Southerners. Once they got their constitution past the people of Kansas, they felt certain it would be passed by the still Democratic Congress and signed by the Democratic President, James Buchanan.[127]

The Lecompton delegates accomplished the task at hand by carefully wording the referendum to approve the Lecompton Constitution presented to the people of the territory. The only choice the referendum presented to the people was whether to adopt a constitution that allowed slavery or to

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[124] Nichols, p. 198.
[125] Nichols, p. 198.
[126] Robinson, p. 24.
[127] Nichols, p. 199.

adopt one that did not allow slavery; they were not provided with an opportunity to vote against ratification of the constitution. Because the constitution contained a grandfather clause that allowed slave owners to retain any slaves that they owned, as well as their progeny, voting for the constitution without slavery would have had a minimal impact on slavery. While a vote for admission without slavery would have prevented the purchase of "new" slaves, it did not constitute an absolute ban upon slavery. Thus, the referendum provided a mechanism through which to protect white privilege. Because regardless of how the white voters made their choice, black people could still be enslaved in Kansas.

The underlying philosophy of equality and property rights is reflected in the following two statements from the Lecompton constitution. First, on slavery, the document provided that "the right of property is before and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its increase is the same and as inviolable as the right of the owner of any property whatever."[128] This clause clearly placed individual property rights before those of the state. The primacy of individual rights is also evident in the language of the proposed bill of rights.

> Instead of the usual declaration that all men are created equal in rights, they declare[d] "that all freemen, when they form a social compact, are equal in rights,….[and] no freeman shall be taken or imprisoned or disseized of his freehold, liberties or privileges, or deprived his life, liberty, etc., but by the judgment of his peers or the law of the land"[129]

The legislature had no power to emancipate slaves without (1) the permission of the owners and (2) renumeration of the value of the slave to the owner. The election on the Lecompton

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[128] Lecompton Constitution, Bill of Rights. As quoted in T. Dwight Thacher, *Transactions of the Kansas State Historical Society Embracing the Third and Fourth Biennial Reports, 1883-1885, Vol. III: 5-15*. (Topeka, Kansas: Kansas Publishing House, T.D. Thacher, State Printer, 1883). Hereinafter referred to as Thacher, 1883.

[129] Thacher, 1883, p. 9-10

Constitution, held on December 21, 1857, was boycotted by the Free Staters because of the loyalty oath that voters were required to sign. Many of the Free Staters still did not acknowledge the legitimacy of the "bogus" legislature. Initially, the constitution allowing slavery was passed with 6,143 voters voting in its favor. It was later determined that 3,000 of the votes, primarily from Oxford, Shawnee, and Kickapoo, had been cast fraudulently.[130] Five hundred sixty-nine men voted for the constitution without slavery.

The Free Staters challenged the initial vote on the Lecompton constitution and countered by conducting their own referendum for ratification, which submitted the question once again to the voters on Jan. 4, 1858. The Pro-Slavery advocates in the state ignored this election. Only 23 men voted for the constitution without slavery, 138 voted for the constitution with slavery, and 10,276 voted against the constitution. In spite of the results of the election sponsored by the free-staters, on February 2, 1858, President Buchanan sent the Lecompton Constitution to Congress urging its acceptance. The territorial legislature, which was now controlled by the free staters, enacted legislation providing for an election to be held on March 9, 1858, to select delegates to yet to a third constitutional convention.

The Leavenworth Constitutional Convention of 1858

While the United States Congress considered the ratification of the Lecompton Constitution, a third constitutional convention was held in Leavenworth. This convention was primarily a political maneuver by the Free Staters, and the constitution drafted at this convention proposed admission as a free state. However, the free state-controlled territorial legislature used deceptive means to convene the constitutional convention. Territorial Governor James Denver pocket-vetoed the bill authorizing a constitutional convention. This action should have

[130] Thacher, 1886, p. 447.

foreclosed the possibility of a constitutional convention. The option to pocket veto a bill is available to the executive branch only when the legislature passes a bill and the legislative session will end prior to the expiration of the time period that the executive branch has to either approve or veto the bill. By exercising a pocket veto, the executive branch forecloses the legislative branch's ability to pass the bill over an executive veto. Not to be thwarted in their efforts to win the race to statehood and for freedom, James Lane presented a counterfeit document bearing Governor Denver's veto to the legislature, which voted to override Denver's veto.[131]

According to T. Dwight Thacher, the liveliest debate of the Leavenworth convention centered around the issue of what to do should Congress grant statehood to Kansas under the Lecompton constitution. The issue on the floor of the Leavenworth convention was whether in the event of admission to statehood under the Lecompton constitution, the government provided for in the Leavenworth constitution would be put into effect immediately. The result of these debates was section 5 of the Leavenworth constitution that provided:

> In case the [Lecompton] constitution should be adopted, then upon admission of Kansas into the Union as a State, the [Leavenworth] constitution should be in full force, the State officers should immediately enter upon the discharge of their duties, and the Governor should immediately, by proclamation, convene the General Assembly.[132]

The Leavenworth Constitution closely paralleled the Topeka Constitution, particularly in its bill of rights. It stated,

> All men are by nature equally free and independent, and have certain inalienable rights, among which are those enjoying and defending life and property, acquiring, possessing and protecting property and seeking and obtaining happiness and safety….and the right of all men to the control of their persons, exists prior to law and is inalienable.

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[131] Zornow, p. 345.
[132] Leavenworth Constitution, Section 5, as quoted in Thacher, 1883, p. 14

This phrase, "the right of all men to the control of their persons, exists prior to the law and is inalienable" supported the position of the free white state advocates, as well as the abolition of slavery advocates, that free blacks and fugitive slaves had the right to control over their body and because this right existed prior to the law (i.e., was a divine or natural right), then it could not be taken away by laws to which the individual had not consented. Political philosophy acknowledges that the consent of the governed can limit one's inalienable rights. In a democracy, consent is given via one's vote. Because, in most instances, free blacks and in all cases enslaved Africans could not vote, they had not been afforded the opportunity to provide or withhold their consent.

The following slavery clause appeared in the Topeka, Leavenworth, and Wyandotte documents and provided "there shall be no slavery in this State, nor involuntary servitude, unless for the punishment of a crime,…whereof the party shall have been duly convicted." Perhaps the most remarkable aspect of this document is the total lack of reference to color. The constitution did not contain the word white. As Dwight Thacher would observe three decades later, because there is no reference to color, "[n]o change would have been required in its provisions or language to have made it in perfect harmony with the fourteenth and fifteenth amendments to the Constitution of the United States"[133] Of the two constitutions, Thacher wrote the following, "[Lecompton] embodied the most radical doctrines of the slave power, the [Leavenworth] anticipated the advanced and humane doctrines of republican equality which remain as the most precious legacy of the War of the Rebellion."[134] Historian Nichols stated that the "delegates moved against both the 'free white state' doctrine of the Topeka Constitution and the proslavery

[133] Thacher, 1883, p. 11
[134] Thacher, 1883, p. 11

bias of the Lecompton. An unqualified anti-slavery stand was framed."[135] On May 18, 1858, an election was held, and the people of the territory rejected the Leavenworth Constitution by a three to one ratio.

The English Bill

In addition to the efforts taking place in Kansas to prevent the legitimation of the Lecompton Constitution, appeals were made to Congress to reject the Lecompton Constitution based on both the allegations of election fraud and that the election did not provide voters with an option to reject the constitution. As a result of these efforts, on April 3, 1858, the same day that the Leavenworth convention adjorned with a constitution, Congress passed the English Bill, which required the return of the Lecompton Constitution to the territory for another ratification vote.[136] President Buchanan signed the English Bill on May 4, 1858.[137] When initially presented to the United States Congress, the Lecompton Constitution had an ordinance attached to it that would have resulted in the Kansas territory receiving twenty-three million acres, the largest land grant any state had ever received upon admission to statehood. In addition to requiring that the qualified voters in the territory be provided with the option of voting against the Constitution entirely, the English Bill reduced the land grant considerably, to four million acres. There were also two other strings attached to the granting of statehood. First, the English Bill provided that Kansas "shall never tax the lands or property of the United States in that State."[138] The second provision prohibited the residents of the state from interfering with the claims of bona fide

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[135] Nichols, p. 218.
[136] English Bill. Approved May 4, 1858. Thirty-fifth Congress, Session I, Chapter 26. United States Statutes At Large, Vol. 11, pp. 269-271. Hereinafter referred to as English Bill.
[137] As the English Bill worked its way through the national legislature, the Free- Staters held a state convention on April 28, 1858 in Topeka to nominate officers, pursuant to the provisions in the Leavenworth Constitution. On May 18, 1858, an election of officers, as well as a vote for the ratification of Leavenworth constitution was held in Topeka.
[138] English Bill, p. 269- 270.

purchasers of land from the United States. If the people voted to accept the reduced land grant, as well as the stipulations on the United States, the Lecompton Constitution and slavery would be approved. Should the people fail to adopt the Lecompton Constitution, the English Bill prevented the election of delegates to a new constitutional convention until the Kansas territory's population reached 94,560. The election authorized by the English Bill on the Lecompton Constitution was held on August 2, 1858. The people voted by a seven to one ratio against the Lecompton Constitution.[139] Because Congress was growing tired of the numerous allegations of election fraud, the English Bill also contained a provision to ensure the integrity of the election that punished any individual who interfered in the election with a sentence of six months to three years of hard labor. Election commissioners were subject to the same punishment in the event that they failed to discharge their duties as provided in the bill.[140]

The Wyandotte Constitutional Convention of 1859

In February 1859 shortly after the territory's population reached 94,560, the territorial legislature submitted the question of whether to convene a constitutional convention to the people. At the election held on March 28, 1859, 5,306 men voted for the measure, and 1,425 voted against it. On May 10, 1859, the Republican Party of Kansas was officially formed at Osawatomie.[141] Both the radical and the conservative factions of the old Free-State party were represented at the convention. According to historian Zornow, "A platform committee drafted a set of resolutions which proclaimed the Declaration of Independence to be the true basis of all government and insisted that the Constitution did not carry slavery into the territories."[142] In

[139] Nichols, p. 211.
[140] English Bill, p. 271
[141] Richmond, 1989, p. 75.
[142] Zornow, p. 81.

addition to adopting an anti-slavery position, the Republican Party's platform also supported "the construction of a transcontinental railroad and free homesteads for settlers."[143]

The Democrats met in May, 1859, and "proclaimed a doctrine of peaceful co-existence for slavery and freedom….[They] recognized no difference between pro-slavery and free-state men as such."[144] The Democratic platform favored state control over state institutions without interference from Congress, a homestead law, and popular sovereignty. The election of convention delegates was held on June 7, 1859. Fourteen thousand men voted. The Democrats carried Leavenworth, Doniphan, Jefferson, and Jackson and elected two of the Johnson County delegates, and the Republicans carried the remaining twenty-seven counties. The provisions of the constitution were debated, and a constitution was drafted. Prior to the vote of the convention to adopt the constitution and present it to the eligible voters in the state for ratification, the Democratic delegates held a caucus on July 28, 1859, and refused to sign the constitution drafted in Wyandotte.[145] Initially, Congress tabled its consideration of the Kansas Constitution. However, after the elections of 1860, and the ensuing withdrawal of the southern congressional members, Congress considered and ratified the Kansas Constitution. Thus, amid the turmoil brewing over Southern succession, Kansas was admitted into the Union on January 29, 1861. In the following sections, an analysis of the competing political philosophies and racial ideologies of the Wyandotte delegates is provided.

Competing Political Philosophies of the Wyandotte Delegates

Who were the fifty-two men who convened in Wyandotte, and what connection do they have to the three factions described in the beginning of this chapter? There were 35 Republican and 17

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[143] Richmond, 1989, p. 75
[144] Zornow, p. 82.
[145] Zornow, p. 85

Democratic delegates. The chief leaders of the contending parties were not elected as delegates to Wyandotte.[146] Twenty-six of the delegates were lawyers, and 19 were farmers.

The delegates also came from a wide range of geographic locations. Twenty-one of the delegates were from Ohio, and they were split along party lines with 14 of the 35 Republicans being born in Ohio and 7 of the 17 Democrats being born in Ohio. The delegates also came from the New England area, the mid-Atlantic states, as well England, Scotland, and Ireland. None of the delegates were from Missouri or the deep South.[147] The following analysis of the proceedings of the Wyandotte constitutional convention reveals multiple perspectives in their political philosophies and racial ideologies. This analysis provides insights into the competing political philosophies and racial ideologies of the men who represented the white residents of Kansas.

The competing political philosophies reflected in the debates that took place during the Wyandotte constitutional convention are discussed in the next section of this chapter and concern (1) defining popular sovereignty, as reflected in the tensions between governance by the civic elite versus the rights of individuals to self-determinancy; (2) determining one's duty toward law, which arose in discussions around strict adherence to the law and civil disobedience; and (3) defining freedom and liberty, as reflected in the tensions that arose between natural rights versus civil rights.

Popular Sovereignty: Civic Elite versus Individual Determinism

The proceedings are replete with declarations from delegates across philosophical and ideological perspectives of "leaving it to the people to decide." Although this vantage point could be broadly cast as falling under the term, "popular sovereignty," a range of underlying

[146] John A. Martin, Wyandotte Proceedings, pp. 664-665
[147] There was one delegate from Virginia, J.T. Barton.

motivations is evident from an examination of the discussions that occurred. Some of these positions are linked to the movement for state's rights, while some seem aligned with a philosophical position that individuals have the right to control and decide how they are to be governed. Thus, in some versions of the popular sovereignty issue, the phrase, "the people," is synonymous with the state. As such it could still be linked with the political philosophy of governance by the civic elite, which could be traced to the beliefs of Jefferson and other colonial leaders that the governing class was endowed with the responsibility of legislating and governing the people. In some instances "the people" referred to the growing ideological belief in individualism associated with Jacksonian democracy, so that the phrase actually referred to individual self-determination, which could be traced to the movement to expand to each individual the right to govern. This movement resulted in universal white male suffrage and was certainly impacted by the wave of Eastern European immigrants and the growing dissatisfaction of the working classes.

An example of these competing interests can be found in the debates surrounding an amendment to the article on suffrage proposed by James Blood.[148] The debate centered on whether future expansions of suffrage rights should be a matter for the people (i.e., individuals) or the legislature (i.e., civic elite) to decide. The following statement by James Blood, originally from Vermont, Republican, and a merchant, reflects his belief in the rights of individuals to self-determinancy:

> It is not proposed to have this power [the right to determine suffrage rights] in the hands of the Legislature, but to confide it to the hands of the people. Mr. President, I have

[148] Blood proposed the following amendment: *Provided*, that the Legislature may at any time extend by law the right of suffrage to person not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the electors at a general election, and approved by a majority of all the votes cast at such election. Wyandotte Proceedings, p. 514.

> confidence in the people of Kansas. I think they are as competent as this Convention is to decide this question.[149]

Winchell, originally from New York, Republican, and a farmer shared similar beliefs as Blood and stated,

> I have two reasons for being in favor of the proposed amendment. One is, that it leaves this whole matter, after all, with the people, to determine whether they will or not extend the right of suffrage to persons not here enumerated…. having no fear that the people will decide what is unjust.[150]

When the education of blacks was debated, Lamb, a Republican originally from Indiana and a mechanic by trade, advocated the rights of the people, rather than elected officials, to decide the issue,. Lamb referred to himself as a common citizen and made the following statement as indicative of the common citizens' viewpoint:

> I am in favor of referring this matter, whether the black man shall have the privilege of coming into Kansas, to a direct vote of the people. I stand upon the popular sovereignty question in relation to their children having a chance of getting an education. If they come into Kansas at all, let us give them an education.[151]

However, the equation of the people as meaning the legislature is reflected in Blunt's statement during the debates surrounding the education of blacks:

> I propose to leave this question entirely open to the Legislature, that society may regulate itself in this respect, and not bar the Legislature from providing for the education of blacks, in case we have them among us.[152]

Another Republican, Blunt was originally from Maine and was a physician. Statements made by Griffith, a Republican farmer from Indiana, also reflected the belief the legislature should speak for the people.

> If we incorporate provisions that shall exclude any class, the time may not be far distant when we may wish we had not done so. If we leave it to the public sentiment, as

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[149] Wyandotte Proceedings, pp. 515-516.
[150] Wyandotte Proceedings, p. 514.
[151] Wyandotte Proceedings, p. 183.
[152] Wyandotte Proceedings, p. 177

> expressed through the Legislature of the State, the people all can govern in this matter. My friends over the way profess to be popular sovereignty men. Let us leave this matter to the people then.[153]

Although this is discussed in the next chapter, the position associated with individualism eventually was put into operation in Kansas with regard to the issue of segregated education. For example, the constitution authorized the state legislature to adopt a "uniform system of public schools" and conferred on the local school districts the ability to decide whether to segregate education on the basis of race.

Duty Toward Law: Strict Adherence versus Civil Disobedience

As discussed previously, the free state advocates held fast to their belief that the political and judicial structures were the appropriate forums through which to effectuate social change. In contrast to this, the abolition advocates believed that individuals had a moral obligation to disobey unjust laws. This belief in civil disobedience could be traced to Thoreau's essay, "Civil Disobedience," an article that was widely read by the abolitionists. Statements from four of the delegates reflected the strict adherence to the law doctrine. Three individuals, McDowell, Stinson, and Wrigley, were lawyers by profession and Democrats.[154] The following statement by McDowell, a lawyer from Leavenworth, expressed this obligation: "When that tribunal [United States Supreme Court] has given a construction to that instrument [Constitution], it does seem to me that it devolves upon us, as law-abiding citizens--as men sworn to support the Constitution of the United States – to consent at once to support it as it has been construed."[155] The debate on one's duty to the law was connected to the position that Kansas would take on the 1851 Fugitive Slave Law. While McDowell and Stinson, both from Leavenworth, were unwavering in their

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[153] Wyandotte Proceedings, p. 175

[154] The Democratic party was a conglomeration of the old- proslavery advocates and the Free State Democrats. Wyandotte Proceedings, p. 126.

[155] Wyandotte Proceedings, p. 273.

support of the 1851 act, the following statement made by Wrigley, a Democrat from Doniphan who was born in Ohio, reflects that, while he believed in adhering to the law, he did not necessarily agree with its provisions.

> I have great respect for the Constitution of the United States; and however much I might dissent from a principle embraced in any particular law enacted under that Constitution, and however much I might desire its amendment or repeal--still, while it is a law, I believe it is the duty of every citizen to uphold and sustain it.[156]

Winchell, a Republican farmer from New York, favored civil disobedience. For example, he stated,

> I am one of those who believe that the fugitive slave law is utterly and entirely without warrant in the Constitution of the United States; that it is subversive of the rights of citizens and subversive of State rights, which are guaranteed in the Constitution of the United States. I believe, also, that it is imperatively demanded of every State, in forming their organic law, that they should take care that their rights shall be respected, in order that their constitutions shall be in conformity with the Constitution of the United States; and that for them to neglect this would be a violation of the Constitution of the United States.[157]

Blunt also espoused a belief in the doctrines of civil disobedience. He stated,

> The fact is patent and too well known to require proof here, that the Legislative, Executive and Judicial departments of this government are under the control and patronage of the slave power, and dare not do otherwise than obey its inexorable demands. And while as a general principle, I am opposed to disobedience of the law, and am ready to submit to any enactment that affects only my material or corporeal interests, however unjust such law may be, yet I will never submit to any statute that compels me in violation of conscience and a conception of Christian duty, to commit a crime against the laws of God and humanity.[158]

Blunt's position aligned with the sentiments of the anti-slavery advocates. While he declared that he would not attempt to interfere with the rights of slaveholders, he also would not assist them in their pursuit of a fugitive slave. He stated he had a moral obligation to disobey the Fugitive Slave law.

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[156] Wyandotte Proceedings, p. 274.
[157] Wyandotte Proceedings, p. 282-285.
[158] Wyandotte Proceedings, p. 278.

Freedom and Liberty: Natural Rights versus Civil Rights

Historian Kenneth S. Davis suggested that many of the early settlers across party lines in Kansas held to a belief in the Natural Law.[159] The Wyandotte delegates discussed how the concepts of freedom and liberty would apply to the bill of rights contained in the state constitution they were drafting. In a democracy, freedom, liberty, and rights "refer to the ability to act with out restrictions or with restrictions which are themselves limited in specific or specifiable ways."[160] One's freedom and liberty can be restricted by the laws individuals adopt when they come together to live as a community. Individuals possess two types of rights: those derived from the fact they are human beings constitute natural rights; those derived from governments are considered to be civil rights.

Political philosophers, such as John Locke, argued that one's natural rights should never be taken away. Natural rights are those rights related to one's right to self-preservation and property rights. A democratic government protects the natural rights of citizens through the enactment of a bill of rights. Within the context of the 1850s United States, the tension between the natural right to self-preservation and the right to property was heightened because of the issue of slavery. This tension was evident in the debates of the Wyandotte delegates and focused on whether the slave owner's right to property superseded the enslaved Africans' right to self-preservation (i.e., the right to control of their persons).

The following language was proposed as Section 1 to the Kansas Constitution's bill of rights: "The right of all men to control of their persons exists prior to law, and is inalienable." The use of the phrase "right to control of their persons" was cause for considerable debate,

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[159] Davis, p. 67.
[160] Lyman Tower Sargent, *Contemporary Political Ideologies: A Comparative Analysis,* 11th edition (Fort Worth, Texas: Harcourt Brace College Publishers, 1999), p. 41.

particularly about whether this was an inalienable right. Interestingly, the debate was dominated by the lawyers, as well as the delegates who had been born in Ohio. McDowell argued that the right to control over one's person was not an inalienable right, because if it was, then it would become impossible to enforce criminal laws. He went on to declare that he was also opposed to "the proposition that all men are entitled to control of their persons except negroes and mulattoes. I say that everybody, negroes and mulattoes included, have not this right." [161]

Wrigley believed "that there are persons of color who have just as good a right to the control of their persons as any white man. I do not say that because a man is a negro or mulatto, therefore, he has not a right to control his person, or may not have and enjoy the rights of a free man."[162] Therefore, he supported the position of protecting the right of a man to control over his person. This was consistent with his position on the 1851 Fugitive Slave Act discussed in the previous section. By advocating for the use of the legal system to change laws, he remained true to his belief in adhering to the law, but he attempted to use the system to establish a state citizenship right that could have been used to challenged the legitimacy of the federal law.

Kingman urged the delegates to adopt the "old established usage" and proposed the following language taken from the Declaration of Independence:

> All men are possessed of equal and inalienable natural rights, among which are those of life, liberty and the pursuit of happiness.[163]

He proposed this route because these words were

> fixed in the minds of the American people – they have become traditional…. We all cling to old truths, and I love the very forms of expression in which old truths have been presented. I dislike to change any old truth from the forms of language to which I have been accustomed. I dislike to see them taken from the habitments in which I have so often seen them clothed and put into new and doubtful phraseology; and our national

[161] Wyandotte Proceedings, p. 275.
[162] Wyandotte Proceedings, p. 274.
[163] Wyandotte Proceedings, p. 283.

> Declaration of Independence is of this class of truth. That Declaration of Rights forms a part of our political creed, from which no man can extricate himself; and I do not wish to change the clothing of these ideas.[164]

By adopting the "old truths," the delegates legitimated white privilege and perpetuated the role that the institution of slavery had played in the entitlement to civil rights bestowed on citizens. If they had adopted the language proposed by the committee, they would have resisted whiteness by granting civil rights to fugitive slaves and free blacks. The committee's language would have opened up the possibility for recognizing that enslaved Africans who escaped from slaveowners were exercising their rights to control over their persons. Additionally, it would have been possible to argue that free blacks should be released from the requirement that they carry papers, indicating they were free and authorized to be within certain geographic areas. Clearly, such an enactment would have been unpalatable to the prevailing racial ideologies of the time. In the following section, I discuss these ideologies.

Competing Racial Ideologies of the Wyandotte Delegates

The delegates' racial ideologies, like their political philosophies, reflected a spectrum of beliefs and positions ranging from (1) the debate between environmental versus physiological causes of racial inferiority; (2) belief in a racial hierarchy as opposed to racial equality; (3) the discussion of the social and legal construction of race. Although the competing racial ideologies at work in Kansas during the 1850s reflected those of the time, these beliefs ranged from those that were waning in popularity, such as environmental causes of differences among races; those rising in popularity, such as explaining variation as physiological differences; as well as one, the social and legal construction of race, which is discussed more generally as a twentieth century ideological construct.

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[164] Wyandotte Proceedings, p. 283.

Environmental Versus Physical Ideologies for Racial Differences

Samuel Stanhope Smith's *An Essay on the Causes of the Variety of Complexion and Figure in the Human Species*, first published in 1787 and republished in 1810 , was the first major American work on racial differences. It supported the belief that racial differences were attributable to environmental causes. While

> there was confidence in the special abilities of the American people [during this era], … this pride was tempered by a belief that other peoples, if given the opportunity, could build free institutions [and] …there was also hope that most other peoples would be liberated and transformed rather than dominated or destroyed.[165]

It was believed that "republicanism, good government, and education would transform other peoples."[166] Therefore, the perceived inferiority of non-white peoples was attributed to the environment and the ideals to which they were exposed. It was believed that inferiority could be removed through proper education, training, and exposure to a civilized lifestyle.

The following statement attributed to John Burris reflected the belief of many of the Wyandotte delegates in the ability of education to transform enslaved Africans:

> We must proceed upon the supposition that the blacks are to live in common with the whites. It is supposed that they are to mingle and live together with us. I ask if it is desirable to see that class of citizens growing up in entire ignorance? If they are to live in the Territory they should be made as intelligent and as moral as an education can make them.[167]

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[165] Horsman, p. 85

[166] Horsman, p. 97

[167] John Burris sent a letter dated August 3, 1859 to the Editor of the *Commercial Gazette* stating this statement was incorrectly attributed to him. "How your reporter could have attributed the above remarks to me it is difficult to determine, as the doctrine therein set forth is in direct opposition to the views which I have always entertained, and always advocated; and I never did, either in the Convention or out of it, utter a single sentence, word or syllable which could possibly be construed to favor the doctrine therein contended for. The truth is, that in the debate on that article of the Constitution on the 14th inst., I took no part whatever except to vote, and my vote was in direct opposition to the arguments which I am represented as having offered."

Yet, it is also evident from this statement that he did not believe education could make blacks equal to whites as is exemplified by his use of "as intelligent" and "as moral." His referent at the end of this phrase is to blacks, rather than to whites. Thus suggesting that, from Burris' perspective, education could improve the stature of blacks, but could never make them as intelligent or moral as the white man.

Beliefs in environmental causes of racial difference were supported by the Protestant religion's adherence to the monogenesis story; which Darwinian science was to confirm by pronouncing that there was one human species. Religion was also used to justify racial inferiority, because differences were attributed to God's plan. McDowell's statement during the convention reflected this belief, which gained popularity in the late 1700s:

> We stand upon the record as believing that God Almighty, for some high purpose, has established this inferiority of the black race and has stamped an indelible mark upon them. Between the two races is an unfathomable gulf that cannot be bridged. We believe the two races can never become homogeneous. All propositions of social equality only tend to complicate this question, and hang round it questions that tend to produce excitement.[168]

Many individuals believed that for some divine reason, which was not to be questioned, God had designated the white race, more specifically white protestants, as superior to all others. However, the attribution of racial differences to environment and the belief that inferiority could be assuaged through education and "civilization" did not result in a belief that non-whites should be welcomed into and allowed to participate in white society.[169] This belief was often manifested in a stance that urged the separation of the races. The following assertion by McDowell is indicative of this position:

> I came here instructed to oppose negro suffrage and negro equality – to advocate the enactment of a clause in the Constitution prohibiting negroes from emigrating to the State

[168] Wyandotte Proceedings, p. 178
[169] Horsman, p. 102.

> of Kansas, and by whatever legislation, to discourage the negroes that are here from remaining.[170]

McDowell espoused the belief that the black race was separate and unequal.

The turn toward physiological causes of racial differences, rather than environmental, marked a sharp departure from the ideological beliefs of the late 1700s. According to Reginald Horsman, "the precision with which scientists distinguished between different racial groups was enhanced …by the increased fascination with anthropometry – anatomical measurement."[171] The most popular of the various forms of anthropometry were physiogonomy, craniology, and phrenology, which involved the comparative measurement of features, the skull, and the head.

> The course of a new science – phrenology – is revealing of the manner in which science and popular opinion intertwined to confirm a rapidly growing belief in wide divergencies between the peoples of the world…. In its early scientific phase phrenology provided inherent, physical reasons for racial differences, and in its later popularization, it provided a channel through which such ideas could be disseminated among the general population.[172]

Phrenology was premised on the belief that separate sections or faculties of the brain were responsible for specific emotional, physical and mental capabilities. While phrenologists believed that exercise (i.e. use of a particular faculty) would lead to further development, most also recognized that one's capability for improvement was limited by genetic inheritance. Phrenologists began to write for popular audiences in the 1840s. The influence that perceived physiological differences had on the racial ideologies of the Wyandotte delegates is reflected in the following statement by Blunt:

> Gentlemen on the other side of the House do not seem to stand so much upon the mere question of color as they do upon the peculiar shade, or whether a man possesses wool or

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[170] Wyandotte Proceedings, p. 302
[171] Horsman, p. 54
[172] Horsman, p. 56.

> hair upon his cranium, or the shape of the nose, or some other physiological peculiarity.[173]

Blunt went on to express his belief that individuals of African descent were "intelligent" while indigenous people were "wild and untutored."[174] Blunt's statement acknowledged physiological distinctions, while recognizing the environmental causes, and indicates that racial ideologies expressed by the Wyandotte delegates did not fall neatly in a particular position. Rather, the delegates' racial beliefs were influenced by all of the racial ideologies in circulation at the time and many times were used to construct a racial hierarchy in which whites occupied the top position.

Racial Heirarchy Versus Racial Equality

In the first decades of the nineteenth century, the establishment of racial hierarchies was supported in both scientific and amateur writings. An ideological distinction between blacks and Native Americans also developed in the late 1700s. Unlike enslaved Africans, who were thought to be educable,

> Indians by the latter years of the eighteenth century were despised because they had tried to remain Indian and had shown little desire to become Christian gentlemen. The Indians could therefore be thrown off the land, mistreated, or slaughtered, because in rejecting the opportunities offered to them they had shown that they were sunk deep in irredeemable savagery.[175]

These ideological differences presented themselves in interesting ways in the Wyandotte debates. The Democrats, who would be more closely aligned to pro-slavery sentiments, consistently advocated for citizenship rights of Native Americans, while the Republicans tended to adopt the viewpoint that Native Americans were savages and as such were below blacks in racial hierarchy. The divergent views about the position on the racial hierarchy that blacks and Native

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[173] Wyandotte Proceedings, p. 303.
[174] Wyandotte Proceedings, p. 303.
[175] Horsman, p. 104

Americans occupied was evident in the debates surrounding the article of the Constitution governing suffrage rights.

J. P. Slough proposed to include the following language in section two of the article dealing with suffrage: "Sec. 2. Male Indians, who by treaty or otherwise, have become citizens of the United States, and who have resided six months in Kansas, and ten days at least before such an election in a township or ward, may vote at such election."[176] This section would have provided Indians with suffrage rights and is aligned with the racial hierarchy viewpoint because it extended rights only to male Native Americans who were "citizens," which presumably meant they had become civilized.

The primary reasons offered by the Republican delegates in opposition to granting citizenship rights to Native Americans were based on their "wild and untutored" nature, as well as their tendency to vote Democratic. As reflected by Blunt's statement, the Republicans also pointed out the inconsistency in the Democrats' racial viewpoints.

> For while they [Democrats] are rigorously opposed to anyone voting who might, perchance, have a drop of African blood in his veins, they are equally eager and zealous to confer upon the wild and untutored Indian all the rights and privileges which we, ourselves enjoy. And, Mr. President, the only solution to which I can arrive for this manifest partiality of our Democratic friends, is in the fact that while persons of African descent are generally possessed of intelligence and a just appreciation of Christian humanity, the red man almost invariably votes the Democratic ticket.[177]

Horsman commented that during the 1830s, antiabolition violence swept over northern cities because it appeared that abolitionists were "advocating both the end to slavery and the incorporation of blacks into white society."[178] The violence died down during the 1840s when it

[176] Wyandotte proceedings, p. 302.
[177] Wyandotte proceedings, p. 303.
[178] Horsman, p. 274.

became evident "that opposition to slavery and to slave expansion did not have to mean a defense of black equality."[179]

In Kansas, the belief that blacks were not equal to whites was also expressed in the desire to exclude them from the state. The effort on the part of many delegates to create a free white state was based on Kansas' geographic location as a buffer between free states and slave states. Many delegates feared that if Kansas became free and if blacks were not excluded, the state would become a haven for emancipated slaves. The inherent inequality of the races was generally accepted as a scientific fact by many whites in the early 1850s. According to Horsman, the intellectual dialogue turned to a consideration of how to make the polygenesis position palatable to those with strong religious convictions. This was important because polygenesis was central to the continued refinement of rationales for racial divisions.[180] Coupled with this was the belief in the need to preserve the purported purity of the white race.

The abolitionists and anti-slavery advocates who advocated for the equality of the races were often accused of seeking to amalgamate the two races. It was commonly believed that mixing the races would result in infertile hybrids. Josiah C. Nott, a well-known proponent of the theory of the racial inferiority of enslaved Africans during the mid-1800s,

> often used De Bow's Review [a popular publication of the time] to expound his views on the importance of racial purity. If the superior race was not kept pure, then it would not maintain the necessary talents to rule and control lesser races. In an effort to make his ideas of separate races conform to Buffon's defintion of species, he continued to stress that "hybirds" produced by the crossing to races tended toward infertility.[181]

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[179] Horsman, p. 274.
[180] Horsman, p. 134-135.
[181] Horsman, p. 154.

During the Wyandotte convention, the Democrats accused the Republicans of being an "amalgamation, a negro-equality party." Thacher, a Republican, countered this by pointing out that by advocating for slavery, the Democrats were

> sustaining and propagating a system whose basis rests upon prostitution and concubinage more loathsome and degrading than any that can be found in the wide world. [The Republicans argued that in the South], there are ten slaves to-day with Anglo-Saxon blood coursing their veins, to one pure African. The system of slavery, in its practical working, is a constant intercourse between the races. Negro equality! there are men among you who shriek this cry, who first saw the light in the arms of a negros nurse, and from her breast drew the milk of infancy.[182]

In spite of the support of a majority of the delegates for the position that blacks were not equal to whites, some Wyandotte delegates did express their belief in the equality of the races. However, these individuals also advocated for keeping the races separate. For example, Greer stated the following,

> I shall vote against the proposition…, not because I do not think the negroes and mulattoes are not free and equal, but because it does not follow, that because they are free and equal, therefore, the white man shall hug them to his bosom, or that white people shall be thereby compelled to admit them to all the social and political privileges of civil government.[183]

Ritchie believed "that it is generally conceded that a black man is part of human creation. Both parties agree in the great, God-given rights which every man possesses. I would be for leaving any party that assumes the position that we must be kept pure and holy, and exclude others of the human family. Take that before the people![184] He also drew attention to Frederick Douglass as an example of black intellectualism and equality.

> Gentlemen assert here that they are a superior race. This body is sufficiently intelligent to know that it is easy to make assertions; but there is no evidence adduced to show that they excel Mr. Douglass – even the black man Douglass. I desire to admit all that is fair

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[182] Wyandotte Proceedings, p. 180.
[183] Wyandotte Proceedings, pp. 272-273
[184] Wyandotte Proceedings, p. 181

> in argument. When gentlemen assert they are superior, I hope they will show this body wherein they excel Douglass the darkey.[185]

Blunt stated that he "expect[ed] to recognize every man upon the free soil of Kansas as a freeman, without reference to color of his skin."[186] Hutchison pointed out the inconsistency of espousing the equality of all men and then restricting these rights along racial lines.

> Our declaration of rights…declares all men are equally free and independent and possessed by nature of certain inalienable rights. We declared that this morning, and this afternoon we propose to stultify ourselves, and say that Chinese or blacks who happen to come here shall be disfranchised and deprived of rights of freemen. I believe that it is not in accordance with that spirit of liberty which is now advancing before the world for us to insert a provision of that kind. Sir, we have endeavored to strike down the forms of tyranny, and the idea that I am better than thou – and yet we are about to insert this old relic of the dark days. I had hoped this word "white" would not be inserted in our Constitution.[187]

By advocating for a constitution that made no reference to color, Hutchison expressed his belief in the equality of all men.

Defining Whiteness: Social and Legal Construction of Race

Recently, scholars such as Michael Omi and Howard Winant have defined "race as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle"[188] Racial classifications have been used throughout the history of the United States as a means of justifying the treatment of African Americans, Native Americans, Hispanics, and Asian Americans in a democratic society based on notions of equality, liberty, and justice "At the heart of the American and western consignment of other races to an inferior, lesser human status was the need to justify exploitation and destruction."[189] Omi and Winant argued that racial

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[185] Wyandotte Proceedings, p. 182.
[186] Wyandotte Proceedings, p. 278.
[187] Wyandotte Proceedings, p. 300.
[188] Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s, 2d edition* (New York: Routledge, 1994), p. 55.
[189] Horsman, p. 300.

formation "must recognize the importance of historical context and contingency in the framing of racial categories and the social construction of racially defined experiences."[190] The social and legal construction of race was evident in the debates of the Wyandotte delegates primarily during the debates surrounding how the term citizen was to be defined in the constitution. For example, Stinson declared, "I would suggest to the chairs that we are only defining who are 'white male citizens.'"[191]

The legal construction of "white" was discussed within the context of a decision by the Ohio Supreme Court, which held that one's designation as white or black should be governed by the principle that, "whichever of that blood predominates, he belongs to that class ."[192] Blunt, who acknowledged his agreement with the Ohio decision, proposed

> the insertion of the word "white" [in the section dealing with suffrage rights] would satisfy all parties, and let that word be interpreted according to its general meaning. It seems, however, that such is not the case; that our Democratic friends are not satisfied with the word "white," for fear that, by a liberal construction of that word, some person who has a drop of African blood might, perchance, be entitled to vote.[193]

To clarify the position that only those with pure white blood should be entitled to vote, McDowell "proposed a substitute section 2 that stated: "No negro or mulatto shall be entitled to vote at any election."[194] He offered "that because in a clause in the Ohio Constitution somewhat similar to the first section, where the word 'white' has been used, the courts have decided any person is white who has a preponderance of white blood; and thereby a great many mulattoes have been allowed to vote."[195]

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[190] Omi and Winant, p. 6.
[191] Wyandotte Proceedings, p. 295.
[192] Wyandotte Proceedings, p. 303.
[193] Wyandotte Proceedings, p. 303.
[194] Wyandotte Proceedings, p. 302.
[195] Wyandotte Proceedings, p. 302.

Lamb's acknowledgment of the role whiteness played in socially constructing the perceived inferiority of blacks is reflected in the following statement he made during the discussion of black education.

> It has been represented here that they are an inferior race – not equal to whites. I admit they are an inferior race, but there is a cause for that inferiority. That cause has been developed here, upon this floor, this afternoon…. The very doctrine of trying to prevent them from having the advantages of common schools makes them an inferior race.[196]

Lamb recognized that racial inferiority was constructed by the legal restrictions, social mores, and beliefs of the time that refused to grant access to the resources on which the assessment of one's ability was judged. By legislating against access to political, social, and economic resources, the power elite was able to insure the inferiority of non-white peoples and to preserve its access to the power and privileges afforded to those who were legally defined and socially constructed as white.

Summary

In this chapter, I have described the various political and ideological tensions present in the Kansas territory because these tensions affected how segregated education was developed, legislated, challenged, and enforced in Kansas. As I move into a discussion of the legal decisions of the Kansas Supreme Court on segregated education, I will show that many of these tensions remained a part of the political and legal structures of Kansas. For example, the alignment of popular sovereignty with the wishes of "the people" resulted in the enactment of a law governing education that left the decisions of whether to segregate, at least for first class cities, with the local people. Limiting the boundaries of where segregated education was allowed to occur in Kansas led to the development of two distinct legal precedents. One refuted the legitimacy of segregated education and supported acts of resistance; one upheld the validity of

[196] Wyandotte Proceedings, p. 183.

segregated education, but was persistent in maintaining, rather than expanding, the parameters of segregated education. However, the development of these lines of precedent can be linked to the strong sense of duty to the law. Equally as important, perhaps, was the belief that individuals should make use of the legal means available to challenge laws that are unjust or unfair. This belief provided a legal forum accessible and amenable to legal challenges to segregated education and resulted in a rich legal history of efforts to desegregate education in Kansas and to procure equal educational advantages for the black children of Kansas. I now turn my attention to the first line of precedent dealing with cities not granted the authority to segregate education.

CHAPTER THREE

LEGAL DECISIONS ON SEGREGATED EDUCATION IN SECOND CLASS CITIES OF KANSAS, 1881-1949

As discussed in the last chapter, Kansas represents an ideological space in which differing political philosophies and racial ideologies came together and forged a place in which to test how various political, social, and economic vantage points could coexist. Now I turn to the Kansas legal decisions on segregated education. The Kansas Supreme Court strictly adhered to the notion of equality as it interpreted Kansas' law that permitted segregated educational facilities. I propose that this strict adherence to the law can be traced back to the political ideologies discussed Chapter Two. This chapter provides an overview of the Kansas educational enactments and then moves into a discussion of the court cases involving second-class cities in Kansas, which were not allowed to segregate education based on race.

Kansas Educational Enactments

The first education law governing the Kansas territory was passed in July, 1855, and provided for the creation, governance, and financing of "a system of district schools that should be free and open to every class of white citizens of appropriate age."[197] In 1858, the Free State Party gained control over the territorial legislature and revised the school code by eliminating the word white. When Kansas was admitted into the United States on January 29, 1861, the state constitution contained the following language "the legislature should establish a uniform system of public schools and schools of higher grade."[198]

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[197] Paul E. Wilson, *A Time to Lose: Representing Kansas in Brown v. Board of Education* (Lawrence: University of Kansas Press, 1995), p. 33.
[198] Wilson, p. 32.

As I suggested in Chapter Two, the notion of "the people" referring to governance by popular vote, rather than the civic elite, was reflected in how segregated education was defined in Kansas. When the state legislature convened in March 1861, a body of school laws was enacted. These laws provided for the establishment of a system of common schools and permitted segregated education for black children. The language of this law is interesting because it did not mandate the separation of white and black children. The statute allowed the issue to be decided at the local level where school boards determine whether education should be segregated. The law created an obligation to secure "equal education advantages"[199] to white and black children. Separate education was permissible as long as it was equal.

In 1868, the Kansas legislature enacted a general statute that created first-class and second-class cities. First-class cities had populations of 15,000 or more, and second-class cities had populations of more than 2,000 and less than 15,000. This legislation permitted first-class cities "to organize and maintain racially separate schools." At the time, Leavenworth was the only city in Kansas large enough to qualify as a first-class city. Second-class cities were not allowed to operate segregated schools. In 1874, the State of Kansas enacted a Civil Rights Act that "prohibited discrimination on account of race, color or previous condition of servitude."[200] During this year, the state legislature also passed a compulsory attendance law requiring children between the ages of 8 and 14 to attend school at least 12 weeks a year. *An act for the regulation and support of common schools* was passed in 1875. This enactment repealed all existing school laws and did not contain any provisions allowing for the segregation of schoolchildren on the basis of race.

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[199] Wilson, p. 36.
[200] Wilson, p. 38.

In 1879, the migration to Kansas of formerly enslaved Africans led to an increase in the African American population in Kansas, particularly in the urban areas. Commonly referred to as the Exodus, this migration is considered the first major black migration from the South. The Exodusters, as they were called, came primarily from Tennessee, Alabama, and Mississippi.[201] That same year, the Kansas legislature amended the 1868 school code and, with regard to cities of the first-class, provided that "the board of education shall have power…to organize and maintain separate schools for the education of white and colored children, except in high school, where no discrimination shall be made on account of color." There were only three cities in Kansas that qualified as first-class cities during this time: Leavenworth, Atchison, and Topeka. The segregated education law was permissive, in that segregation was not required; the local school districts could choose to segregate schools on the basis of race. The law was also restrictive in that it allowed only cities of a certain size to segregate education by race. While segregated education was permitted only in certain locales, Jim Crow laws did mandate segregated public facilities, such as restaurants, parks, and theatres. Public transportation was generally not segregated.[202]

Even though segregated education was not permitted in second class cities, many of them instituted educational practices that resulted in separate education for black and white children. The black community in these cities resisted the practices by making use of the legal system, and the Kansas Supreme Court consistently held that second class cities lacked the power to segregate. The Kansas Supreme Court considered five cases between 1881 and 1916. The following provides an analysis of these legal decisions.

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[201] Nell Irvin Painter, *Exodusters: Black Migration to Kansas after Reconstruction* (New York: W.W. Norton & Company, 1986).
[202] Richard Kluger, *Simple Justice* (New York: Random House, 1975).

Board of Education of Ottawa v. Tinnon (1881): Segregation By Building

When the number of school-age children exceeded the capacity of the school in the second-class city of Ottawa, the Board of Education decided

> to provide for some of the children by using two small buildings belonging to the board of said city. One of said buildings stands two blocks distant from said main building, and to this school some of the white children belonging to the primary grades were assigned. The other building is separated from the main school building by the width of the street only, and to this room the colored children were assigned.[203]

The Ottawa Board of Education adopted a policy in 1880 requiring the assignment of all black children below grade No. 7 to Mr. Rickett's room in the white schoolhouse. As used by the school board, the term school house included all three buildings. However, Mr. Rickett's room was in a separate building from the building that housed the classrooms for the white children. Elijah Tinnon attempted to enroll his son, Leslie, in the grade seven classroom located in the white school building. When his son was denied admission, he sued the school board and the principal and requested that the court order the admission of his son to the white school.

The applicable education statute provided as follows:

> SEC. 2. In each city governed by this act [second class cities] there shall be established and maintained a system of free common schools, which shall be kept open not less than three nor more than ten months in any one year, and shall be free to all children residing in such city between the ages of five and twenty-one years. But the board of education may, where school-room accommodations are insufficient, exclude for the time being children between the ages of five and seven years.
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> SEC. 9. The board of education shall have power to elect their own officers, except the treasurer; to make their own rules and regulations, subject to the provisions of this article; to organize and maintain a system of graded schools; to establish a high school whenever in their opinion the educational interests of the city demand the same; and to exercise the sole control over the schools and school property of the city.[204]

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[203] Statement of Case, *Board of Education of Ottawa v. Tinnon,* 26 Kan. 1, 3(1881), hereinafter *Tinnon*.

[204] Kansas Laws of 1876, ch. 122, art. 11. secs. 2, 9. *Compilation of Kansas Laws of 1879*, pp. 846, 847. Hereinafter referred to as Kansas Laws of 1876.

The legal issue the Kansas Supreme Court decided was "whether the board of education of a city of the second class had the power to establish separate schools for white and colored children, and to exclude colored children from the schools established for white children for no other reason than that they are colored children."[205] H.C. Mechem, the attorney for the Ottawa Board of Education, argued that providing a separate room for black students was not an action that excluded Leslie from the school, rather the board was exercising its power to classify students when assigning them to classrooms provided to it by Section 9 of the1876 education law. Mechem, also argued that a child's right to an education was

> not the right to dictate the management of the schools, the classification of pupils..., and the distribution of teachers, but the privilege of learning in these schools, subject to such rules and regulations as the board of education in its discretion may deem it prudent to make.[206]

Mechem argued that the Tinnons' grievance was that of being denied the opportunity to pursue knowledge in the company of white children, [and] such a grievance was not something to which black children were entitled to demand as a right. In establishing a separate classroom for the black children, "the board has said in its discretion that it is best to educate the races separately."[207] The Board argued that the Fourteenth Amendment was not pertinent because it applied solely to federal citizenship rights and education was a right granted by states and as such constituted a state citizenship right.

John DeFord, Tinnon's attorney, argued the Fourteenth Amendment

> contain[s] a necessary implication of a positive immunity, or right, most valuable to the colored race – the right to exemption from unfriendly legislation against them distinctively as colored, exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy,

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[205] *Tinnon*, p. 16.
[206] *Tinnon*, p. 4.
[207] *Tinnon*, p. 5.

> and discriminations which are steps toward reducing them to the condition of a subject race.[208]

He argued that segregated education violated the Fourteenth Amendment because it discriminated against blacks based upon their race and implied that blacks were inferior.

Mason, the other attorney representing Ottawa, then argued that the Fourteenth Amendment was inapplicable in this case because the control and regulation of education was within the purview of state authority. Mason also argued that "questions of association are different from the political rights and protection aimed at, and in which the government has the right to demand an equality."[209]

Justice Valentine delivered the opinion of the court and found that the Kansas legislature had not provided boards of education in second class cities with the power to establish schools that were segregated on the basis of race. Valentine said,

> It is true that in cities of the first class, which included up to within a year past, only the city of Leavenworth, the power to make such distinctions existed. But this power has always existed in the city of Leavenworth, from its earliest territorial days down to the present time, and was given to that city first as a matter of local concern, and at a time when prevailing opinions of men were very different from the prevailing opinions of men at this time.[210]

Because the Ottawa Board of Education lacked this authority, it was obligated to provide common schools to all of the children within its limits. Valentine interpreted common schools as those

> where both sexes and all kinds of children mingle together, we have the great world in miniature; there they 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

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[208] *Tinnon*, p. 10.
[209] *Tinnon*, p. 15.
[210] *Tinnon*, p. 18. The act that initially granted Leavenworth the right to establish separate schools was passed in 1862. In 1881 there were only two other cities that were large enough to be considered first class: Atchison and Topeka.

> they may learn the secret springs of human actions, and the attractions and repulsions which lead with irresistible force to particular lines of conduct.[211]

Because only one school was free for the colored children to attend, the board was not maintaining "common schools free to all children of the city."[212]

The court did not address the issue of whether the state legislature had the power to authorize the establishment of separate schools, believing this was a matter of federal constitutional law and best decided by the United States Supreme Court. Valentine wrote,

> The question whether the legislatures of states have the power to pass laws making distinctions between white and colored citizens, and the extent of such power, if it exists, is a question which can finally be determined only by the Supreme Court of the United States; and hence we pass this question and proceed to the next; over which we have complete jurisdiction.[213]

The rule of law followed in this case was that "unless the legislature has *clearly* conferred power upon the school boards to establish separate schools for the education of white and colored children, no such power has been conferred."[214] The Kansas court chose to follow a line of precedent out of Iowa in reaching this decision and cited a decision of the Iowa Supreme Court as the binding precedent in this case.[215]

The court stated that the Kansas legislature clearly intended to prohibit second-class cities from establishing separate schools because the language of the statute mandated that they "maintain a system of free common schools … free to all children residing in such city."[216] Justice Valentine then proceeded to ask the same question asked by Deford in his brief: "If only one school out of all the schools of a city of the second class is free for colored children to

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[211] *Tinnon*, p. 19.
[212] Kansas Laws of 1876
[213] *Tinnon*, p. 18.
[214] *Tinnon*, p, 19-20
[215] The Iowa cases cited were *Clark v. The Board*, 24 Iowa 518; *Smith v. The Directors*, 40 Iowa 518; and *Dove v, Independent School District*, 41 Iowa 639.
[216] Kansas Laws of 1876, section 2

attend, is that maintaining *common* schools, *free to all the children of the city?*"[217] The answer to this question was prima facie no.[218]

The court referenced the United States Supreme Court's decision in *Railroad Co. v. Brown*, which held that because the law passed by the United States Congress granting charters to railroad companies also prohibited them from excluding people based upon color, the establishment of separate railway cars for blacks violated the statute.[219] Valentine applied the principle articulated in Brown that "railroad cars are not *free* to a person who is excluded from all but one of them"[220] to the Board's policy, which excluded black children from all but one of the schools, and found that such a practice was not permissible and was not a proper exercise of the school board's authority. The Kansas Supreme Court did state that school boards had the power to create grades, to assign students to the appropriate grade, and to divide the city into districts and require students to attend school within those districts. However, "the power to divide a city territorially into districts does not include or provide the power to divide the city according to race, color, nationality or descent."[221] The court stated that the cases referenced by the school board were not applicable because they were either decided prior to the Civil War or dealt with jurisdictions that had enacted laws that expressly granted the right to segregate schools.

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[217] *Tinnon*, p, 20.
[218] As used in a legal context, *prima facie* means that unless evidence to the contrary can be produced, the matter is presumed to be true. Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (St. Paul, Minn.: West Publishing Co., 1979), p. 1071. Hereinafter referred to as Black's Law Dictionary.
[219] *Railroad Co. v. Brown*, 17 Wall. 445 (1873). DeFord relied upon the Brown case in his arguments, and Mason, the attorney for the Board of Education refuted its applicability since it was decided based upon the interpretation of a federal law, not the Fourteenth Amendment of the Constitution.
[220] *Tinnon*, p. 21.
[221] *Tinnon*, p. 21.

Justice Brewer dissented and reframed the question that was before the court as one addressing "what power of classification and control has been given by the legislature to boards of education, in cities of the second class?"[222] Brewer's interpretation of free was that "schools as a whole shall be free, not that each school shall be free to everybody."[223] Brewer recognized the power of the state to determine how children should be classified for the purposes of education and recognized race as one factor on which classification could be based. Brewer argued that the legislation providing for schools that were free to all children provided boards of education with the authority to classify students based on territory, sex, or color.

Knox v. Board of Education of Independence (1891): Segregation by Ward

On September 15, 1890, Jordan Knox accompanied his daughters, ten-year old Bertha and eight year old Lilly, to the second ward school. There were four wards in the Independence school district. The Knox children were seeking admission into the second primary and first primary grades. The teachers, Belle Bates and Bertha Canary, refused to admit them into their classrooms and referred them to Superintendent S.M. Nees. They made application to the second ward school, and Superintendent Nees assigned them to the fourth ward school. The Knox family lived 130 yards from the second ward school and 2,300 yards from the fourth ward school. On October 10, 1890, Miss Bates had 51 students in her classroom and Miss Canary had 53 students.

All of the black students who lived in Independence and who were in the primary and intermediate grades attended the fourth ward school and were taught by Clara McCord. The finding of facts stated "that other children, both colored and white, who live in the second ward, and in the fifth ward of [Independence] … are required and compelled to attend school at the

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[222] *Tinnon*, p. 23.
[223] *Tinnon*, p. 25.

fourth ward school building…. [However,] there are no white children who belong to the same grade that plaintiffs do, who now live in the second ward, who are sent, at the present time, outside of the second ward."[224]

The schools in Independence were segregated because of an initial request for the establishment of a separate black school made by a group of black parents in 1881. Subsequently, "in the fall of 1887, the majority of the colored people of [Independence]… petitioned the board of education … to employ … Mr. E.M. Wood, a colored man to teach …[the] grades taught at …[the] fourth ward school."[225] The school board hired Mr. Wood. During the regular meeting of the school board in July of 1890, Jordan Knox "appeared and informed the … board that he desired his children to go to the second-ward building,"[226] a white school.

The Supreme Court applied the *Tinnon* precedent to the *Knox* case and held that Independence, a second-class city, lacked authority to establish separate schools for white and black children. Justice Horton, who wrote the opinion of the court, reiterated the words of Justice Valentine in *Tinnon*:

> 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 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. We do not think that the board has any such power. We have conceded for the purpose of this case, that the legislature has the authority to confer such power upon school boards.

Once again the court assumed that the legislature had the authority to permit school boards to segregate education. However, this issue was not specifically raised in either of the lawsuits.

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[224] *Knox*, p. 154.
[225] *Knox*, p. 155.
[226] *Knox*, p. 155.

The use of the language, "we have conceded for the purpose of this case, that the legislature has the authority to confer such power upon school boards," in both *Tinnon* and *Knox* suggests that the court may have been doubtful of the legislature's authority to grant school boards with the power to separate the races in schools. In legal practice, it is common for judges to provide clues about positions they are likely to adopt about related issues that are not presented in the cases they are deciding. Therefore, it is reasonable to propose the Kansas Supreme Court was articulating their openness to entertaining a suit arising from a first-class city challenging segregated education, particularly when this statement is considered along with Justice Valentine's statement equating racial segregation with segregating children based on eye color. Atchison and Topeka, both first-class cities, were the most likely candidates for such a case to arise. However, by the time such a challenge was raised in the *Reynolds* case, discussed in Chapter Four, the United States Supreme Court had rendered its decision in *Plessy.*[227]

Cartwright v. Board of Education of Coffeyville (1906): Segregation by Classroom

On or about October 24, 1904, James H. Guy, Bud Cartwright's attorney, filed a writ of mandamus with the Kansas Supreme Court requesting that it order the Coffeyville Board of Education to admit Eva Cartwright to the white classroom. Prior to the opening of the 1904 school year, William Sinclair, the Coffeyville School Superintendent, had decided to assign the black children to separate classrooms. According to fifteen-year-old Eva Cartwright, "I seen a piece in the paper about a week before school started that all children should apply there at the Whittier building and get their assignment."[228] Eva Cartwright went to Whittier and received a

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[227] *Reynolds v. Board of Education of Topeka*, 72 P 274 (Kan. 1903); *Plessy v. Ferguson*, 163 US 537 (1896).

[228] Deposition of Eva Cartwright, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 2. Hereinafter referred to as Deposition of Eva Cartwright.

card of entrance from Superintendent Sinclair for admission into the sixth grade at the Lincoln School Building. "When school started, we went over to the school house…. Professor Werner, he asked me what grade I was in, I said in the 6th. He said go downstairs to Jackson Dodd's room so we came away, came back home."[229] On October 10th, Eva returned with her mother, Lilly Cartwright. Lilly Cartwright knocked on the door to Mr. Werner's classroom, and when he came to the door, she stated, "I come to enroll my children in school."[230] When Mr. Werner learned that the children were in fourth and sixth grade, he told them, "You will go downstairs to Jackson Dodd. She didn't say any more, come on back home."[231] Eva's father, Bud Cartwright, went to see Superintendent Sinclair in his office in the Whittier Building.

> I says, I want to know why is it my girl can not attend any other room than the room where colored children are being taught by colored teachers…. He said she could not…you have competent teachers and that if Eva went to school she would go to the colored room or she would not go at all…. I don't see what is the matter with you colored people you are making sure a kick over this matter.[232]

Later, Bud Cartwright saw Superintendent Sinclair at Trudy's Jewelry Store, "he was just passing, and I said, Mr. Sinclair, can't this girl go to school yet? Not unless she goes to the colored school, he said. That stopped the conversation."[233]

One of the school board members, Will Hyde, confided to Bud Cartwright that "he was not in favor of the action of the school board in this matter, that he didn't believe it was right, but

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[229] Deposition of Eva Cartwright, p. 2-3
[230] Deposition of Eva Cartwright, p. 3
[231] Deposition of Eva Cartwright, p. 3
[232] Deposition of Bud Cartwright, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 17. Hereinafter referred to as Deposition of Bud Cartwright.
[233] Deposition of Bud Cartwright, p.18

he was only one and all the rest of them was against him."[234] Mr. Cartwright also spoke to Charles Carpenter, president of the school board:

> He said I don't see why you people are always kicking about this school business, it has annoyed me a great deal, you have got good teachers over there, just as good as you will find anywhere. I says, Mr. Carpenter, you would not allow one of those teachers to teach your children…. He says, I don't know about that, you are speaking a little broad.[235]

William Sinclair started as Coffeyville's School Superintendent on January 1, 1904. In his deposition, Sinclair stated that he used his judgment and discretion to arrange and classify scholars and that he felt "it is better for both races to be educated separately."[236] Later on he stated,

> The colored children were put into the colored rooms because I thought it the best thing to do, both for the colored children and the colored teachers, as giving an opportunity to let the colored people get some benefits from the school taxes paid, I mean in the matter of salaries.[237]

Sinclair described the racial demographics of the school age children in Coffeyville, as follows:

> In the Lincoln School District there is perhaps 75% of the colored school population in the remaining perhaps 25% or less scattered through the City, goodly portion living in the vicinity of the Washington school, several living in the vicinity of the Longfellow school and the others scattered in the north-west parts of the City. There were three colored teachers employed for work in the Lincoln Building and one in the Washington building and one in the Longfellow building. [McKinley, Garfield, and Whittier had mixed classrooms; however, the black school age population was small.] In the Lincoln Building in one of the rooms there was a white child, but that was a matter of choice. In the Longfellow building there was a white child. In the 7th and 8th grades of the High School they went to the building that they were nearest, to white teachers, they were so few of them.[238]

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[234] Deposition of Bud Cartwright, p. 19
[235] Deposition of Bud Cartwright, p. 21
[236] Deposition of William Sinclair, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 37. Hereinafter referred to as Deposition of William Sinclair.
[237] Deposition of William Sinclair, p. 43.
[238] Deposition of William Sinclair, p. 33-34.

The issue involved in this case was whether Coffeyville, a second-class city, was authorized to maintain separate schools for the black and white children residing in its school district. The Board of Education also raised the issue of whether Bud Cartwright had standing to bring the lawsuit because his daughter, Eva, was the real party of interest.

> Coffeyville filed a motion to quash based upon the argument
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> > that boards of education and superintendents of city schools, in cities of the second class, have power, or should have power to exercise the sole control over the schools of the city … including the right and authority to organize and maintain separate schools for the education of white and colored children provided that equally advantageous schools be established for the children of the two races.[239]

While Coffeyville acknowledged the legislature could vest school boards with the authority to establish separate schools, it argued that the school boards in second-class cities had the power to classify and distribute pupils. "In the absence of specific legislation and any constitutional inhibition, the school board is vested with discretion and authority as to classification and distribution of pupils and the establishment of separate but equally advantageous schools."[240]

Coffeyville Board of Education's attorneys, Zeigler and Dana, argued that, irrespective of the facts (1) the law governing first-class cities expressly granted the right to establish separate schools and (2) the law governing second-class cities did not contain an express prohibition on the establishment of separate schools. Therefore, the establishment of separate schools for the white and black children in Coffeyville was a proper exercise of the school board's discretion. They based their argument on Section 6305 of the Kansas General Statutes, which conferred school boards with the power "to exercise sole control over the schools and school property of

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[239] If granted, the motion to quash would have resulted in the dismissal of the lawsuit. Motion to Quash, Brief of Defendant, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 1-2. Hereinafter referred to as Motion to Quash, Brief of Defendant.

[240] Motion to Quash, Brief of Defendant, p. 5

the city."[241] Even though Coffeyville was a second class city and the Kansas Supreme Court's decision in *Tinnon* and *Knox* provided the binding precedent, the defendants cited the *Reynolds* case, which dealt with segregated schools in the first-class city of Topeka, Kansas.

James Guy, the Cartwright's attorney, called Coffeyville's argument "audacious" and argued that the challenge to the existing precedent was being mounted solely because "the membership of this court has been increased to seven…and but one of the justices who concurred in those decisions remains on the bench."[242] Guy argued that the Kansas Supreme Court should let stand the "*simple rule of interpretation* which has stood for twenty-three years."[243] Guy argued that *Cory v. Carter*, which was relied on by Coffeyville, did not apply because it dealt with Constitutional interpretations, rather than statutory construction.[244] The Kansas Supreme Court denied Coffeyville's motion.

The brief filed by Guy and G.C. Clemens, the other attorney representing the Cartwrights, relied on the precedent established in *Tinnon* and *Knox* and the testimony presented at the beginning of this section that established that Eva Cartwright presented herself to the Lincoln school for admission into the sixth grade and was refused admission into the white classroom solely on the basis of her color. Their position was that because the school board lacked express power to establish separate schools, they lacked the authority to establish separate white and black classrooms.

The primary argument made against the motion filed by Bud Cartwright, Eva's father, was that because he was not a real party in interest, he lacked standing to file this action. This

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[241] General Statutes of Kansas, Section 6305 (St. Paul, Minn.: West Publishing Co., 1901).
[242] Motion to Quash, Brief of Plaintiff, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 3. Hereinafter referred to as Motion to Quash, Brief of Plaintiff.
[243] Motion to Quash, Brief of Plaintiff, December 3, 1904, p. 4.
[244] *Cory v. Carter*, 48 Ind. 327.

argument hinged on the fact that Bud Cartwright brought this suit individually, rather than by Eva Cartwright by her guardian or next friend, Bud Cartwright, as required by the Kansas Code, Section 31: "the action of an infant must be brought by his guardian or next friend."[245] This argument was important because courts do not decide cases unless the real parties of interest are involved. The law treats minors as *sui juris* or without being and, therefore, without standing to bring a lawsuit. Parents or guardians must file the lawsuit on behalf of the minor, referred to as bringing the suit as the next friend.[246] Therefore, a decision in favor of Coffeyville on this point would have dismissed the Cartwright's motion and no decision would have been made as to whether Eva Cartwright was entitled to admission to the white classroom. For the court to hear that issue, the motion would have to have been refiled in the name of Eva Cartwright, by next friend Bud Cartwright. Given that a year and a half had passed since she first sought admission to the sixth grade and it appears that she had been attending school in the interim, the issue would have become a moot point, which was the third argument made by the defendant.

The second argument paralleled the request made in the motion to quash urging the court to overturn *Tinnon* and *Knox* in light of more recent decisions, such as *Plessy v. Ferguson*, "that it is no violation of the constitutional provision [14th Amendment], providing that equally advantageous schools are maintained for both white and colored pupils."[247] As discussed in Chapter One, *Plessy v. Ferguson* established the "separate, but equal" doctrine.[248] Although black letter law mandated separate, but equal, practice led to the maintenance of separate, but unequal political, economic and social conditions. Whereas, the Fourteenth Amendment

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[245] General Statutes of Kansas, Section 31 (St. Paul, Minn.: West Publishing Co., 1901).
[246] *Black's Law Dictionary*, p. 941.
[247] Writ of Mandamus, Brief of Defendant, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 5-6. Hereinafter referred to as Writ of Mandamus, Brief of Defendant.
[248] *Plessy*.

required the Court to establish boundaries around the definition of "equal protection," the definition provided by *Plessy* mandated the establishment and dismantling of the boundaries of the doctrine of separate, but equal.

While the defendants cited several cases, interestingly enough, they did not cite *Cumming v. Richmond County Board of Education*, which was the first case to reach the United States Supreme Court that dealt directly with the operation of separate schools for white children and black children.[249] To solve the problem of overcrowded black grade schools, the Richmond County, Georgia, school board decided to convert the black high school into a grade school. The conversion of the school resulted in access to public high school education being afforded only to whites. A group of black parents brought suit, seeking the enforcement of the separate, but equal doctrine. The court found no violation of *Plessy*. Ironically, Justice John Marshall Harlan wrote the opinion, which ruled that state taxation for the public support of education is a matter left to the state legislature. "Any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have no such case here."[250] It appeared that blacks had no right to equal protection, or separate, but equal treatment.

Finally, the defendants argued that Eva Cartwright was denied admission into Werner's room because it was full, not because of her race. "My room was entirely full. The forty-eight seats that were there the first day were occupied and there had been three new seats put in the

[249] *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).
[250] *Cumming*, p. 532

room…. [Superintendent Sinclair] said not to admit any more, white or black into that room because the seating capacity was full."[251]

On February 10, 1906, the Kansas Supreme Court issued a unanimous two-paragraph decision finding that Mr. Cartwright was a proper party to the suit and followed the line of precedent established in *Tinnon* and *Knox* holding that, in the absence of an express authorization by the Kansas legislature, the Coffeyville Board of Education lacked the authority to establish separate schools. On April 18, 1906, a transcript of the case was sent to the United States Supreme Court by Zigler and Dana.[252] However, the U.S. Supreme Court received a letter on July 23, 1906, "from Zeigler & Dana of Coffeyville…stating that it is now the desire of the Board of Education of the City of Coffeyville to abide by the decision of the Supreme Court of the State of Kansas."[253] Coffeyville withdrew its appeal because, "inasmuch as we are now a city of the first class the Board of Education instructed us to not to have this case filed in the United States Supreme Court and that the Board of Education as far as this case is concerned will abide by the decision of the Supreme Court of the State of Kansas."[254]

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[251] Deposition of E.E. Werner, Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906), p. 51-52. Hereinafter referred to as Deposition of E.E. Werner.
[252] Letter to Bud Cartwright from James H. McKenney, Clerk U.S. Supreme Court dated May 7, 1906. Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906).
[253] Letter to D.A. Valentine, Clerk Supreme Court of Kansas from James H. McKenney, Clerk U.S. Supreme Court dated July 27, 1906. Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906).
[254] Letter to D.S. Valentine, Clerk of Kansas Supreme Court from Ziegler and Dana dated July 23, 1906. Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906).

Woolridge v. Board of Education of City of Galena (1916): Segregation by Classroom

" 'Helen you get out of this room, Mr. Worthington…gave this room to the white children,'" those words greeted 12 year-old Helen Watson when Principal Hainer entered into her sixth grade classroom on September 14, 1915. When school started at East Galena School on Monday, September 6, 1915, Helen and the other pupils were not segregated by race, but were "assigned to the grade to which they respectively belonged without discrimination on account of their race or color."[255] The next day, September 7, 1915, at the regular meeting of the Board of Education, Mildred Griggs, an African American, was hired to teach at East Galena.

On September 13, 1915, the "colored teacher opened her school for said colored children, which school no white children were allowed to attend."[256] On that Monday, Alice Woods "went to school and when we got to our seats Mr. Hainer called all the colored children's names and told them to take their books and go to the room on the West side upstairs… I got my books and went up there."[257] Her classmate, Helen Watson, said, "Alice Woods got her book out and I was a little slow in getting mine, I wanted to see how many more names he called."[258] When Attorney E.B. Morgan asked her if any other names were called, her reply was "no, sir." This scenario happened in each of the classrooms at East Galena on that morning. The children arrived at school, "played around on the grounds, … the bell rang and [the children] marched in

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[255] Petition for Writ of Mandamus, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 3. Hereinafter Petition for Writ of Mandamus.
[256] Petition for Writ of Mandamus, p. 3.
[257] Testimony of Alice Woods, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 24. Hereinafter Testimony of Alice Woods.
[258] Testimony of Helen Watson, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 39. Hereinafter referred to as Testimony of Helen Watson.

[their] room"[259] and sat down. The teachers then called the names of the black students in their classrooms and sent them upstairs to Miss Grigsby's room. Helen Stewart described what happened in Miss Derfelt's room. "I went in our room and took a seat and she called off all the colored children's names and took us up to the room that Miss Grigsby was going to teach."[260]

The following day, Veomia and Sherman Woolridge, as well as Helen Watson went back to school,[261] and each tried to reenter the white classrooms. According to Sherman Woolridge, "We had to line up in the colored line…. I went back in the same room [Miss Derfelt's] on Tuesday and she told us to go to our own room."[262] In the fifth grade, "when Miss Kelsey came in she said, 'in the other room girls', and she looked at us and we went out of the room and went home."[263]

Helen Stewart recounted what happened on Wednesday when she returned to school and went into Miss Derfelt's room: "I went in and she said, 'Have you forgotten?', and I told her no." Attorney Morgan asked, "When you told her you hadn't what did she say then?" Helen replied, "I started home and she grabbed me and told me to go up to Miss Grigsby's room." Morgan: "What did you do?" Helen: "I made out like I was going up there and then went home."[264] Her father told her "to go up there [the school] and if I could not stay in Miss Derfelt's room for me

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[259] Testimony of Veomia Woolridge, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 14. Hereinafter referred to as Testimony of Veomia Woolridge.
[260] Testimony of Helen Stewart, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 71. Hereinafter referred to as Testimony of Helen Stewart.
[261] Alice Woods and Helen Stewart testified that they didn't go back on Tuesday, but did return to East Galena on Wednesday. Alice Woods did not return on Tuesday because her sister would not let her.
[262] Testimony of Sherman Woolridge, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 18-19. Hereinafter referred to as Testimony of Sherman Woolridge.
[263] Testimony of Veomia Woolridge, p. 7.
[264] Testimony of Helen Stewart, p. 73.

to come home."[265] In resisting the actions of the school board, the students were threatened with violence if they continued to refuse to comply with the wishes of the school board. Helen Watson recounted the following story about what happened when she returned to the school and tried to claim her seat in the white classroom. When Mr. Hainer told her to go to the black classroom, Helen Watson returned home:

> Because my father told me to come home if they told me to go to the colored room…. Ever time I would go back I would get in [Mr. Hainer'] line, and there were no colored people in this line but myself…and he asked me to get out and I would not do it and he would jerk me out…. One morning he went to whip me and when he went to get Mr. Long, I run home…. He threatened to let Mr. Long whip me [if I returned to his room]…. One morning I went up there, … Mr. Long was in one door watching the colored line…. I went and got in Mr. Hainer' line. I had been getting in his line and he would tell me to get out and I would not do it…. [that morning] Mr. Hainer told me to wait until the lines marched up the steps. The next morning he did not tell me, he waited until I got to the door, and then he made me wait. He took me on up the stairs and when I got to the foot of the stairs, I was going to run…. He jerked me and knocked me up against the post…. Then he taken me up the stairs and held me in the corner there… I told him my papa told me to go in his room and he said my papa did not have anything to do with that school. He and Mr. Long were running that.[266]

The following Thursday, Helen Stewart, Helen Watson, and Alice and Francis Woods retuned to Galena to get their books. "[We] went back … and went up after our books and come down and Mr. Hainer told us not to come back in the building again."[267]

Miss Grigsby had graduated with a three-year certificate from the State Manual Training Normal School in Pittsburg, Kansas, on July 31, 1915.[268] According to the last paragraph of her certificate, "there [was] no authority for renewing it."[269] She had "never taught school before but

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[265] Testimony of Helen Stewart, p. 74.
[266] Testimony of Helen Stewart, p. 41-43.
[267] Testimony of Helen Stewart, p. 74.
[268] Exhibit A to Testimony of Mildred Grigsby, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 39. Hereinafter referred to as Exhibit A to Testimony of Mildred Grigsby.
[269] Exhibit A to Testimony of Mildred Grigsby, p. 39.

had practice work at the Normal School[270]…. [Miss Grigsby stated] I took the position only for the experience, not for the money, that was my object in view was to get the experience."[271] In their brief, the defendants stated that she "was the first colored teacher who had ever been employed in Galena and of course she was handicapped by reason of her color."[272] Even though Miss Grigsby held a valid teaching certificate, prior to receiving her job at East Galena, she was employed as a domestic "for Mr. Worthington, president of the Board of Education. Her $30.00 a month salary was $12.50 less than beginning white teachers made."[273] She was responsible for teaching all of the grade levels, while the other teachers at East Galena only taught one grade level.[274] Her room was also equipped from "stuff [that] had been taken out of the basement where they had thrown it away."[275]

Veomia Woolridge described the room as follows:

> Well, the first day we didn't have a waste basket, had to take the paper up and lay it on the teacher's desk, and then that afternoon she went downstairs and got a wire basket that was all bent over and she had to straighten it up…. When she picked it up the bottom fell out of it…. The seats were too small and they put them together to make them big

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[270] Testimony of Mildred Grigsby, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 102. Hereinafter referred to as Testimony of Mildred Grigsby.
[271] Testimony of Mildred Grigsby, p. 105.
[272] Brief of Defendant, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 2. Hereinafter referred to as Brief of Defendant.
[273] Re-call testimony of R.E. Long, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 67-70.
[274] Commissioner's Finding of Facts, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p.
[275] Cross examination of Mildred Grigsby, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 114. Hereinafter referred to as Cross examination of Mildred Grigsby. This quote is actually from a question that Morgan asked. The evasive nature of Miss Grigsby's response, "I did not inquire about that," which was neither an admission or a denial, could reasonably be taken to be evidence that there was truth to Morgan's question, particularly when viewed in light of the student's testimony about the conditions in the room.

> enough to sit in…. [They didn't have a pencil sharpener]. She had a knife and we had to sharpen our pencils with her knife….. [The teacher's desk] came down in a slant and did not have any drawers…. She had to raise the top up when she wanted anything out of the desk."[276]

The Board also hired a new teacher for the Columbia School building. However, the students in this school were not separated by race because "there were not enough colored students." At Columbia, the new teacher was hired to teach a second/third grade split.[277]

The city of Galena, Kansas, is situated on the state line of Kansas and Missouri in close proximity to the Missouri cities of "Joplin, Webb City, Carterville, and Carthage."[278] According to William F. Sapp and A.S. Wilson, the defendants' attorneys, there was a large black population in these cities and they chose to segregate their schools, "which was the cause of quite a number of colored people moving to Galena from those towns if they were of that class of colored people who desired to force their children in the white schools."[279] The establishment of segregated schools in Joplin coupled with the increasing black population resulted in many white families moving from Galena to Joplin or sending their children to the Joplin schools.

Morgan filed a writ of mandamus on September 21, 1915.[280] He filed the suit directly with the Supreme Court,

> on account of the public sentiment existing in Galena in favor of the attempt on the part of the Board of Education and school officials to separate the colored from the white children…. There is a Commercial Club in said city of Galena, which meets on Thursday night of each week, and C.G. Worthington, who is president of the Board of Education, is also Secretary of [the] Commercial Club…. At the meeting of the club held on the Thursday night following the Tuesday on which the writ of mandamus was served in this case, resolutions were passed strongly endorsing the action of [the] Board…and strongly

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[276] Testimony of Veomia Woolridge, p. 12-13.
[277] Brief of Defendant, p. 8.
[278] Brief of Defendant, p. 8.
[279] Brief of Defendant, p. 8.
[280] Defendant's Abstract, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 1. Hereinafter referred to as Defendant's Abstract.

> condemning [Morgan and holding him up] to public ridicule and scorn by referring to the action as being by … 'Morgan and his friends', meaning that Morgan was without friends except colored people, and attempting to intimidate and harass [Morgan].[281]

The Woolridge case identified the plaintiffs in the case, W.E. Woolridge, George Stewart, and Charles Woods, as "members of the colored race and descendants of slaves." This was the first time the phrase "descendants of slaves" had been used in a case dealing with second-class cities.

The plaintiffs articulated the issue to be resolved as, "has the legislature given the Board of Education the legal right to separate the schools along color lines?"[282] They did not present any constitutional issues, which would have called for an interpretation of the Fourteenth Amendment. By keeping the issue solely within the realm of state law, the plaintiffs foreclosed any appeal to the United States Supreme Court because it would have lacked jurisdiction over the case. In order for the Supreme Court to review a case it must involve either a federal law or a U.S. constitutional issue. E. B. Morgan relied on an interpretation of the state education law that did not grant second class cities the authority to segregate schools, as well as the 35-year old judicial precedent requiring an express grant of such authority. Plaintiffs' argument was that, because the law had not been changed, the following cases, *Tinnon*, *Knox*, *Rowles*, and *Cartwright*, provided the legal precedent to be applied in this case.

Defendants cited only the *Tinnon* case and relied on Justice Brewer's dissenting opinion. They argued that because the students were separated due to the crowded conditions of the school, the separation was a legitimate exercise of the board's power to control the schools and did not violate the rule announced in the *Tinnon* case because "the separation was not on account

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[281] Affidavit of E.B. Morgan, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 2. Hereinafter referred to as Affidavit of E.B. Morgan.

[282] Brief of Plaintiff, Kansas State Supreme Court Records, *Woolridge v. Board of Education of Galena,* Case No. 20,378 (Topeka: Kansas State Historical Society, 1916), p. 3. Hereinafter referred to as Brief of Plaintiff.

of color *only*."[283] Since the court italicized "only" in the published opinion, the defendants contended the court was pronouncing that separation by race was not allowed if that was the only reason for the separation. If race was only one of the criteria used to make the separation, then the precedent announced in *Tinnon* was not binding. They took the position that a board of education has the power to classify students "in any manner it sees fit as long as they do not do any thing prohibited by the statutes, and equal facilities are granted to all."[284] They urged that without this power,

> there would be no way to separate them [i.e. students] any way in the room; in classes or seats or in any other way…. For instance, if there should be twelve pupils in a class, half of whom are colored and half of whom were white, the teacher would have no power to direct the six colored pupils to sit on one end of the bench and the six white children on the other end of the bench, but if the colored children desired they would have to be sandwiched in between the white children.[285]

J.J. Burr urged the court to abandon the *Tinnon* precedent because the circumstances in society had changed such that the racial views on which *Tinnon* relied were no longer held by the majority of the people.

> The view now taken by all intelligent people in the state of Kansas and elsewhere, both white and colored…is…that it is better that the white and colored children be separated in the schools, no matter what the opinion might have been in 1881 when that case was decided.[286]

Burr completely ignored the *Cartwright* and *Rowles* cases, which upheld the rule of law requiring an express grant of authority from the legislature to boards of education before segregated schools could be established. These cases were decided in 1906 and 1907, respectively, and constituted a reaffirmation by the Kansas Supreme Court of Tinnon. Burr ignored these cases because it would have weakened his argument that racial attitudes had

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[283] Brief of Defendant, p. 4
[284] Brief of Defendant, p. 7.
[285] Brief of Defendant, p. 7-8.
[286] Brief of Defendant, p. 5.

changed. The Kansas Supreme Court found that the City of Galena lacked the authority to segregate schoolchildren on the basis of race.

Webb v. School District No. 90, Johnson County, State of Kansas (1949): Gerrymandering of Attendance Zones

On May 24, 1948, a group of black parents, Alfonso Eugene Webb, Mary J. Webb, Thelma Turner, Ernest Burrell Turner, Jr., Lucille Gay, and Thomas Black, filed a writ of mandamus with the Kansas Supreme Court seeking an order admitting their children, Harvey Lewis Webb, Alfonso Eugene Webb, Jr., Shirley Ann Turner, Norbert Edward Turner, Delores Gay, and Patricia Black, to South Park Elementary School. Located in School District No. 90 of Johnson County, Kansas, South Park was a newly constructed school in 1947 and was one of two elementary schools located in the school district. The other elementary school known as "the Walker School" was housed in a building that was sixty years old. The school board adopted attendance zones whereby the white students in School District No. 90 attended South Park Elementary and the black students attended the Walker School. The black parents challenged, first of all, the power of the school district to segregate schools in the basis of race and, secondly, the school district's failure to provide equal educational facilities. They argued the Walker School was not equal because of its dilapidated condition, the use of unqualified teachers, the number of grades assigned to a single classroom, the failure to provide kindergarten and music, and the lack of a phone in the building.

Prior to the construction of the new South Park Elementary School, School District No. 90 had operated a segregated school system, even though it was not located in a first-class city. On several occasions, the black parents involved in this case sought the admission of their children to the South Park Grade School and had demanded that School District No. 90 stop its practice of segregating children on the basis of race. The parents attended the annual meeting of

the school district held on the second Friday of April each year and "demanded that the separation and segregation of the school children of said district be stopped and that the Negro students be admitted to the one and only lawfully constituted common grade school in [the] district."[287] Likewise, at the beginning of each school year, they attempted to enroll their children in South Park Grade School, but their children were denied admission based on their race.

On October 8, 1947, a committee from the black community led by Alfonso Eugene Webb, Jr., chairman of the local chapter of the NAACP, met with school board and called to its attention improvements they wanted at the Walker School. The committee made the following demands:

1. A complete new school;
2. Remove rubbish from playground;
3. Qualified teachers;
4. A telephone; and
5. Fix basement so that dampness would not come in.[288]

The last demand that the parents made of the school district prior to filing their lawsuit had been at the annual meeting of the district board on April 9, 1948. According to the plaintiffs, the school district officers refused to consider their request and also "refused to present the question of the segregation of the races to the qualified voters of [the] district attending the

[287] Plaintiff's Abstract and Brief, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 5. Hereinafter Plaintiff's Abstract and Brief.
[288] Testimony of Eugene Alfonso Webb, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 36. Hereinafter referred to as Testimony of Eugene Alfonso Webb.

annual meeting."[289] Helen E. Swann described the efforts of the black community in her testimony:

> I know … that we have tried very, very hard these last few months to get some consideration from the school board so we decided we would have the school board and we would tell them our grievances and we thought if they were fair minded, if they felt like giving us a fair chance, if they had any consideration for the health, welfare and educational benefit of our children, they would do something for us so we waited patiently. Nothing was forthcoming so at the board meeting which we attended we made our demands; we were present and since we had no consideration from the school board, we had an attorney there and he asked the chairman of the board what would he do about our school since our school was so inefficient and it was a disgrace to the community, especially since they had spent $90,000 and we were taxpayers and pay more than others, we felt we were entitled to a portion of that money set aside for the school.[290]

According to Alfonso Eugene Webb, the Walker School committee gave the board ten days to respond to them about their plans to equalize the educational opportunities afforded the black children of South Park.

James H. Wagner, the clerk of the school board, testified that the board met with a contractor in late April to discuss the modernization of Walker School, the board requested a meeting with the Walker School committee, and "the meeting was called and no member from the Walker District appeared."[291] A second meeting was held in early May. The following notice of a meeting to be held on May 17, 1948, was sent to the board on May 15, 1948.

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[289] Plaintiff's Abstract and Brief, p. 5-6.

[290] Testimony of Helen E. Swann, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 26-27. Hereinafte referred to as Testimony of Helen E. Swann.

[291] Testimony of James H. Wagner, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 42. Hereinafter Testimony of James H. Wagner.

Notice of Special Meeting of School Board

I, the undersigned, the duly qualified and elected Director of the School District #90 of Johnson County, Kansas, do hereby give notice to the other members of the said board that there will be a special meeting of the School Board of the School District #90 to be held on the 17th day of May, 1948, at the South Park School House in Johnson County, Kansas. The meeting shall be held for the purpose of determining the use of the school house within said school district and for the purpose of determining the pupils that will attend said school.

Dated this 15th day of May, 1948.

Virgil Wisecup
Director[292]

According to James Wagner, individuals were notified of the meeting by telephone. James Wagner testified that only one person, Mr. Marshall, from the Walker School District was present at the meeting.[293] Mrs. Thomas Black related that she had received a call from Mr. Wisecup about the meeting the day of the meeting. Alfonso Webb, Helen Swann, Oscar Hill, and Mildred Sharp stated they had not received notice of the meeting.

On May 17, 1948, the school board for Johnson County School District No. 90 held a meeting and passed a resolution providing for the designation of attendance zones for South Park and Walker Schools. The school board passed this resolution

> because of pupil congestion and was definitely established … within certain territorial boundaries, taking into consideration the facilities of said school buildings and the number of pupils that could be accommodated without regard to racial discrimination or without regard to color.[294]

Elwin Campbell, the principal of both South Park and Walker, explained that the reason the attendance zones were developed so soon after the black parents appeared before the school board with their demand was due to the fact that in the summer he conducted another business

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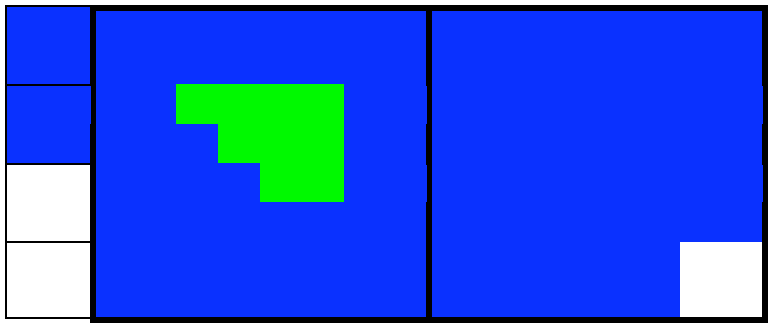
[292] Commissioner's Findings of Fact and Conclusions of Law, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 48. Hereinafter referred to as Commissioner's Findings of Fact and Conclusions of Law.
[293] Testimony of James H. Wagner, p. 42.
[294] Abstract and Brief of Plaintiff, p. 10.

meeting and the attendance issues needed to be resolved, he stated, because "we had a pretty heavy enrollment and in making plans for the ensuing year before the summer vacation began it

Figure 3.1: School District #90, Kansas Attendance Zones



= South Park School Attendance Zone
= Walker School Attendance Zone

Source: Resolution by the Board of Directors of School District #90 of Johnson County, Kansas, Abstract and Brief of Plaintiff.

was considered that these attendance areas should be definitely established before we went into the summer."[295] According to Elwin Campbell, the sole purpose for establishing the attendance zones was to relieve "the congestion in this suburban school district."[296] During the 1947-48 school year, two hundred fifty-seven children attended South Park and 48 children attended Walker.[297] Raymond W. Campbell, a licensed engineer of Kansas, drew the attendance zone map

[295] Testimony of Elwin Campbell, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka, Kansas: Kansas State Historical Society, 1949), p. 15. Hereinafter referred to as Testimony of Elwin Campbell.
[296] Testimony of Elwin Campbell, p. 6.
[297] Testimony of Mabel Click, Abstract and Brief of Plaintiff Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 32. Hereinafter referred to as Testimony of Mabel Click.

"at the direction of the South Park School Board."[298] A map of South Park was used as a guide and the "various areas were pointed out by the board" and used to determine the zones.[299] As shown in Figure 3.1, the South Park Attendance Zone surrounded the Walker School Attendance zone. As Commissioner Everett E. Steerman stated, "The metes and bounds of these attendance areas does not divide the district East and West nor North and South, but meanders up streets and alleys and by reason thereof all of the Negro students are placed in the Walker School Attendance area."[300]

While awaiting a decision in the pending lawsuit, Patricia Black presented herself for admission to South Park, but was denied admission according to her father, Thomas Black, because "the principal didn't have any authority to enroll Negroes."[301] Thomas and Patricia Black lived at 104 Park Street, two blocks from South Park School, and some of white children who attended South Park lived further west of the school than the Black residence. The Walker School was three and a half to four blocks from their home. Thomas Black stated it was a "good quarter of a mile anyway." [302]

Mrs. Black described what happened when Patricia requested admission to South Park, as follows:

> Mr. Campbell drew a surveyed map on us and said there was a section surveyed or a certain portion of the children couldn't attend the South Park School and we asked why

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[298] Testimony of Raymond W. Campbell, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 39. Hereinafter referred to as Testimony of Raymond Campbell.
[299] Testimony of Raymond W. Campbell, p. 39.
[300] Commissioner's Findings of Fact and Conclusions of Law, p. 55-56.
[301] Testimony of Thomas Black, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 19. Hereinafter referred to as Testimony of Thomas Black.
[302] Testimony of Thomas Black, p. 21.

> the children west of us could attend the South Park and the children two blocks west couldn't. He said he didn't know, that the board had gotten together and they had surveyed the South Park in zones and there was a certain zone people living in that zone couldn't attend the South Park School.[303]

In addition to being a newer, more modern facility, South Park Grade School differed from the Walker School because it provided a kindergarten, and had an auditorium, a cafeteria, and in-door toilets. According to Mrs. Mable Click, the county superintendent of schools in Johnson County, Kansas, the South Park School also had nine rooms, and employed ten full-time teachers and one part-time teacher. Elwin Campbell testified, "There were eight grades and a teacher for each grade at the South Park School."[304] The Walker School did not offer a kindergarten and lacked an auditorium and a cafeteria. The toilets were located outdoors and were unsanitary. There were two teachers at Walker School, and they taught "four grades each."[305] The basement of the Walker School flooded when it rained. Because the flooding made it impossible to operate the furnace, Walker School would often be closed for one or two days at a time. Mary Jane Webb testified her children were sent home for two days because "they couldn't pump it [the water] out fast enough."[306] Thomas Black said, "I can recall on one occasion our girl had to come home on account of the furnace, couldn't have fire in the basement"[307] because of the water. Robert B. Hayes, the janitor at Walker School, testified the

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[303] Testimony of Mrs. Black [first name unknown], Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 22. Hereinafter referred to as Testimony of Mrs. Black.
[304] Testimony of Elwin Campbell, p. 13.
[305] Testimony of Mrs. Mable Click, p. 13.
[306] Testimony of Mary Jane Webb, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 30. Hereinafter referred to as Testimony of Mary Jane Webb.
[307] Testimony of Thomas Black, p. 20.

pump located in the basement was there "to keep the water out of the basement" and there was not any water in the basement.[308]

The black parents had tried to establish a lunchroom or cafeteria in the Walker School. Mrs. Estelle described the situation as follows:

> They tried to have [a cafeteria or lunch room] once, but it was in very bad shape; there wasn't any place for it, no room, no arrangement so they could operate a lunch room or cafeteria. They did serve several little lunches but the dirt got in so bad that they finally discontinued it because it wasn't sanitary and there was too much water; they couldn't serve the meals the way it was.[309]

Mrs. Corinthian Nutter, a former teacher at Walker, described the basement lunchroom as follows:

> The basement was very damp and besides it was right next to the coal bin and the coal was blowing out on the table in the same room, only a little door separating that and the furnace and in one corner there was a big stack of papers full of dust and rats running in and out and, of course, it was too unsanitary and the space was not adequate, not large enough, so we had to disband that.[310]

Walker School did not receive any of the federal aid provided for meals.

Helen E. Swann, another former teacher, testified about the condition of Walker School as well as the quality of education the black children received there. She said that, despite years

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[308] Testimony of Robert B. Hayes, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 41. Hereinafter referred to as Testimony of Robert B. Hayes.

[309] Testimony of Mrs. [first name unknown] Estelle, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 23. Hereinafter referred to as Testimony of Mrs. Estelle.

[310] Testimony of Mrs. Corinthian Nutter, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 26-27. Hereinafter referred to as Testimony of Mrs. Corinthian Nutter.

of effort "to build it up to the standard of school," it was her belief that Walker School, as well as the teachers, were inadequate.[311] In support of her assessment, she said,

> I know four grades is too much for any one teacher to teach, I know the children have to go outside in all kinds of weather to the toilets, I know we should have a kindergarten so we may start the little children so they will have a better foundation when they become of school age.[312]

Ester Randall and Madeline Randall were the black teachers at Walker School. Ester Randall had been a teacher for about seventeen years, but "had been out of the school system about 10 years before teaching at the Walker School."[313] She did not have a college degree. Madeline Randall also lacked a college degree, although she had earned 12 hours from Lincoln University and 111 hours from Washburn University. She had 24 years teaching experience.[314] Mabel Click, the School Superintendent, testified that the Kansas State Department of Education had issued common school teaching certificates to Ester and Madeline Randall. Superintendent Click also stated she had provided the appropriate course of study to Ester and Madeline Randall and that they were following the state-approved curriculum at Walker School. According to Alfonso Eugene Webb "one of the teachers at the Walker School was old and would go to sleep."[315]

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[311] Testimony of Helen E. Swann, p. 26.
[312] Testimony of Helen E. Swann, p. 26.
[313] Testimony of Ester Randall, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 33. Hereinafter referred to as Testimony of Ester Randall.
[314] Testimony of Madeline Randall, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 38 (Hereinafter referred to as Testimony of Madeline Randall); Testimony of Mrs. Mable Click, Counter Abstract of Defendants, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 4. Hereinafter referred to as Testimony of Mable Click, Counter Abstract.
[315] Testimony of Alfonso Eugene Webb, p. 37.

The school district supported its position that the children who attended Walker School received an education equivalent to that provided at South Park School because the achievement scores for both schools were comparable and the teacher-to-pupil ratios were practically the same. According to Superintendent Click, the teacher-to-pupil ratio at South Park was 25:1, while at the Walker School it was 22:1. Principal Elwin Campbell testified "the books, book lists, and courses of instruction at the schools are identical."[316] School districts were not required to provide lunch counters, and according to Elwin Campbell, if established, the costs were "not borne by the taxpayers of the district but rather by the students and allotments from the commodity distribution at Topeka."[317] The library facilities at both schools were comparable. Walker school had a 10:1 ratio of books per pupil and South Park had a 7:1 ratio.[318]

After the lawsuit was filed, the school district improved the Walker School in the following ways: the outdoor toilets were

> pumped out…cleaned up and painted. The interior [had] been decorated, the walls have been painted with a cream-color paint and the ceiling a white paint. The fluorescent lights have been installed to make adequate lighting, venetian blinds have been put on the building on the rooms where the sun shines in….. We had some window guards made for the side of the building, on the east side of the building, next to the play ground, so the children would have more free range without knocking out window glasses.[319]

According to Principal Campbell, these improvements had been in the works long before the lawsuit was brought. He said,

> During the whole course of the past year the matter of improvement of that building [Walker School] has been discussed, how much they could stand on account of the financial obligations the district had; in fact some of the school board were anxious to

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[316] Testimony of Elwin Campbell, Counter Abstract of Defendant. Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 5. Hereinafter referred to as Testimony of Elwin Campbell, Counter Abstract.
[317] Testimony of Elwin Campbell, Counter Abstract, p. 6
[318] Testimony of Elwin Campbell, Counter Abstract, p. 7.
[319] Testimony of Elwin Campbell, p. 14.

> apply for emergency funds and it would have applied for it if they had seen there was much hope of getting them in order to get those improvements made because it was realized that the people were getting impatient about the matter so it was fully discussed and planned to make progress as fast as money could be secured to make the best use of that school building and school grounds including the toilets, indoor toilets.[320]

The financial obligations of the school district included the cost of the new South Park Grade School, which was $90,000. Mrs. Hill testified that the black community "helped float a $35,700 bonds [sic] for a gymnasium and to increase the improvement of our cafeteria at the South Park Common School… They didn't put this money in a gymnasium. I understand this money was used to cover up what they had overspent into the school."[321]

The Supreme Court appointed Everett E. Steerman as the commissioner to hear the testimony. Steerman found that for several generations School District #90, Johnson County, Kansas, had operated separate schools for white and black children and that the facilities were equal until 1947 when the new South Park school was built. Even though repairs had been made at the Walker School, Steerman found that South Park offered "a modern educational program…superior to that found at the Walker School."[322] Steerman did note that based on a comparison of achievement tests the scholastic attainment of the students at both schools was comparable and that the teachers at both schools were qualified. As referred to earlier in this section, the commissioner also found fault with the school district's establishment of the school attendance zones. He commented further, "The designation of the school area for each of the two schools, as set out in the resolution, clearly established that the two areas were not designated on a territorial, school census, or any other reasonable basis and such action taken by

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[320] Testimony of Elwin Campbell, p. 16.
[321] Testimony of Mrs. [first name unknown] Hill, Abstract and Brief of Plaintiff, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), p. 26.
[322] Commissioner's Findings of Fact and Conclusions of Law, p. 54.

the officers of the school district was therefore arbitrary."[323] The attendance zones had the effect of segregating the black and white children.

Commissioner Steerman articulated the following conclusions of law. First, that common school districts "may legally establish, maintain and operate two separate school buildings," provided there is a reasonable basis for the division. The second conclusion of law proposed by Steerman was the law did not allow the common school district to segregate the black children in the district. Third, the educational facilties must be comparable "in order to give each pupil in the district equal opportunity for a common school education."[324] Steerman recommended the school district (1) redraw the attendance zones on a territorial basis, (2) maintain the two schools on a comparable basis, (3) make the equipment and facilities uniform and comparable, and (4) institute the same educational program (i.e., kindergarten, music, and lunch) at the Walker School.

Elisha, John, and Charles Scott, the attorneys for the plaintiffs, urged the court to adopt the Commissioners Findings of Fact and Conclusions of Law, but sought rejection of the commissioner's recommendations because they believed they were not supported by the evidence presented in the case. In their brief, the Scotts presented three questions for the court to consider. The first question dealt with the authority of the school board to operate segregated schools. The second question addressed the issue of equal educational facilities. The third question considered "whether or not the school district acted arbitrarily and capriciously in maintaining segregated schools on account of color."[325]

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[323] Commissioner's Findings of Fact and Conclusions of Law, p. 56.
[324] Commissioner's Findings of Fact and Conclusions of Law, p. 57.
[325] Abstract and Brief of Plaintiff, p. 62.

The Scotts used the line of precedent that had existed since the *Tinnon* decision in 1881 to support their position that Johnson County lacked authority to segregate schools because that power had been granted solely to first-class cities. They cited the following passage from *American Jurisprudence*,[326] which was consistent with Kansas' precedent.

> In the absence of express statutory authority, the prevailing rule is that a school board of a school district has no power to establish separate schools for white and colored children, even though the schools so established for colored children furnish educational advantages and facilities equal or superior to those of the schools established for white children.[327]

Edward F. Arn, Kansas Attorney General, issued an opinion on April 27, 1948, stating that common school districts lacked authority to maintain separate schools for black and white children. The Kansas legislature had not provided Johnson County with the authority to segregate education. Additionally, the Scotts proposed the school board passed the resolution establishing attendance zones to legitimate their unauthorized practice of segregating schoolchildren on the basis of race.

On the provision of equal educational facilities, the Scotts proposed that it was clear from a comparison of the two schools that the education received at the Walker School was not the same as the education received at South Park. They reminded the court of the statement it had made in the *Graham* case: "It will not do to say to one American citizen, you may not have the benefits of an improved method of education because of your race, when at the same time other citizens in the same school district are being accorded those benefits."[328] The Johnson County school district provided white children with a kindergarten as well as a semidepartmentalized education in line with the best educational practices of the time. At the same time these

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[326] *American Jurisprudence* is a legal reference book used by lawyers. While it does not carry precedential weight, it serves as a resource and is persuasive authority.
[327] 47 Am. Jur., Sec. 217.
[328] *Graham v. Board of Education of City of Topeka*, 114 P. 2d 313, 318 (Kan. 1941), p. 846.

educational advantages were denied to black children residing in the district, who attended school in a building that had not been properly maintained and that failed to secure to them the educational advantages of kindergartens and semidepartmentalized instruction.

On the establishment of the attendance zones, the Scotts argued,

> the line of demarcation as between the whites and the Negroes is clearly a fraud and [was] wrongfully perpetrated by the school board…. It is admitted by members of the school board, that Negro taxpayers and children of school age live in the "white zone" and that white children living in the "colored zone" pass the Walker Grade School going to the South Park Common School and vice versa with both "zones."[329]

These actions, the Scotts argued, were motivated by racism. They urged the court to continue to denounce white privilege by adhering to "its previous stand for justice and fair play to all people regardless of creed, color, or previous condition of servitude."[330] The Scotts tied the racial motivations of the board back to lingering vestiges of the proslavery ideologies and the era of the border ruffians by calling to the courts attention the fact that Elwin Campbell

> is definitely a Missouri product, which is a slave state; and as we understand, he still lives in Missouri. He assumes the position of a dictator because it can not be questioned that he tells the members of the school board just what to do and when to do it, especially with reference to the two races.[331]

Although slavery had been abolished for over eighty years, the Scotts acknowledged the role that access to educational advantages played in maintaining the "new slavery," resulting from the denial of access to political, social, and economic resources and privileges.

The school district presented two questions for the Kansas Supreme Court to consider. The first question involved a determination of whether school boards had the authority to establish attendance zones. If school districts did possess this power, the second question

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[329] Abstract and Brief of Plaintiff, p. 74.
[330] Abstract and Brief of Plaintiff, p. 74.
[331] Abstract and Brief of Plaintiff, p. 74.

considered whether the Johnson County School Board had acted illegally when establishing its attendance zones.

The school district distinguished its case from the *Tinnon* case on the grounds that the facts were different. In *Tinnon*, the school district's resolution mandated segregation on the basis of race. The Johnson County resolution contested in this suit involved the establishment of attendance zones. *Rowles* was inapplicable, the school board argued, because in that case schoolchildren were denied admission to a particular school on the basis of race. The children in this case were denied admission to South Park School not because of their race, but because they did not reside in the appropriate attendance zone. The school board also distinguished their situation from the *Knox* case, which did involve attendance zones. The City of Independence had established four wards, and they assigned all of the black children to a specific ward, regardless of where the children resided. Johnson County School District No. 90 had established two school zones, and children were assigned to attend the school located in their attendance zone.[332]

The school board argued that the court could not issue a writ of mandamus in this case because "the writ is not available to those who do not come into the court with clean hands."[333] They urged that the plaintiffs had unclean hands because they had refused to cooperate with the school board. As evidence of their lack of cooperation, the school board pointed to the failure of the plaintiffs to attend the late April and May 17th meetings where the resolution was discussed and voted on. The school district conceded "that the Walker School building must be

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[332] Brief of Defendant, Kansas State Supreme Court Records, *Webb v. School District No. 90, Johnson County, et al,* Case No. 37,427 (Topeka: Kansas State Historical Society, 1949), pp. 16-17. Hereinafter Brief of Defendant.
[333] Brief of Defendant, p. 19. 34 Am.Jur, 829, Sec. 32.

modernized and made equal to the South Park building in all respects."[334] Yet, they pointed to the steps they had already taken to modernize the building and stated that the improvement of the Walker building was the next phase of the school district's plans "to equip the School District with better and more efficient physical operating units within the congested school district."[335] Issuance of the writ would thwart these plans and would increase the harm, rather than promote justice. The school district argued that the appropriate remedy was to adopt the commissioner's recommendations.

The Kansas Supreme Court issued its opinion on June 11, 1949. In addition to the Scotts, Thurgood Marshall was involved in this suit as one of the lawyers for the plaintiffs. The Supreme Court found that Johnson County School District No. 90 had, for generations, operated segregated schools without legislative authority to do so. It further found that their action of passing the resolution establishing attendance zones was made "not on a reasonable basis but was arbitrary and had the effect of segregating the Negro children from the white children."[336] The Court concluded that the school district's action of gerrymandering the lines for the attendance zones was a clear act of subterfuge. It ordered the school district to admit all of the school-age children to South Park District School for the 1949-1950 school year. Even though the plaintiffs had alleged a violation of the due process rights afforded by the Fourteenth Amendment, the Kansas Supreme Court decided this case solely on the grounds of state law and did not address the federal constitutional issues.

The NAACP was involved in this case as part of its campaign to challenge segregated education in elementary and secondary schools. The Kansas Supreme Court's decision left no

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[334] Brief of Defendant, p. 21.
[335] Brief of Defendant, p. 18.
[336] *Webb et. al v. School Distruct No. 90, Johnson County, et al.,* 206 P.2d 1066, 1072 (Kan. 1949).

grounds for appeal first because it found in favor of the plaintiffs. However, the school district was also without recourse because the Court chose not to address the federal constitutional issues. If Webb had been decided in favor of the school district, it is likely that it would have appeared on the Supreme Court's docket instead of the Brown case out of Topeka.

Summary

As is evident from these cases, the efforts of second class cities to segregate schools along racial lines was thwarted by the legal resistance waged by the black community as well as by the strict adherence to the law by the judiciary. The Court consistently rejected the arguments posited by the white-controlled school boards and upheld the rights of the black community and in many instances expressly adopted an antisegregation stance. However, as the the next chapter indicates, the Kansas Supreme Court's position of strictly adhering to the law resulted in a different legal posture when dealing with the segregated education cases from first class cities.

CHAPTER FOUR

LEGAL DECISIONS ON SEGREGATED EDUCATION IN FIRST CLASS CITIES OF KANSAS, 1903-1941

This chapter provides an analysis of the six Kansas Supreme Court decisions on segregated education in first-class cities. Through these decisions a second line of legal precedent, which differed from those discussed in Chapter Three, was established. The nuances of these legal decisions acted in ways that both protected and circumvented white privilege. These decisions also laid the legal groundwork for creating the context that would make *Brown v. Board of Education of Topeka, Kansas*, unique in comparison to the other four cases that shared its name before the United States Supreme Court.

Reynolds v. The Board of Education of the City of Topeka (1903): Defining Common and Uniform

During 1890, the city of Topeka annexed the Lowman Hill area into the city. At the time of the annexation, children residing in Lowman Hill went to the same school, irrespective of their race. Although Topeka had established separate schools prior to 1890 throughout the city, at the time of the annexation, it lacked sufficient financial resources to maintain two schools in Lowman Hills. The school building was destroyed by fire on July 20, 1900. The school district rented a building known as Campbell Court for use as a temporary school for the white children and decided to send the black children to Buchanan school. After this decision had been made, a committee of the black parents went to the superintendent and demanded they be provided with a school building in the Lowman Hill area for their children. The superintendent told the

committee "that the Board would be glad to provide such a building if one could be found."[337] The committee located a building at the corner of Tenth and Spruce, and it was rented for use as a school for the black children.

William Reynolds contended the school district abandoned the site of the old school because it was unsanitary. Another location was selected, and construction began on a new "first class modern school building."[338] The black community believed that the school was being built for all of the children residing in the Lowman Hill area. According to Reynolds, the white community circulated a petition requesting the establishment of separate schools. The black community sent a committee to the superintendent requesting to see the petition. They were assured that the school district was building only one school and that it would be open to both races. On February 2, 1902, an article entitled "A Place for Niggers" was published in the Topeka *Journal*, which discussed the establishment of a separate school for the black children in the Lowman Hills area. The school district had moved a building to the old school site and fixed it up for use as the black school. Instead of reporting to Douglas, the black school, on the first Monday in February 1902, William Reynolds took his son, Raoul, to Lowman Hills, the new white school building. He was denied admission and protested sending his son to Douglas because of its unsanitary conditions.

The black community contended that the Douglas school was unfit because, after the fire, the basement of the old school had been used to dump rubbish and as a place for the streetcar workers to relieve themselves. The black community was also concerned about the stench that

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[337] Testimony of Superintendent , Kansas State Supreme Court Records, *Reynolds v. Board of Education of Topeka,* Case No. 13,140 (Topeka: Kansas State Historical Society, 1903), p. 119. Hereinafter referred to as Testimony of Superintendent.

[338] Brief of Defendant, Kansas State Supreme Court Records, *Reynolds v. Board of Education of Topeka,* Case No. 13,140 (Topeka: Kansas State Historical Society, 1903), p. 4. Hereinafter referred to as Brief of Defendant.

was created by flooding in times of heavy rain. The culvert that was used to carry off sewage and excess water was located across from the school.

The school district asserted, "The Board made no secret of the fact that [the site where the Lowman Hills school was built] was purchased for a white school."[339] Separate schools were established "for the reason that the colored pupils--especially in their initial years --need a little different discipline from the white pupils, have somewhat different intellectual requirements, and for the reason that in mixed schools quarrels are frequent between the two races."[340] The assignment of the white children to the new school was based on the number of children in the school district rather than their race. Because there were 175 white children and 35 black children the larger building was used for the white children. The school district identified several white schools, Jackson, Grant, and Quincy, that were older than the Douglas school building. The school district observed that Lowman Hills was more centrally located to the residences of the white children and Douglas was more centrally located to the residences of the black children. The furnishings of both schools were similar. The school board argued that the furnishings in the Douglas school building were in better condition because the Lowman Hill furniture was damaged by the fire in the temporary Campbell Court facility.

The school district denied that the site was unfit and provided evidence of the use of the well water by local residents. The school district supported this testimony with that of an engineer who had tested the water and found it to be safe. Thomas Lloyd, the janitor, and two men who worked on the building after it had been moved testified that the basement area had been properly cleaned. The school district also denied that water stood in front of the school as deeply as asserted by the plaintiffs. Their expert, W.E. King, a civil engineer employed by

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[339] Brief of Defendant, p. 90 and p. 139
[340] Brief of Defendant, p. 2, Testimony of Superintendent, p. 108.

Topeka, testified that for the water to have stood that deeply in front of the school, there would have been "a lake measuring more than two hundred feet from its eastern edge to its center or deepest place, and about ten feet deep and at least a mile long north and south."[341] William Reynolds testified, however, that "a year and a half before, and before the city had done any work on the streets there was stagnant water in the vicinity that gave rise to a stench."[342] The residents in the area also testified that the water only stood for an hour or two after a heavy rain.

Gaspar C. Clemons and F.J. Lynch, the Reynolds' attorneys, presented two arguments challenging the power of the city of Topeka to provide separate schools for white and black children. The first argument was that Section 6290 of the Kansas General Statutes of 1901, which provided "the Board of Education shall have power to organize and maintain separate schools for the education of white and colored children,"[343] violated section 2, article 6 of the Kansas State Constitution, which provided

> the legislature shall 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."[344]

Clemens and Lynch argued that a uniform system of common schools did not exist if separate schools for whites and blacks were established. They argued, "a 'common' school is a school 'open to all.'"[345] Because the Kansas Constitution did not define the term "common," Clemens and Lynch established their meaning of the term through the use of *Webster's International Dictionary* and a judicial decision from the State of New York, *The People v. Board of*

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[341] Testimony of W.E. King, p.
[342] Testimony of William Reynolds, p.
[343] Brief of Plaintiff, Kansas State Supreme Court Records, *Reynolds v. Board of Education of Topeka,* Case No. 13,140 (Topeka: Kansas State Historical Society, 1903), p. 3. Hereinafter referred to as Brief of Plaintiff.
[344] Brief of Defendant, p. 30.
[345] Brief of Plaintiff, p. 5.

Education of Brooklyn, 13 Barb. 400-410. Webster's dictionary defined the term common school as "a school maintained at the public expense, and open to all."[346] In *The People v. Board of Education of Brooklyn*, the New York Supreme Court defined common schools as schools that were "not confined to any class, but are open to all….[Such schools were] bound to instruct all children who present themselves without regard to their social relations, their station in life or their religious faith."[347] Clemens and Lynch argued that the separate schools were not common because a school open to only one race is not open to all. They argued that "*every* school was to be a 'common' school. *No* school was to be a *select* or class school."[348] This argument paralleled Justice Valentine's judgment in *Tinnon* where he stated that if the school district provided one school for black children then it was not maintaining "common schools free to all children of the city."[349] Clemens and Lynch urged the court to adopt "one inflexible definition of the term 'common schools.' [They believed] there must be one and the same meaning for all constitutional purposes."[350] The definition of common school they supported was consistent with Horace Mann's conception of a common school. At the time common schools were established, the intent was to provide an educational environment open to children from all classes and stations in life, who would learn a common curriculum and be provided with equal opportunities to obtain the advantages society offered.[351]

Clemens and Lynch next argued that the bifurcated system of segregated schools was not uniform. A uniform system was one that was the same throughout the state. They asked,

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[346] Brief of Plaintiff, p. 5
[347] *The People v. Board of Education of Brooklyn*, 13 Barb. 400-410
[348] Brief of Plaintiff, p. 8.
[349] Kansas Laws of 1876, *Compilation of Kansas Laws of 1879*.
[350] Brief for Plaintiff, p. 11.
[351] Joel Spring, *The American School, 1642-2000,* Fifth Edition, (Boston: McGraw-Hill, 2000).

> Can any reason be given why the five cities of the first class should have power to establish and maintain separate schools for white and colored children when that power is denied, not only to every other rural district, but to all other cities of the state? Are the white children whiter or the colored children blacker in Leavenworth, than in Ottawa?[352]

Clemens and Lynch argued that if Kansas was "to have separate schools, let there be a statute establishing 'a uniform system' of separate schools. If segregation be lawful at all, it must be uniform and systematic."[353] Because two systems existed, one permitting segregated schools and one prohibiting segregated schools, Clemens and Lynch urged the court to find that the statute governing first class cities violated the Kansas Constitution's requirement that education in the state be a common and uniform system.

Clemens and Lynch then proposed that the Kansas statute violated the Fourteenth Amendment of the United States Constitution. They provided two grounds on which the Fourteenth Amendment was violated. The first reason was that the guaranty of the equal protection of the laws was violated by the exclusion of the black children from "common" schools on the basis of race. While they acknowledged that the majority decision in *Plessy* opened the door for segregated schools, they urged the Kansas Court to heed the words of Justice Harlan and invalidate the education law legalizing "the drawing of 'the color line.'"[354] The second rationale provided for finding a violation of the Fourteenth Amendment was that, even if separate schools were permissible, the statute was void because it did not require school boards to provide equal facilities. Clemens and Lynch proposed that because the Kansas law lacked a mandate for equality, school boards "may build an educational palace for the whites and give the colored children a hovel without violating" the statute.[355] They argued that this is what happened

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[352] Brief for Plaintiff, p. 13.
[353] Brief for Plaintiff, p, 13
[354] Brief for Plaintiff, p. 16.
[355] Brief for Plaintiff, p. 17.

in Topeka when the board built a new first class modern building for the white children and refurbished an older school building for the black children.

The Topeka Board of Education was represented by Gleed and Hunt. They argued that the Fourteenth Amendment did not apply to this case because public education when provided by the state was a privilege or immunity of state citizenship and the right to establish separate schools for blacks and whites had been recognized by the United States Supreme Court as a valid exercise of state authority that did not violate the equal protection clause of the Fourteenth Amendment. They argued that

> Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age, in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the Constitution of the United States. Equality of rights does not necessarily imply identity of rights.[356]

They argued that the provision of equal school advantages did not require that children be educated in the same schools. Instead it allowed classifications of students as long a substantially equal school advantages were provided.

Gleed and Hunt then turned their attention to the validity of Article 6, Section 2, of the Kansas Constitution. They argued that the reason this section was silent about the establishment of segregated schools could be attributed to the Wyandotte state constitutional convention delegates' desire to leave this decision to the legislature. They used the journal of the constitutional convention to support this contention because "in order to arrive at the reason and purpose of the constitution, it is also permissible to consult the debates and proceedings of the constitutional convention which framed the constitution."[357] Because it was the intent of the

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[356] Brief for Defendant, p. 23.
[357] Black on Interpretation of Laws, p, 30 as quoted in Brief for Defendant, p. 37.

delegates to leave the issue of separate schools to the legislature, the state law authorizing first class cities to establish separate schools was valid.

Gleed and Hunt also used the *Plessy* decision as support for the validity of separate schools. They cited decisions from other state courts upholding separate schools. In *Cory v. Carter*, the Indiana Supreme Court upheld a legislative enactment permitting separate schools even though the Indiana constitution provided "that the legislature should 'provide by law for a general and uniform system of common schools…equally open to all."[358] The Indiana Supreme Court stated that a process of classification should be part of a common school system and that classifications made on the basis of "some properties or characteristics common to or possessed by a certain number of the whole" did not violate the Fourteenth Amendment because "it concerns the general good, and does not affect the quality of the privilege, but regulates the manner of its enjoyment." Therefore, they argued that classification on the basis of race was within the discretion and authority of the legislature and so long as educational opportunities were provided, the classification did not result in the exclusion of either group of children. Gleed and Hunt also relied on decisions from California, New York, North Carolina, and Nevada.

Gleed and Hunt countered Reynolds' position that separate schools for black and white children were not common and uniform with the argument that legislatures must have the right to classify students.

> They may be classified with reference to their knowledge; they may be classified territorially; they may be classified with reference to their respective needs; they may be classified with respect to the discipline they require; they may be classified in order to promote harmony and prevent dissension.[359]

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[358] Brief for Defendant, p. 41.
[359] Brief for Defendant, p. 56.

Gleed and Hunt posited that the classification on the basis of race was due to the fact "that the younger colored children need a little different discipline from the white children and a different application of that discipline [and] … that when younger children are mingled in the same classes they do not agree, and that quarrels ensue."[360] Interestingly, there is no evidence that when the children in Lowman Hills attended a mixed school, the school officials encountered disciplinary problems. Gleed and Hunt also proposed that the meaning of the term "common" referred to the lower or graded schools. They also argued that the state's bifurcated system of segregation did not impact the uniformity of the system of schools because "the Legislature did not see fit to burden the taxpayers of the State with the expense of providing separate colored schools where there were only a small number of colored pupils to be provided for."[361] They proposed that because uniformity allowed for reasonable classification, taking into consideration the financial burden that would have been placed on smaller cities and rural communities was a proper exercise of legislative authority. This argument is interesting because, as mentioned in Chapter Three, Kansas' law was permissive in that it granted school boards the power to establish separate schools, but it did not require separate education.

During the oral argument before the Kansas Supreme Court, Clemens and Lynch challenged the validity of the 1879 education law because it attempted to amend a law that had been repealed. If Reynolds succeeded in invalidating the 1879 act, then the valid law would have been *An act for the regulation and support of common schools* passed in 1875. As mentioned in Chapter Three, this enactment repealed all existing school laws and did not contain any provisions allowing for the segregation of schoolchildren on the basis of race. Therefore, first class cities would have lacked the authority to segregate schools.

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[360] Brief for Defendant, p. 56.
[361] Brief for Defendant, p. 57.

On March 9, 1903, the Topeka Board of Education responded by filing a supplemental brief. The supplemental brief traces the educational enactments pertinent to the case. Section 75 of the 1868 law contained an express grant of the power to operate separate schools and stated "the board of education shall have power…to organize and maintain separate schools for the education of white and colored children."[362] A new law governing first class cities was passed in 1874 that expressly stated "this act shall not in any way change or affect existing laws with reference to the public schools."[363] This resulted in Section 75 of the 1868 law remaining the valid educational law. In 1876, the Kansas legislature enacted another law governing first class cities. Section 4 of Article 10 of this act governed education and provided

> The board of education shall have power to select their own officers; to make their rules and regulations subject to the provisions of this act; to establish a high school whenever in its opinion the educational interests of the city demand the same; and to exercise the sole control over the public schools and school property of the city.[364]

Gleed and Hunt argued this was a reenactment, rather than a repeal, of "substantially all of the provisions of Article V in the Act of 1868."[365] While the 1876 act does closely parallel the 1868 act, the missing language was the clause, "to organize and maintain separate schools for the education of white and colored children," that expressly acknowledged the power to segregate schools. Therefore, when the legislature passed the 1879 legislation amending the 1868 education law, it was undertaking a valid action. The 1879 legislation inserted the following language in Section 75: "to organize and maintain separate schools for the education of white and colored children except in the high school, where no discrimination shall be made on

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[362] Supplemental Brief for Defendant, Kansas State Supreme Court Records, *Reynolds v. Board of Education of Topeka,* Case No. 13,140 (Topeka: Kansas State Historical Society, 1903), p. 1. Hereinafter referred to as Supplemental Brief for Defendant.
[363] Supplemental Brief for Defendant, p. 2
[364] Supplemental Brief for Defendant, p. 3
[365] Supplemental Brief for Defendant, p. 2

account of color."[366] The reinsertion of this language gave school boards the power to segregate education, except at the high school level. In 1881, the Kansas legislature enacted "An act to incorporate and regulate cities of the first class, and to repeal all prior acts relating thereto." Gleed and Hunt argued that, although this article expressly repealed the act of 1874, as well as "all acts and parts of acts in conflict with it;…since it did not contain any provisions whatsoever in relation to schools, it did not repeal Article 5 of the act of 1868"[367] and was immaterial to this case.

The Kansas Supreme Court had previously upheld the validity of the 1879 statute on the issuance of bonds to fund education. The decision in *Board of Education v. State* provided that the 1881 act did not affect the school laws and that the 1879 act was still valid. Therefore, Gleed and Hunt argued that first class cities had the power to segregate schools.

While Gleed and Hunt urged the Court to overrule the *Tinnon* decision and find that separating children on the basis of color was a valid exercise of a school board's control over schools and a valid classification of students, they also claimed that the court did not have to overrule *Tinnon* to decide in their favor. They argued this because the legislature had expressly granted first class cities the power to segregate education. Gleed and Hunt relied on the following legal principle in support of their position that the 1868 act had been amended rather than repealed: "The provisions of any statute, as far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions and not as a new enactment."[368]

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[366] Supplemental Brief for Defendant, p. 3
[367] Supplemental Brief for Defendant, p. 4
[368] Supplemental Brief for Defendant, p. 7 quoting Section 7342, Kansas General Statutes of 1901.

Gleed and Hunt argued that, even if the court found that the 1879 act was an attempt to amend a repealed act, the educational provisions contained enough details to constitute an independent enactment. They relied on the following legal authority to support their position:

> Where there is a positive reenactment of a former statute with such changes as the legislature sees fit to make, and it is manifest from the act itself that it was the intent of the legislature that the act as thus passed should become the law of the State, such an act as thus passed would become the law of the State.[369]

Treating the 1879 act as an independent act would have resulted in its validity and would have created an express grant of the power to operate separate schools for black and white children.

In their supplemental brief, Clemens and Lynch argued that the 1874 act was an absolute repeal of the 1868 law. Therefore, the 1879 act attempted to amend a law, the 1868 act, that was void. They relied on several Indiana cases to support their position. The Indiana precedent provided "an amendatory act, to be valid as such must relate to an existing statute, and not to one which is non-existant, or has been repealed."[370] Clemens and Lynch pointed out that the Kansas Supreme Court decision in *Board of Education v. The State* was limited only to section 5 of the 1879 act and while it found that section valid, it did not address the validity of the remaining sections of the act. Because the validity of section 1 was not before the court, Board of Education v. The State had no bearing on the Reynolds case.

Clemens and Lynch also refuted the position the Topeka Board of Education took about the continuing existence of section 75 of the 1869 act. They argued that section 75 ceased to exist when it was repealed. On whether section 75 was reenacted in 1879, Clemens and Lynch argued that if it was reenacted, it was repealed by the 1881 law. "For it was clearly the intention

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[369] Supplemental Brief for Defendant, p. 10.
[370] Supplemental Brief for Plaintiffs, Kansas State Supreme Court Records, *Reynolds v. Board of Education of Topeka,* Case No. 13,140 (Topeka: Kansas State Historical Society, 1903), p. 2. Hereinafter referred to as Supplemental Brief for Plaintiffs.

of the act of 1881 to destroy *all* preceding provisions to cities of the first class 'and leave not a wrack behind.'"[371]

Clemens and Lynch then turned to the economic inefficiency of operating two school systems.

> The support of public schools in cities of the first-class has become an onerous burden on the taxpayers and it grows more onerous every year. It costs money to maintain two sets of schools. A man has a legal right to cherish any prejudice that gives him pleasure, but he has no right to cherish it at the public expense. The section hand who objects to having his daughter attend the same schools as are attended by the daughters of colored business men, doctors, preachers, and lawyers, can find private institutions of learning where the races do not mingle. If he wishes to use *public* institutions, he should be required to use them on terms not too burdensome to taxpayers. Race prejudice is a luxury which should be paid for by those who wish to enjoy it.[372]

They urged that the expense of operating two systems was a threat to the ability of the state to support public education. They proposed that the continued operation of two systems would result in there being no public schools because they would become too burdensome financially.

The opinion of the Kansas Supreme Court was focused primarily on whether a valid legislative grant of authority to establish separate schools existed. The court determined that, when the Kansas legislature passed the 1879 statute, it intended to reenact the 1868 statute granting first-class cities the power to operate separate schools. The court stated the Kansas Constitution provided that repealed laws could be revived "only if the new enactment contain[ed] all revived matter, and [did] not merely make reference to it."[373] Because the 1879 statute included the language from the 1868 act rather than referring to it, the mandates of the Kansas Constitution on reviving a repealed law were satisfied. The court held that Topeka, as a first-class city, could operate separate schools for black and white children.

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[371] Supplemental Brief for Plaintiffs, p. 8.
[372] Supplemental Brief for Plaintiffs, p. 12-13.
[373] *Reynolds v. Board of Education of Topeka*, 72 Pacific 274, 276 (1903).

The court then turned its attention to the argument that the provision of separate schools for black and white children violated the Kansas Constitution, which required the establishment of a "uniform system of common schools."[374] The court adopted the position that the term common school referred to a particular grade and rejected the definition proposed by Reynolds that common referred to schools that were "open to all." Adopting this definition of common was a departure from the position the court had taken in the *Tinnon* case in which Justice Valentine had defined common schools as those open to all. The court stated the following definition of uniformity, which had been adopted by the Indiana Supreme Court in *Cory v. Carter*: "Uniformity will be secured when all the schools of the same grade have the same system of government and discipline, the same branches of learning taught and the same qualifications for admission."[375] Therefore, the court found that a uniform system of common schools existed in Kansas and that the separation of children on the basis of race was a proper exercise of the power to classify students. This position opposed the position that the court had taken in the *Tinnon* line of precedent on classifying students on the basis of race. This was an interesting position for the court to take because typically, courts give terms consistent meanings to ensure legal uniformity.

In addressing whether separate education violated the Fourteenth Amendment, the Kansas Supreme Court relied on *Plessy*, as well as legal decisions from Ohio, New York, and California and announced that separate schools did not violate the United States Constitution.

The final point addressed by the court was whether the facilities provided to the black children in the Lowman Hills area were equal to those provided to the white children. The court found that no substantial discrimination had occurred. They stated that while it is

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[374] *Reynolds*, p. 277.
[375] *Reynolds*, p. 277.

> true, for the accommodation of a numerous white population a much larger and more imposing school building is provided than that set apart for the few colored children in the district. This, however, is an incidental matter, and necessarily unavoidable in the administration of any extended school system. Schoolhouses cannot be identical in every respect; but parents cannot, on this account dictate the one their children shall attend.[376]

The court relied on the New York case of *People ex. rel. King v. Gallagher* as authority for the position that what must be protected is equality of privileges and rights, not identical privileges and rights.

The Reynolds case was a case of first impression in the State of Kansas in two ways: first, it was the initial legal challenge to segregated education in first-class cities and, second, it was the first post-*Plessy* decision that the court made. The term first impression is used to refer to the first time a court considers a particular legal issue in that jurisdiction. The legal operation of the turning of the phrase discussed in Chapter One is evident in the Reynolds case. While evidence was presented supporting the position that the two schools were not equal, and the court had previously questioned whether segregated schools were permissible, the court affirmed the school district's power to segregate education on the basis of race. In its first post-*Plessy* decision, the Kansas Supreme Court issued a seven-page opinion of which one paragraph was devoted to the issue of equality. The remainder of the opinion dealt with the issue of whether the district had the authority to segregate education, thereby making the consideration of the issue of **separate** education more important than the issue of **equal** education. By doing so, the court adhered to the doctrine of *stare decisis* and followed the precedent announced by the United States Supreme Court in *Plessy.*

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[376] *Reynolds*, p. 281.

Rowles v. Board of Education of Wichita (1907): Loss of Power to Segregate Education By Special Enactment

"My Dear Sir and Friend: We are on the eve of a Separate School fight here and for that reason, I would like to examine the files of Cartwright v. Board of Education of City of Coffeyville,"[377] wrote O.H. Bentley, the attorney for Sallie and Fannie Rowles. In 1889, at the urging of the City of Wichita, the Kansas state legislature passed a law prohibiting segregated education in Wichita, a first class city. However, in January of 1906, the Wichita School Board adopted a resolution that established a separate school for black children at the Park School Building. According to R. F. Knight, Superintendent of School, Park School was

> centrally located … and most accessible to a large majority of the colored children of school age…. An order was made by the School Board that the colored children residing in a certain prescribed district … should attend this separate school for colored children…, but that colored children residing outside of this district where they were not numerous enough to justify the Board in establishing and maintaining a separate school should attend the mixed school…. I, as Superintendent of the school have had numerous applications from the parents of colored children who live outside of the district where colored children are required to attend the Park school, for permission to send their children to the Park school maintained for the accommodation of colored children exclusively, thereby manifesting a desire on their part for their children to attend a separate school rather than the mixed school.[378]

When school started on September 10, 1906, Sallie Rowles took her daughter Fannie to the Emerson School, the white school, and demanded that Miss Clark, a seventh grade teacher, admit her daughter into the seventh grade. She returned to the school on September 20, 1906, demanding that Mrs. Shaw, another adult at Emerson School, admit Fannie in to the seventh

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[377] Undated letter from O.H. Bentley to the Clerk of the Supreme Court. Kansas State Supreme Court Records, *Rowles v. Board of Education of Wichita,* Case No. 15,281 (Topeka: Kansas State Historical Society, 1907).

[378] Affidavit of R.F. Knight, Superintendent of Wichita Public Schools, dated January 11, 1907. Kansas State Supreme Court Records, *Rowles v. Board of Education of Wichita,* Case No. 15,281 (Topeka: Kansas State Historical Society, 1907).

grade.[379] Both times she was denied admission "because she was of African descent and colored"[380] and sent to the Park School. On September 20, 1906, the Rowles filed a writ of mandamus seeking the admission of Fannie into the Emerson School. While the case was being decided, "Fannie S. Rowles [was] not attending either Park or the Emerson School … because she [claimed] the right to attend the Emerson school."[381]

The legal issue in this case was "whether … the Board of Education of the City of Wichita … possessed the power to provide for and maintain separate schools for the education of white and colored children of the City of Wichita."[382] Section Four of Chapter 227 of "An act concerning the public schools of the City of Wichita, a city of the first class" provided that

> The board of education shall … exercise the sole control over the public schools and school property of said city; and shall have the power to establish and maintain a high school: Provided, No discrimination shall be made on account of race or color.[383]

This act did not expressly grant or deny Wichita the power to establish separate schools for white and black children. The only type of schools that it expressly gave the board the power to establish and maintain was a high school. H.C. Sluss, the attorney for the Wichita Board of Education, argued first that the law was unconstitutional and second, if found to be

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[379] Handwritten notes on calendar page dated January 29, 1906 through February 3, 1906. Kansas State Supreme Court Records, *Cartwright v. Board of Education of City of Coffeyville,* Case No. 14, 249 (Topeka: Kansas State Historical Society, 1906). This page was located in the Cartwright file along with a letter from O.H. Bentley requesting permission to review the Cartwright file. The fact that the dates on the calendar coincide with the approximate date that the school board adopted its resolution to establish a separate school suggests that there was an organized effort to challenge the Wichita school board's actions that involved both the community and John W. Adams and O.H. Bentley, attorneys. Mrs. Shaw's position at the school is not identified.

[380] *Rowles v. Board of Education of Wichita*, 91 P. 88 (Kan. 1907), p. 88

[381] *Rowles*, p. 88

[382] Brief of Defendants in Error, Kansas State Supreme Court Records, *Rowles v. Board of Education of Wichita,* Case No. 15,281 (Topeka: Kansas State Historical Society, 1907), p. 1. Hereinafter referred to as Brief of Defendants in Error.

[383] Section 4 of Chapter 227, Kansas Code of 1889.

constitutional, it did not amend or repeal the educational laws of 1879, which granted first class cities the right to establish separate schools for black and white children. Sluss argued the law was unconstitutional because, by using the term "body corporate," the law established a corporation, Wichita Board of Education, an action prohibited by the Kansas Constitution. The Kansas Constitution provided that "the legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws."[384] Following the precedent established in Telegraph Company v. Austin, 67 Kansas 208, if part of the act was found to be unconstitutional, then the entire act would be void and invalid, unless "the portion [of the act] not opposed to the constitution can stand by itself."[385] Sluss argued the remainder of the statute could not stand alone "because they all relate[d] to the same subject, and [were] so closely connected."[386]

Sluss next argued the 1889 legislation did not repeal the law of 1879 granting first class cities permission to establish separate schools. This argument was based on the fact that "there is an absence of that usual declaration at the end of the act that is common in all cases where the legislature deemed the law complete in itself, that all laws and parts of laws in conflict therewith are repealed."[387] Because it did not repeal the 1879 act, Sluss argued that both laws were in force and susceptible to working congruently with each other. Since the 1889 legislation was silent as to the power to establish separate schools and the 1879 expressly conferred this power on cities of the first class, Wichita, a first class city, had the power to establish segregated schools.

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[384] Kansas Constitution, Article 12, Section 1.
[385] Brief of Defendants in Error, p. 11 quoting Cooley's Constitutional Limitations, 5th edition, p. 213.
[386] Brief of Defendants in Error, p. 13.
[387] Brief of Defendants in Error, p. 14.

Discussion then turned to a consideration of the effect that the following phrase, "Provided, no discrimination shall be made on account of race or color," had on the Wichita Board of Education's power to segregate schools. Returning to the full language of Section 4, Sluss drew "the attention of the Court to the punctuation of Section 4 of that act…. According to the well established rule of construction the proviso only relates to the last preceding clause." Applying this rule of statutory construction, Sluss argued the phrase applied only to the establishment of a high school. The Sedgwick County District Court Judge agreed with Sluss' interpretation of the phrase, stating "while it is true that courts do not permit punctuation to give statutes absurd construction, still it will not be denied that punctuation is frequently an aid in ascertaining the meaning and intent. And it is universally adopted as an essential requisite in the accurate expression of ideas by writing…. The provision in question prohibits discrimination on account of color only in the high school."[388]

On the issue of punctuation, O.H. Brantley cited several cases from California, Massachusetts, and Ohio supporting the position that "Courts will, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[389] Brantley argued that the real intent of the legislation was "the elimination of the power of the Board to make race discrimination and establish separate schools."[390] That being the case, Brantley proposed that the logical interpretation of the phrase was that it was intended to apply to all of the common schools of Wichita.

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[388] Addendum to Brief of Defendants in Error, Kansas State Supreme Court Records, *Rowles v. Board of Education of Wichita,* Case No. 15,281 (Topeka: Kansas State Historical Society, 1907).p. 41-42.
[389] *Hamilton v. The R.B. Hamilton*, 16 Ohio St. 428.
[390] Brief of Plaintiffs in Error, Kansas State Supreme Court Records, *Rowles v. Board of Education of Wichita,* Case No. 15,281 (Topeka: Kansas State Historical Society, 1907). p. 10.

The Kansas Supreme Court acknowledged both arguments. However, instead of adopting one of the positions, the court stated, "it is certain that the city is not by any provision thereof authorized to maintain any grade of its public schools for the separate education of white and colored children."[391] The court found in favor of Rowles and held that Witchita lacked express authority to segregate its schools.

Although this argument was not made or addressed by the court, it would seem that by including the language, "Provided, no discrimination shall be made on account of race or color," which closely parallels the language of the education law for first class cities rather than the law for second class cities, the Kansas legislature did intend to provide Wichita with the power to segregate schools. If the purpose of the 1889 act had been to deny this power, then this clause would have been superfluous, for all of the schools under the control of the Wichita School Board would have been integrated and it would not have been necessary to distinguish the high schools.

Williams v. Board of Education of City of Parsons, (1908): Dangerous Location As Abuse of Schools Board's Discretion

The City of Parsons, a first-class city, decided to build a new school. An election was held to authorize Parson to issue bonds for the purchase of the school site and to construct the new school. Nowhere in the call for election did it state "that the school house, to be constructed, would be used exclusively for children of African descent, commonly called colored children."[392] The Parsons Board of Education claimed that it was commonly understood among

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[391] *Rowles*, p. 89.

[392] Report of Commissioner, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), paragraph 5. Hereinafter referred to as Report of Commissioner.

the black and white citizens of Parsons that the school was to be a separate school for the black children.

Parsons, a railroad town, was divided into four wards by the main line of the Missouri, Kansas and Texas Railway Company running north and south and Main Street extending east and west through the city. A grade school was located in each ward and the city's high school was located in the Third Ward. Prior to the construction of Douglas, the new school, "the children of each ward would attend the grade schools in that ward."[393] The new school building cost $20,000 to build and the site cost $4,000. Douglas was the best ward school in the district and "equipped with all the modern facilities that go with a school house."[394]

When the black community learned about the location of the school and that it was to be a separate school for the black children, they sent a committee to speak to the board of education. N.T. Ransom, a member of the committee, stated that the committee

> went before the Board and told them it would not be right to build that school building down there in that loop, surrounded by those tracks and we insisted on the inconveniences to the colored families; and we also pleaded with the Board as to whether or not they would take chances on their little fellows traveling a great distance, as many of the colored children would have to travel.[395]

N.T. Ransom was also a member of a second committee that presented a petition to the Board. According to Sam Daniels, another member of the second committee,

> we had a mass meeting and at that meeting we appointed a committee to draw up resolutions, which was done, I believe. It was circulated for signatures and after the

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[393] Report of Commissioner, paragraph 4.
[394] Report of Commissioner, paragraph 5
[395] Deposition of N.T. Ransom, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 74. Hereinafter referred to as Deposition of N.T. Ransom.

> petition was signed up, I think, in fact, I know, that Mr. French presented it to the Board of Education, or to the clerk of the Board.[396]

Daniels testified that this petition was presented to the board prior to the commencement of construction on the new building.[397] Ransom recalled that there were 280 to 380 signatures on the petition.[398] D.A. Williams also recalled attending the mass meeting and was another member of the committee who went to the board of education.[399]

The black community protested against the location of the new school because it was in a dangerous location. Douglas was in an area referred to as "the loop" and surrounded on all sides by railroad tracks. The main line of the St. Louis and San Francisco Railway was 250 feet north of Douglas, the main lines of the Missouri, Kansas, and Texas Railway were 250 to 300 feet to the east of Douglas, the Osage Division line was 500 to 700 feet south of Douglas, and the front of the school was 500 feet from the disinfect tracks "used for storage of cars."[400] Children attending the school had to cross numerous railroad lines to reach the Douglas school. There were numerous street crossings available for pedestrians. They were located at Crawford Street, Main Street, Morton Street, Appleton Street, Morgan Avenue, and Grand Street. The Appleton Street crossing was considered by most to be the safest crossing.[401]

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[396] Deposition of Sam Daniels, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 70. Hereinafter referred to as Deposition of Sam Daniels.
[397] Deposition of Sam Daniels, p. 71.
[398] Deposition of N.T. Ransom, p. 75.
[399] Deposition of D.A. Williams, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 38. Hereinafter referred to as Deposition of D.A. Williams.
[400] Deposition of J.M. Giles, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 5. Hereinafter referred to as Deposition of J.M. Giles.
[401] Deposition of J.M. Giles, p. 6.

R.F. Bailey, the secretary of the board of education said that he had no record of any "protest or remonstrances made by any of the citizens of Parsons, against the erection or location of the school."[402] Bailey's testimony was refuted by Arthur Cranston, who had served as the clerk of the board of education from 1904 until the summer of 1907. He did recall that the black community had protested the site of Douglas. He commented, "That is my memory, that they objected to having the school building down there, and a committee came up, and they had quite a debate there for a couple of hours one evening."[403] He estimated 150 to 200 individuals signed the petition. He testified that he turned everything over to Paul Kimball when he resigned. M.J. McKnight, President of the School Board, admitted that the board had received a petition from the committee and described it as follows:

> It was simply written on a pencil tablet, near 150 names all written in one handwriting. There was nothing official about it. It was just like a committee would come together here and get a lot of names and bring them before us…. I did not consider it as anything official, and I do not think the Board did.[404]

While the black community perceived their efforts to constitute an official action, the Board did not perceive the petition as being of any consequence.

Cranston also testified that he did not believe that the black community wanted a separate school at all and that "if there had to be one, they thought they would rather have two buildings rather than one."[405] The black community wanted one building on each side of the tracks.

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[402] Deposition of R.F. Bailey, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 11. Hereinafter referred to as Deposition of R.F. Bailey.
[403] Deposition of Arthur Cranston, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 17. Hereinafter referred to as Deposition of Arthur Cranston.
[404] Deposition of M.J. McKnight, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 103. Hereinafter referred to as Deposition of M.J. McKnight.
[405] Deposition of Arthur Cranston, p. 19.

Ransom estimated that 75 percent of the black population lived on the east side of Parsons. M.J. McKnight testified that prior to the opening of Douglas, 33 black children attended the First Ward school, 100 attended the Second Ward School, 111 attended the Third Ward School, and no black children attended the Fourth Ward school. However, the testimony of McKnight reveals that the number of enrolled students at Douglas was 148 and the actual attendance was 110 students. This meant that 100 fewer black students were attending school. McKnight attributed the drop in attendance to the city's decision not to enforce the compulsory attendance law in the black community.

> Because of this lawsuit and all, we did not care to push this law this year; and for that reason, while we have compelled the white children to attend school, we have left it entirely with the colored people as to whether they did or did not send their children to school…. We wanted to see how many really and truly wanted to get an education and go to school…. When they get to be fourteen or fifteen years old, they usually drop out anyhow.[406]

Cranston recalled the board had requested that the blacks select an alternate site and make a proposal to the board.

The board of education stated that it built Douglas "at a point as near the center of the territory of the residence of the colored children as could well be obtained. As to distance to school, it accommodate[d], at least ninety percent of the colored children of school age in the city of Parsons."[407]

The Douglas school was completed on September 1, 1908, and on September 28, 1908, the Parson Board of Education promulgated a rule requiring black children to attend Douglas. D.A. Williams lived in the first ward and took his children Amuel (age 16), Fannie (age 14), Charley (age 12), and Emmett (age 6) to Lincoln, the first ward school for admission. Even

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[406] Deposition of M.J. McKnight, p. 107.
[407] Report of Commissioner, paragraph 7.

though the Williams children had been attending Lincoln since 1889, the principal, Miss Morley, refused to admit the Williams children to Lincoln because "they were of African descent."[408] Williams also spoke with J.M McKnight and Superintendent Highlin and demanded that they admit his children to Lincoln School. They also denied his request. Williams did not want to send his children to Douglas because he did not want "to send [his] children to any dangerous location for an education while [he] was so situated in [his] life to give them better chances."[409] Since being denied admission to Lincoln, Williams had been sending his children to school in Thayer, Kansas. N.T. Ransom's children did not attend Douglas because "there were too many tracks and trains for my little fellows to attend school away down there."[410]

The school day in Parsons was from 9:00 a.m. until 4:00 p.m. with a lunch break at midday. During this time, four trains from the St. Louis and San Francisco Railway Company were scheduled[411], and the Missouri, Kansas, and Texas Railway Company had four passenger trains and eight freight trains scheduled to run on the lines that passed the school.[412] The noise and smoke from the trains would sometimes disturb the teachers and students in the Douglas school. R.E. Smith, one of the Douglas teachers, testified that he had trouble teaching because of the trains. Smith said that children were late to class and "when the windows were up, I have

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[408] Application for Alternative Writ, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 3. Hereinafter referred to as Application for Alternative Writ.
[409] Deposition of D.A. Williams, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 42. Hereinafter referred to as Deposition of D.A. Williams.
[410] Deposition of N.T. Ransom, p. 75.
[411] Deposition of W.C. Knight, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 9. Hereinafter referred to as Deposition of W.C. Knight.
[412] Deposition of E.M. Pace, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 22. Hereinafter referred to as Deposition of E.M. Pace.

had to stop while the trains pass on account of the noise."[413] On the issue of noise, R.D. Kelley, the general yardmaster for the Missouri, Kansas, and Texas Railway, testified that the grade from the south was "a pretty stiff grade [and] a train climbing a steep grade ordinarily makes more noise than a train running on a level grade."[414] Anna Dudley, who had a child at Douglas, visited the school on April 16, 1909, and while no trains passed while she was there, "the switch engine bumped around there."[415] She heard the noise, and it confused Mr. Smith and the students. "They could not understand what they were saying."[416] Miss Bertha Taylor visited Douglas during November 1908 and "while [she] was there, a string of freight cars run up by the building, and [Professor Clark] asked the pupils to stop reading while the cars passed."[417] Miss Taylor remarked, "There was a young lady right with me and I could not hear what she said as the train was passing."[418] She was there between 3:00 and 4:00pm.

The smoke from the trains sometimes made it difficult to read because "on heavy, damp days, when the air is heavy enough to force the smoke down, it forces it down against the windows."[419] The smoke darkened the windows. When pressed to testify about the frequency of the children's tardiness, noise, and smoke, R.E. Smith replied with statements, such as "I do not

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[413] Deposition of R.E. Smith, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 13. Hereinafter referred to as Deposition of R.E. Smith.
[414] Deposition of R.D. Kelley, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 36-37. Hereinafter referred to as Deposition of R.D. Kelley.
[415] Deposition of Anna Dudley, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 55. Hereinafter referred to as Deposition of Anna Dudley.
[416] Deposition of Anna Dudley, p. 55.
[417] Deposition of Miss Bertha Taylor, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 56. Hereinafter referred to as Deposition of Bertha Taylor.
[418] Deposition of Miss Bertha Taylor, p. 56.
[419] Deposition of R.E. Smith, p. 14.

know," "I would not like to say how much that it is," or "I would not like to say that." He made these types of statements eleven times indicating that he may not have felt comfortable describing the frequency of these events because it could have jeopardized his job. When questioned by Sloneker, the board of education's attorney, about the efficiency of the ventilation system and when pressed to admit the Frisco trains did not pass that often, Smith limited his reponse to "I don't know" or "I would not like to say how often." This caused Sloneker to become so frustrated with him that he commented, "You do not know, as a matter of fact, how much you do know?"[420]

Several of the local residents discussed how dangerous the location was for school age children. Alice Allen, who lived on Morgan Avenue, told the following story:

> I saw Mamie Mitchel and Edna Malone and Cy Bowes come running out there. I was going along on the Hood lot, right adjoining the school building, when the three children came running, and the two girls were ahead and got across the track and the boy was knocked back. I screamed and hollered and tried to stop them. I knowed if Edna heard me she would stop. Edna was my sisters' child and would have stopped if she had heard me. And I hollered and hollered; and this little Cy Bowes, he was – the train was crowding so close, the train ran between them and knocked him back, and the other two children standing on the other side of the crossing. I commenced talking to the children.[421]

Mrs. Tenny Sims, who lived four blocks east of Douglas on Morton Avenue, also witnessed several narrow escapes.

> I seen Irene Malone come very near getting run over in the morning there between the Frisco and the Katy tracks – It was a freight train on the Frisco and a passenger train on the Katy, as she was coming to school, and she made an attempt to cross the tracks there, and her brother grabbed her by the arms and pulled her back and that is all that saved her life. Not very long after that, it was Madie Mitchell and Belva Williams and Fred Malone. They were coming down the Frisco there, and there was a freight train coming

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[420] Deposition of R.E. Smith, p. 15.

[421] Deposition of Alice Allen, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 46. Hereinafter referred to as Deposition of Alice Allen.

> right there; and I hollered at them and got them off the track just in time to keep them from being killed. Just as they stepped off the track, the train passed them.[422]

The Kansas Supreme Court issued two opinions in this case. The first decision was based on the motion to quash filed by the Parsons Board of Education. While C.S, Dennison and James Nation, the attorneys for Williams, conceded that first class cities had the authority to establish separate schools, they argued the school board was required to provide schools that "afford equal privileges and educational facilities."[423] For this decision, the court treated the facts as presented in the Parson's Alternate Writ of Mandamus as true. The Court considered the following issue:

> Whether the defendant [Parson Board of Education] by locating and constructing the school building for colored children in the dangerous place described in the alternate writ is maintaining there a lawful school within the meaning of the law, or whether its construction in such a perilous location is such an abuse of discretion as will sustain this action.[424]

The test the court used to decide this question was "whether the perils that must be encountered are so obvious and so great that, in the exercise of reasonable prudence, [the children's] parents should not permit them to incur the hazard necessarily and unavoidably involved in attending the school."[425] The court determined that the school board's action of building the school in a location surrounded by railroad tracks was an abuse of discretion. The court pronounced the following rule of law:

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[422] Deposition of Mrs. Tenny Sims, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 53. Hereinafter referred to as Deposition of Tenny Smith.
[423] First Brief of Plaintiff, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 1 The plaintiffs filed two briefs in this case, both entitled Brief of Plaintiff. One in connection with the 1908 Supreme Court decision and one for the 1910 decision. Hereinafter they will be referred to as First Brief of Plaintiff and Second Brief of Plaintiff .
[424] *Williams v. Board of Education of City of Parsons*, 99 P 216, 217. (1908).
[425] *Williams* , p. 217.

> Having power to maintain separate schools in cities of the first class, the duty rests upon boards of education therein to give equal educational facilities to both white and colored children, in such schools. This requirement must have a practical interpretation, so that it may be reasonably applied to varying circumstances. But, where the location of a school is such as to substantially deprive a part of the children of the district of any educational facilities, it is manifest that this equality is not maintained, and the refusal to furnish such privileges, where it is practicable to do so, is an abuse of discretion for which the courts will afford a remedy.[426]

The court ordered the Parsons Board of Education to admit the Williams children to a school they could safely reach, but did not require the board to admit them to Lincoln. The court also acknowledged that because the board of education had not yet presented evidence in the case, it was possible the location of Douglas was not as unsafe as represented in the writ filed by the Williams.

The Kansas Supreme Court appointed a commissioner, S.C. Brown of Chanute, Kansas, "to take testimony under the issues and report his findings."[427] After receiving all of the evidence, Brown issued his finding of facts and recommended that the court deny the William's writ. Dennison, Nation, and Jamison argued that because the Williams children had to cross seven railroad tracks to get to Douglas School, the location was dangerous and perilous. Given this, the board had failed to secure equal educational privileges to the Williams children. The Parsons Board of Education was represented by J.G. Sloenecker, who agreed with Brown's recommendation. Sloenecker argued that there was no discrimination in this case for the following reasons:

1. The Board had a history of assigning students to schools without regard to the number of railroad tracks they would have to cross to reach school.
2. The location of the Douglas school was convenient for a majority of the black students in Parsons and is as safe as any other location would be.

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[426] *Williams* , p. 218.
[427] Second Brief of Plaintiff, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 2

3. The Williams children did not have to cross the main Missouri, Kansas and Texas railway line and twelve sidetracks to arrive at Douglas and the lines were not as heavily used as alleged in their writ.
4. Douglas school was "the newest and best schoolhouse in the city of Parsons."[428]
5. White children are also required to cross railroad tracks to attend their ward schools.
6. The fact that "Between forty and fifty colored children, living east of the M. K. & T. Railway tracks have been attending the Douglas School regularly since it was opened in September, 1908" is evidence that the school can be arrived at safely.[429]
7. "Board of Education exercised great care and caution in the selection of a site for this building and … they exercised good judgment in the selection and in the construction of the building."[430]

When the Supreme Court considered the case this time, it found that "while some tracks had to be crossed, they are fewer than the number stated and are used less frequently; that the crossings are reasonably safe."[431] Therefore, the court found that there had been no abuse of discretion, nor had the actions of the board been arbitrary and capricious.

Thurman-Watts v. Board of Education of Coffeyville (1924): Defining High Schools

In 1920, the Publicity Committee for the Coffeyville School Bond published a pamphlet entitled, "Facts about our School Situation: To the Voters and Patrons of Coffeyville Schools."[432] This pamphlet provided information on why the citizens of Coffeyville should authorize the board of education to issue bonds for the construction of a junior high school. The reasons given were that "the Board of Education propose[d] to do two things – first to relieve the present crowded conditions of the ward schools, second, to build a Junior High School, where

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[428] Brief of Defendant, Kansas State Supreme Court Records, *Williams v. Board of Education of City of Parsons,* Case No. 16,181 (Topeka: Kansas State Historical Society, 1908, 1910), p. 10. Hereinafter referred to as Brief of Defendant.
[429] Brief of Defendant, p. 10
[430] Brief of Defendant, p. 10.
[431] *Williams*, p. 37
[432] Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924).

practical manual training, as well as the regular academic courses will be taught."[433] Table 4.1 reflects the enrollments in the Coffeyville schools prior to the construction of Roosevelt Junior High. The committee argued that for children to receive proper instruction, the average class size for teachers should be 30 students. Only three of the Coffeyville schools met this benchmark, the Spaulding, Logan, and Douglas. However, the Spaulding was a one-room school with one teacher who was responsible for teaching all subjects for all three grades. Logan School had two rooms with two teachers, each responsible for three grades. Douglas had three rooms with the three teachers dividing grades 1-8 among themselves. Although the pamphlet did not provide this information, presumably the student-teacher ratio at Washington High School was around 31:1, indicating that building a new junior high school would help to alleviate the overcrowded conditions at the grade school level.

Table 4.1: Coffeyville, Kansas 1922 School Enrollments

Name	Rooms	Race	Grades	Enrollment	Teacher Pupil Ratio
The Spaulding	One	White	Grades 1-3	21	21:1
Logan	Two	White	Grades 1-6	44	22:1
Douglas	Three	Black	Grades 1-8	89	30:1
Ingalls	Three	White	Grades 1-4	119	40:1
Cleveland	Eight	Black	Grades 1-8	288	41:1
Garfield	Eight	White	Grades 1-7	408	51:1
Whittier	Ten	White	Grades 1-7	401	40:1
Longfellow	Eight	White	Grades 1-7	445	55:1
Lowell	Ten	White	Grades 1-7	505	50:1
McKinley	Five	White	Grades 1-7	414	41:1
Lincoln	Six	White	Grade 8	166	33:1
Washington	Fifteen	Mixed	High School	466	Not given

The committee also proposed that the junior high school model or what was referred to as the six-three-three school model, would afford the children of Coffeyville the opportunity to

[433] Facts About Our School Situation: To the Voters and Patrons of Coffeyville Schools, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 1. Hereinafter referred to as Facts About Our Schools.

receive the same quality of education provided to children residing in cities and town contiguous to Coffeyville. They argued that academic high schools were geared toward preparing individuals for the liberal arts and sciences. "These college courses are intended to give those who master them a general culture desirable for those who will live a life of leisure or enter one of the learned professions, law, medicine, ministry or teaching."[434] Academic high schools met the needs of a small proportion of the students. Therefore, junior high schools that offered manual and technical training were better suited to accommodate the educational needs of "a larger portion of pupils [who] might have instruction and training in occupations they would probably follow in after life."[435] The committee pointed out that Kansas City, Topeka, Witchita, Hutchinson, Lawrence, Winfield, Salina, Fort Scott, Manhatten, Arkansas City, Iola, Chanute, Athison, Pittsburg, Garden City, Junction City, Holton, Neodosha, Hiawatha, and Independence either offered or were in the process of establishing junior high schools for their children and that their high school enrollments exceeded that of Coffeyville. Therefore, the establishment of a junior high school would better meet the needs of students and would provide a model of education in line with what other first-class cities in Kansas offered.

The pamphlet also stated that the junior high school would offer grades seven through nine and that "all pupils who have made the necessary grades, regardless of race" would be allowed to attend.[436] The promise that the junior high school would be open to both black and white children was recapitulated by Ralph P. Brown, a member of the publicity committee, and A.A. Bessie, a member of the board of education, who actively campaigned for the black community's vote in favor of the bonds. Reverend Alexander Wendall Ross, the pastor of

[434] Facts About Our Schools, p. 1.
[435] Facts About Our Schools, p. 1.
[436] Facts About Our Schools, p. 3.

Calvary Baptist Church, testified that two men "came to our church, and they made to us the statement that there would not be segregation. That the colored children wouldn't be prohibited from going to the Junior High School."[437] When the election was held on August 3, 1921, the measure authorizing the board of education to issue bonds was approved in all of the wards except for the two wards where the blacks lived. Although Lamb, the school board's attorney, tried to establish that the issue failed in these two wards because the black vote, Reverend Ross stated

> I believe Mr. Brown stated to me one of the wards where the colored folk live did, but it is a possibility that the majority of the colored folks could have voted and the other white folks in that ward could have thrown the balance the other way. It isn't reasonable that the colored folks voted against it because there are white folks in every ward.[438]

While it is uncertain which group of voters voted against the measure, it is reasonable to propose that the proposition, as presented in the pamphlet, was perceived as a threat to the whites in Coffeyville because, rather than attending a whites-only school, their seventh and eighth graders would have attended Roosevelt Junior High, an integrated school.

Construction on the new Roosevelt Junior High School started in April 1922, and the school was completed and slated to open on September 24, 1923. Prior to the opening of the school, a rumor that Roosevelt was to be a whites-only school began to circulate. Cecelia Thurman-Watts contacted A.I. Decker and had a conversation with him right before school opened. According to Cecelia Thurman-Watts

> There was so much talking about people that they had fooled us to get the money in there to build the Junior High School and tax us in that manner and take it for the white children. I heard so much of it and I called him [Superintendent Decker] up and asked him was it a fact that the colored 9th grade was going to Cleveland and he said yes…..

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[437] Testimony of Reverend Alexander Wendall Ross, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 52. Hereinafter referred to as Testimony of Rev. Ross.
[438] Testimony of Reverend Ross, p. 92.

> And I said well, we have to pay taxes for the Junior High and I don't think we colored people will stand for that.[439]

Students entering the ninth grade were to enroll on September 18, 1923, eighth graders were to enroll on the nineteenth, and seventh graders were to enroll on the twentieth. Victoria Thurman arrived at Roosevelt Junior High School on September 18, 1923, to enroll in the ninth grade. She recalled,

> We went there about the time we thought school was to take up and we stood in line until we could get into the building. We pushed our way in the building and we were stopped at the door….I was told they wasn't enrolling colored children, that he was given notice by the superintendent not to enroll any colored children and for us to report at the Cleveland School.[440]

The directive to segregate the children came from A.I. Decker, the superintendent of the Coffeyville Schools. Decker testified that the statute providing him with the authority to assign students to buildings gave him the authority to segregate the children.

Celia Thurman-Watts, Victoria's mother filed suit on September 21, 1923, in the Kansas Supreme Court seeking the admission of her daughter to Roosevelt Junior High. Even though Carter promoted twenty students to the ninth grade the previous year, only one ninth grade student, Lucille Walker, enrolled in Cleveland School. Lucille testified that she had moved to Coffeyville from Granada, Mississippi, about two weeks after school started. She sat in the eighth grade room and was not allowed to go to domestic science or music because they were

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[439] Testimony of Cecelia Thurman-Watts, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 34. Hereinafter referred to as Testimony of Cecelia Thurman-Watts.

[440] Testimony of Victoria Thurman, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 22. Hereinafter referred to as Testimony of Victoria Thurman.

available only to students in the eighth grade or lower.[441] "The children would rise to go to their domestic science one day and the teacher said that I didn't go to domestic science and to take my seat."[442] The other children did not attend school because "the Cleveland School was not qualified to teach the ninth grade students."[443] The court heard testimony from five students who were not attending school. An arrest warrant was issued for the Cartwrights, and the following black parents were arrested for not sending their children to school: Mrs. Celia Watson, Mrs. Blake and Mrs. Gruggs.

The ninth-grade students sat in the seventh-eighth grade classroom to complete their lessons. When it was time to recite, they would pick up one of the folding chairs in the hallway. The folding chairs would be brought into the cloakroom in Mr. Carter's office, which had been converted into a classroom for recitation. The manual and technical training area of the school was located in the basement. An inspection of the basement area made in September cited numerous violations and fire hazards. Walter Ashby, a sanitary officer, who was present during the inspection stated,

> There was only one thing wrong with it, in the manual training room at the northwest corner of the building, in order to get into the manual training room we had to go around the furnace, and in case of fire there was only one way to get out and it was to pass through this furnace room. And in our report it was suggested that they make some openings there, and fix some screens so they could get out of the windows.[444]

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[441] Testimony of Lucille Walker, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 89. Hereinafter referred to as Testimony of Lucille Walker.
[442] Testimony of Lucille Walker, p. 89.
[443] Testimony of Lucille Noland, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 39. Hereinafter referred to as Testimony of Lucille Noland.
[444] Testimony of Walter Ashby, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 40. Hereinafter referred to as Testimony of Walter Ashby.

Albert Richardson, the former janitor at Cleveland, also testified about the inadequacy of the waterworks and lavatories. According to his testimony, they would overflow, and the building would stink for two or three days afterward.[445]

Some of the black high school students went to Roosevelt Junior High School for manual training. One student, Robert Alexander, took Spanish and physics at Washington High School and carpentry and Architecture I at Roosevelt. He testified that he experienced discrimination and explained, "There is a kind of a discrimination in there, they assign certain things for you to do that you don't come into contact with the other students. [In carpentry class, with fifteen students], they group them [whites] together."[446] The black students were not permitted to use the gymnasium, although the white high school students had a designated time to use it. They were also denied access to band, music, and glee club.

Thurman-Watts objected to sending Victoria to Cleveland because it was not equipped to handle the ninth grade. She also objected to the qualifications of Robert A. Carter, the principal, to teach the ninth grade because he held only a certificate from the Teachers College at Emporia and not a degree. Decker described his teaching credentials as follows:

> Through the successive years 1907 to the year just passed 1923…he has accumulated hours of credit that total 70, that of these 70 hours these records show that 64 are of a grade that entitle him to teach in the present-day schools. Some courses were offered in teachers' colleges as far back as 1910, 1908, and 1909 that are not now considered by the State Board of Education as being of subjects that were of a grade to entitle him to recognition on a state certificate. Now, Mr. Carter has 64 hours of such and 60 hours are sufficient to entitle him to a High School Certificate….The only reason he hasn't been granted a Junior High School certificate or intermediate certificate as it is sometimes called was that one or two courses are not of the type of courses that would entitle him to

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[445] Testimony of Albert Richardson, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 98. Hereinafter referred to as Testimony of Albert Richardson.

[446] Testimony of Robert Alexander, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 55. Hereinafter referred to as Testimony of Robert Alexander.

> recognition. That is, he must have so many hours of physiology, so many hours of history and … he has made up hours in subjects such as English and Algebra that he is teaching in this school.[447]

Carter had received a three-year certificate from the state that was valid from July 31, 1919, until July 1, 1922. At that time, the State of Kansas allowed boards of education to issue teaching certificates, and Decker had issued Carter a certificate based on the expired three-year state certificate.

A committee from the black community went to see Decker about the conditions at Cleveland school. Elmer H. Riley, who was a member of the committee along with James T. Smith, Mr. Medlock, Mr. Lock, and Mr. Hamilton, recounted the following:

> As well as I can remember the conversation that we spoke about was relative to conditions at the schools and he asked me in substance concerning the principal of the school and wanted to know about his morals and we wanted to talk about the teachers as the children wasn't advancing as they should, and I said I love my children and I want to see them have the best, and he said, I know you do, and I told him that I stayed in the woods most of my life, and I didn't have much education, but I wanted my children to have educations, and he said I understand you do, and he said, isn't Mr. Carter all right, and I said yes, but we want better things, better conditions…. He said he would change sometime in the near future…. He also stated to us that he understood the colored people was always running up there for something, and I let him know in the presence of those gentlemen that any of us in our race come up there for business, and we was rough and ready if he wanted it that way… Then I told him I didn't come for that, I came there like a man and a gentleman to ask him to remedy the conditions in the school and so far it has failed to be done.[448]

Decker testified that the only difference between Cleveland and Roosevelt was that Roosevelt was "new and prettier, but so far as their use in teaching, there is no difference."[449]

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[447] Testimony of A.I. Decker, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 48. Hereinafter referred to as Testimony of A.I. Decker.

[448] Testimony of Elmer Riley, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 30-31. Hereinafter referred to as Testimony of Elmer Riley.

[449] Testimony of A.I. Decker, p. 5.

Two groups played a role in this case, and a great deal of time was spent by the lawyers on both sides trying to establish the witness's relationship to each. The first group was the National Association for the Advancement of Colored People (NAACP). The lawyers for the Coffeyville Board of Education attempted to establish that the NAACP was funding the lawsuit. However, the black community denied this. Will Hale, a painter and paper hanger, described the NAACP as "an Association composed of Negro and Indians or anybody else that wants to belong to it, that has for its purpose the advancement of the Negro." The other group involved in this case was the Ku Klux Klan (KKK). According to the plaintiff's brief, "Three of the members of the school board have been or are members of the organization known as the Ku Klux Klan, an organization that is against the advancement of the colored people, their education or of giving them an equal show in educational facilities."[450]

The Thurmans were represented by Elisha Scott and R.M. Van Dyne. Scott and Van Dyne argued that the board's action of separating the children on the basis of race was invalid because the powers of school boards are statutory; that is, they are derived from laws. Therefore, they can exercise only powers that have been expressly granted. While Kansas law did allow first-class cities, such as Coffeyville, to segregate grade schools, the law expressly stated that other than high schools in Kansas City, Kansas, "no discrimination on account of color shall be made in high schools."[451] Scott and Van Dyne then pointed out that the courts had also recognized and adopted precedent that precluded boards of education from segregating schools unless they had been expressly granted that power by the legislature. They then established that the ninth grade was the first year of high school through the testimony of Superintendent A.I.

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[450] Brief of Plaintiff, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 36. Hereinafter referred to as Brief of Plaintiff.

[451] Brief of Plaintiff, p. 10.

Decker. As the following excerpt from the testimony reveals, this was no small task for Elisha Scott to accomplish.

> **Scott:** Now, under the system you have adopted, however, it compels all of the colored children of this school district, and that is not where they live, to go to the Cleveland Building for their education?
> **Decker:** Above the sixth grade…Yes sir, including the Ninth.
> **Scott:** Now, Mr. Decker, I will ask you if you don't know positively that the Ninth grade is, under our law, designated and considered a High School Grade? Lamb, board of education attorney objects.
> **Decker:** The judgment of authorities with whom I have talked said it would have to be decided as to when this elementary, intermediate and high school work were not ninth grade, or whether ninth grade would be intermediate or high school. That is a question for the legislature and the courts to decide. During the eight years I was superintendent at Fredonia City Schools the grades usually taught in the high schools began in the seventh grade and continued over a long period, and many subjects sometimes taught in the seventh and eighth grades were often taught in the ninth and tenth grades. I did not consider the classification of schools there, as the subjects were not taught in that order. We considered the seventh and eighth and ninth grades as intermediate and the tenth and eleventh and twelfth grades as high school for the eight years I was in that city.
> **Scott:** What was the rule previous to that eight years?
> **Decker:** The common rule of eight and four. Educators over the country are adopting the change and doing it everywhere, and it is being done legally in some states, the six and three. If you will look up the grades, you find that is the rule…Well, that was twelve years ago, we had a division of the eight and four.
> **Scott:** What do you mean, eight and four?
> **Decker:** I mean eight grades and four grades.
> **Scott:** Then the ninth grade was the high school grade?
> **Decker:** Yes, of course, that is what they were, but we did not call it a high school grade, we called it elementary.
> **Scott:** What did they call it?
> **Decker:** They call them grades, one, two, and three up to twelve.
> **Scott:** Well, you say eight and four. Then the first year in high school you would consider it the ninth grade?
> **Decker:** They call it the four upper grades.
> **Scott:** Let's get between that eight grades.
> **Decker:** The first eight grades are common or elementary schools and the four grades are second school.
> **Scott:** After you leave the eight grades and go to the ninth grade, what is the next grade?
> **Decker:** The Ninth.
> **Scott:** Then when you leave the eight grade and go to the high school, it is the ninth grade"
> **Decker:** I believe that I have tried to answer that fairly.
> **Scott:** The first eight grades are common school?
> **Decker:** Yes, sir.

Scott: And after you leave the eighth grade you go to the ninth?
Decker: Yes, sir.
Scott: The high school?
Decker: Yes sir, the second school.
Scott: When you left the eight grades you go to the ninth?
Decker: I will simply say this: the first eight grades are common elementary schools. The grades nine, ten, eleven and twelve are high school.
Scott: Then the ninth is the first year in the high school?
Decker: Yes.

It took Scott six attempts to get Decker to admit the ninth grade was the first grade in high school. Decker attempted to correct his answer to the first question by an affidavit filed with the Kansas Supreme Court on December 31, 1923. In this affidavit, Decker stated that he made the following statement, "excluding the ninth," rather than "including the ninth." His affidavit stated "colored students are in fact enrolled in the ninth grade at the Washington School building as shown by the testimony of this affiant set out at page seventeen and eighteen of the transcript in this case."[452] Establishing this fact was essential to the next argument that Scott and Van Dyne made. They argued that the term "high school" referred to the school that students entered after the elementary or grammar schools. While they noted that the term "high school" had not been defined in Kansas, the courts had determined that the affixes "junior" or "senior" "do not form part of the name, but are descriptive only. Hence, in legal contemplation, their presence or absence is immaterial."[453] Applying this construction, Scott and Van Dyne argued that affixing the term junior or senior to high school served as a description only and would not serve to take ninth grade "out of the term 'high school' as used in our statute."[454] Therefore, the board of

[452] Affidavit of A.I. Decker as included in the Counter Abstract of the Defendant, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 15.
[453] *State v. Lewis*, 83 N.J. Law 161.
[454] Brief of Plaintiff, p. 16.

education had no authority to exclude Victoria Thurman from attending ninth grade at Roosevelt Junior High School because of her race.

Scott and Van Dyne next argued that while the Kansas General Statutes of 1915 provided boards of education with the power to specify the courses of study for public schools, it did not provide them with the power to "say that a certain class shall or shall not be in the high school."[455] Lacking this authority, the board of education could not make the determination that the ninth grade was not a high school grade. Therefore, when the Coffeyville Board of Education segregated the black ninth-grade students from the white ninth-grade students, they undertook an action they had not been expressly granted.

In addition to the discrimination resulting from the unauthorized segregation, Scott and Van Dyne argued that the black ninth-grade children had not been provided with equal educational facilities. The Cleveland School lacked "many of the essentials necessary to the proper and adequate teaching of the pupils in the Ninth grade."[456] The white children who attended Roosevelt were afforded the use of a gymnasium and a cafeteria. The area of Roosevelt devoted to domestic science had housekeeping rooms. The Roosevelt School also had regular rooms set up to accommodate the ninth grade. At Cleveland, domestic science, as well as manual training, occupied the basement, which was dark, damp, and smelly. The close proximity of these classrooms to the furnace also posed a problem in the event of a fire, because no exit was available to the children.

A.R. Lamb and Clement Reed represented the Coffeyville Board of Education. Lamb and Reed argued that Cecelia Thurman-Watts' complaint amounted to an attempt on her part to determine which school her child, Victoria, should attend. This power, they argued belonged to

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[455] Brief of Plaintiff, p. 17.
[456] Brief of Plaintiff, p. 32.

the school board. Lamb and Reed asked the court, "Where the ninth grade is taught in three different buildings in a city of the first class, can a student or the mother of a student select one of the buildings where the ninth grade is taught and compel the Board of Education by mandamus to enroll and admit this student to school there?"[457] Lamb and Reed argued that ninth grade was taught at Washington, Roosevelt, and Cleveland Schools. The superintendent and board of education acted in accordance with the power provided to them by Sections 9774 and 9108 of the Kansas General Statutes when they assigned her to one of the schools.

Lamb and Reed next contended that Thurman-Watts never approached the superintendent or the board to request that her daughter be placed in a particular school. Because she never made a request, they were never provided with "an opportunity to assign [Victoria Thurman] to Washington school building."[458] Lamb and Reed characterized her rush into this lawsuit as "an advertising proposition for members in this National Association for the advancement of colored people that is backing this suit. The promoters of this organization can use this suit as bait to catch members by saying 'look what we did down in Coffeyville.'"[459] They argued that Thurman-Watts' concerns would have been addressed because Decker and the Board of Education did "everything in their power to prevent any friction of any kind whatsoever among members of the negro race."[460] They directed the court's attention to the "feeling of the better class of negroes of the City of Coffeyville that the interest of the colored students would be

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[457] Brief of Defendant, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 2. Hereinafter Brief of Defendant.
[458] Brief of Defendant, p. 6
[459] Brief of Defendant, p. 6
[460] Brief of Defendant, p. 7-8.

advanced by maintaining in the City of Coffeyville separate schools throughout the entire school system."[461]

In making this argument, they used a small portion of Rev. Ross's testimony as evidence of his support for segregated schools. It is evident from examining his testimony *in toto* that Reverend Ross supported integrated education and advocated for the enrollment of the black children of Coffeyville in Roosevelt Junior High School, When Lamb asked him if he knew "that this is a fact that from the tests that have been given throughout the country that these tests disclosed that the colored children [were] unable to advance as quickly as the white children,"[462] Reverend Ross pointed out "some specific cases where a colored child is brought under the same conditions with the white and he has the advantage in many cases."[463] Lamb interrupted Rev. Ross and turned the line of questioning toward Coffeyville and solicited Ross' opinion about why so few blacks graduated from the high school. Rev. Ross replied,

> I might be biased in my opinion on it, but some of them think they are unfairly treated and discriminated and humiliated and did not feel like going up against the proposition…We went before the school board here on some of the reasons, and I believe especially the word, 'nigger' used on the platform by the principal and the student body, and a committee of us went to Mr. Decker and the board to protest against such use on one occasion.[464]

Rev. Ross did express support for a separate high school when Lamb asked him if he thought a separate black high school would result in a higher high school graduation rate; however, this support was limited in nature. Ross said, "In the face of the condition that now exists in the way of humiliation and discrimination, I believe we could use a very fair argument that most of them

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[461] Brief of Defendant, p. 8.
[462] Testimony of Reverend Ross, p. 55
[463] Testimony of Reverend Ross, p. 55.
[464] Testimony of Reverend Ross, p. 55.

attend, but I don't think that would be best for the community and the public in general."[465] Reverend Ross's position reflects the stance that many in the black community adopted. The central focus was on the adequacy of education, rather than a debate about separate or mixed schools. Although mixed schools were the ideal, the persistence of racism made separate schools the most palatable solution in many contexts.

The next argument presented by Lamb and Reed centered on whether under the Six-Three-Three Plan the ninth grade was still considered to be a high school grade. They argued that the Six-Three-Three Plan was "recognized as the best system of education that has ever been advocated,"[466] and that the definition of high school should reflect the changes and advancements being made in the educational system. They pointed to the evidence in the case supporting the position that under the Six-Three-Three Plan, "the high school in the City of Coffeyville commences at the 10th grade and is composed of the tenth, eleventh and twelfth grades."[467] They explained that Superintendent Decker's testimony designating the ninth grade as the first high school grade had no bearing on this case because Decker was discussing the Eight-Four Plan of education and that plan was not in effect in Coffeyville. They argued that specifying which grades were those assigned to the high school was within the Board of Education's power

> to prescribe the course of study that shall be followed in the high school and if this course of study for high school is laid out by the Board of Education so that it commences at the tenth grade, we say that this is a matter within the sound discretion of the Board of Education and until the legislature lays down some different rule or classification that the course of study adopted and specified by the Board of Education is binding upon this court.[468]

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[465] Testimony of Reverend Ross, p. 56.
[466] Brief of Defendant, p. 8.
[467] Brief of Defendant, p. 12.
[468] Brief of Defendant, p. 13.

If the Board of Education had the power to prescribe a course of study that took the ninth grade out of high school, Section 9108 of the General Statutes of Kansas, 1915, permitted then the provision of separate ninth-grade classes for white and black children.

In the conclusion to their brief, Lamb and Reed urged the court to consider the consequences should it grant the plaintiff's writ.

> Suppose all of the twenty students entitled to enter the ninth grade return to school and arrangements are made to take care of them in the already overcrowded Roosevelt building. This group of student having been absent since the first of the school year will be away [sic] behind the students who have gone to school. Could this group of Colored students be taught separately in the Roosevelt Building or would it be necessary to take a half dozen or more white children who have attended school since the first of the year and group them with this class of colored students, compelling them again to go over work already done in order to prevent discrimination.[469]

In this passage, the board of education is soliciting guidance on whether a separate classroom for the black children was a reasonable accommodation.

Lamb and Reed then asked the court to provide them with guidance on how to alleviate the crowded conditions at Roosevelt. They proposed the reassignment of white pupils to Cleveland as a way to reduce the crowded conditions at Roosevelt and asked the court to answer the following: "How many white children, is it necessary to assign to the ninth grade in the Cleveland building in order to escape the accusition of discrimination against the colored students?"[470] Presumably this solution would have also enabled the board of education to keep Roosevelt secured as a white school.

Scott and Van Dyne's allegations that the board of education's action were motivated by racism is supported by the racist statements in the defendant's brief. As a counter to Thurman-

[469] Brief of Defendant, p. 14.
[470] Brief of Defendant, p. 15.

Watts' allegations that the Cleveland facilities were subpar and did not afford equal educational advantages to the black children of Coffeyville, Lamb and Reed wrote,

> It was amusing upon the trial of this case to hear some of these old colored men and women, who had not taken a bath in the past ten years and whose personal odor would almost knock you down, get on the witness stand and testify that this Cleveland School building was very unsanitary, and relative to the fact that some of these colored people were able to smell odors in the Cleveland building, we have this to say that we have yet to see as many as two hundred and fifty or more colored children assemble in one building and have the air absolutely free from all noxious odors.[471]

By using the phrase "it was amusing," it seems as though Lamb and Reed were appealing to the all-white Kansas Supreme Court to join in the amusement and render a decision that supported the privileges of whiteness.

Lamb and Reed argued that the educational facilities provided at Cleveland were "equal to or superior to that enjoyed in the other buildings of the city."[472] They point out that "there is not a word of testimony" in the record that provided evidence of the inferiority of the conditions at Cleveland. Perhaps it would have been more apropos for Lamb and Reed to state that there had been no white testimony to support the adverse conditions. The following black witnesses testified about the unfit conditions at the Cleveland School: Cecelia Thurman-Watts, Elmer H. Riley, Will Hale, Ella Cartwright, Lillie Anderson, Albert Richardson, R.M. Bradshaw, Geneva Childress, George Alexander Sweatt, Eva E. Sweatt, and Professor William Sterling James. Even Walter Ashby, the white sanitation officer, admitted that while "all the sanitary arrangements were O.K., there was a little trouble,"[473] which indicates that Cleveland School was not equal or superior to the other buildings.

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[471] Brief of Defendant, p. 15-16.
[472] Brief of Defendant, p. 16.
[473] Testimony of Walter Ashby, p. 41.

In response to the defendants' brief, Scott and Van Dyne filed a Reply Brief, the purpose of which was not "to enter into a discussion of problematical matters, something that may arise in the future, but, rather, to confine ourselves to the facts as they existed at the time of bringing of this action."[474] Scott and Van Dyne addressed the defendant's position that Thurman-Watts had made no demand on them prior to filing the lawsuit by pointing out "the civil code of procedure, in so far as it relates to proceedings in mandamus, nowhere provides that there shall be a demand made previous to the bringing of the action."[475] They did concede that, when the duties are of a private nature as opposed to a public nature, a demand may be necessary. However, Scott and Van Dyne argued first that the duty Thurman-Watts sought to enforce was a public duty and as such was governed by the following rule:

> Where however, the duty is strictly public and enjoined by law and no person is charged by law with the duty to demand, no demand is necessary.[476]

Additionally, even if the court determined that the duty was private in nature, the governing rule in that instance provided that

> where it appears that a demand would be unavailing it need not be made, as where the course and conduct of officers is such as to show a settled purpose not to perform the imposed duty.[477]

They argued that the actions of Principal Benefield, Superintendent Decker, and the Coffeyville Board of Education made it evident there existed "a design and plan on the part of the defendants

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[474] Reply Brief of Plaintiff, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305. (Topeka, Kansas: Kansas State Historical Society, 1924), p. 1. Hereinafter referred to as Reply Brief of Plaintiff.

[475] Reply Brief of Plaintiff, p. 2. The code of civil procedure sets out all of the rules governing the administration and consideration of all civil (i.e., noncriminal) lawsuits. The failure to follow proper procedure constitutes grounds for dismissal. Dismissal on a procedural error precludes the consideration on any other issue before the court because the proper protocol for bringing the case before the court was not followed.

[476] Reply Brief of Plaintiff, p. 2

[477] Reply Brief of Plaintiff, p. 2

not to admit colored children in the 7th, 8th and 9th grades to the Roosevelt School."[478] This design and plan negated any duty on the part of Thurman-Watts to make a demand other than to attempt to enroll Victoria in the ninth grade at Roosevelt.

Scott and Van Dyne addressed the definition of high school and proposed that the court apply the following principle guiding the interpretation of the language of a statute:

> A statute must be construed with reference to the time of the passage, thereof, or with reference to its going into effect. That meaning must be given to words which they had at the date of the act, and descriptive matter therein must refer to things as they existed at the time of its passage.[479]

The statute governing education in first-class cities was originally passed in 1868, and the most recent amendment occurred in 1915. At the time the statute was passed, the Eight-Four Plan was used in schools. The first eight grades encompassed the elementary school or grades one through eight, and the last four grades encompassed the high school or grades nine through twelve. Scott and Van Dyne argued, at the time the statute was passed and at the time of its amendment, the term high school was understood to include the ninth grade. Therefore, the Coffeyville Board of Education had received no express grant of authority from the Kansas State Legislature to operate separate schools for black and white children in the ninth grade and in fact were expressly prohibited from doing so because ninth grade was included in the meaning of the term high school.

The Kansas Supreme Court issued its opinion on January 25, 1924, and found that the Coffeyville Board of Education lacked the power to segregate the ninth-grade students on the basis of race. The court stated that it was commonly understood that the ninth grade was

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[478] Reply Brief of Plaintiff, p. 5.
[479] Reply Brief of Plaintiff, p. 7.

considered part of the high school and that boards of education lacked the authority to determine which grades were part of the high school and which were not.

> Giving force to the language of existing statutes, we cannot say that the term 'high school' is so indefinite that boards of education may so restrict its meaning as to determine that one of its four years – one quarter of the whole – may be separated therefrom and made a part of the elementary school.[480]

In addition to the statute authorizing first-class cities to segregate, the Kansas Supreme Court relied on the state laws that governed the reporting of school data to the state superintendent, as well as the state laws governing accreditation, as evidence of their position that "the four year is substantially interwoven into the fabric of the public school system of this state."[481] Basically, this meant that, until the state legislature adopted a definition of high school that did not include the ninth grade, this grade could not be segregated on the basis of race.

The court did not address the issue of equality other than to state "all three [of the junior high schools: Cleveland, Washington, and Roosevelt were] modern school buildings, the Roosevelt is the newest and most up-to-date."[482] The court did find issue with Coffeyville's system of designating Roosevelt as the white building, Cleveland as the black building and Washington as mixed. The board of education had argued if the court recognized that parents had the power to select the school building they wished their child to attend, then all of the black students would present themselves for enrollment at Roosevelt, which was already overcrowded. However, in addressing the board of education's concern, the Kansas Supreme Court's reply was

> the defendants have charge and control of the schools of Coffeyville and have power to make all necessary reasonable rules for the government thereof. A limitation upon such power is that defendants may not separate students of the ninth grade or high school on account of their color. The defendants are empowered under the law to make necessary and reasonable regulations for attendance of pupils at various buildings in order that there

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[480] *Thurman-Watts v. Board of Education of Coffeyville*, 222 P. 123, 125 (1924).
[481] *Thurman-Watts*, p. 125.
[482] *Thurman-Watts*, p. 125.

> may be no congestion at any one, by zoning or districting the city or by some other reasonable method, providing always that no discrimination be shown on account of race or color.[483]

By making this ruling, the court acknowledged the board's power to designate school zones and to assign students to schools on the basis of these zones so long as they were reasonable and not based on race or color.

On the issue of making a demand, the supreme court concurred with the opinion of Scott and Van Dyne and found that

> The attitude of the defendants was such that, in our opinion, no specific demand upon the defendants was necessary. Where the proceeding is instituted to compel the performance of a public duty, no formal demand upon the defendants is necessary where their course and conduct manifest a settled purpose not to perform the duty and where it clearly appears that a formal demand would be useless and unavailing.[484]

This accomplished two things. First, it established that admitting students to schools was a public duty. Second, it established that the actions of a board of education amounting to a failure to perform a public duty negated the need for a formal demand.

On January 28, 1924, Victoria Thurman and Alonzo Grubbs presented themselves at the Roosevelt School for admission into the ninth grade. They were accompanied by their mothers, Cecelia Thurman-Watts and Mrs. M.L. Grubbs.. However, the board of education continued to resist the admission of the black children to Roosevelt Junior High School, and Principal Bennefield informed them "that he had no orders to admit colored students to said school and that they were to report to the Cleveland School for orders."[485] The next day, Elisha Scott sent Lamb and Reed the following telegram:

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[483] *Thurman-Watts*, pp. 125-26.
[484] *Thurman-Watts*, p. 126.
[485] Affidavit of Mrs. M.L. Grubbs, dated February 2, 1924 Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924).

> Are you requiring the actual issuance of preemptory writ commanding Board of Education to admit colored children in the Roosevelt High School Building? If unfamiliar with rule call any justice of Supreme Court for information. Please answer immediately by wire my expense.[486]

Apparently Scott received a reply that such a writ would have to be issued because on January 30, 1924, Scott and Van Dyne filed an Application For Issuance of Peremptory Writ with the Kansas Supreme Court, requesting the court to issue the writ because

> Since the filing of the opinion in said case, and since the defendants have all had actual notice of the decision of said court, they wholly refuse to admit Victoria Thurman and other colored children, eligible to the ninth grade, to said grade, in the Roosevelt Junior High School Building.
>
> That the enrollment clerk of the said Roosevelt Junior High School stated to all of the applicants of African descent who applied for enrollment on Monday, January 28, 1924 that they had received no order from the court and would not admit them until such an order was actually served and for them and each of them to report to the Cleveland school building. That no preparation had been made or could be made at the Cleveland Building.[487]

The board of education awaited an official order before they would admit the black children to Roosevelt.

Within this same timeframe, Lamb and Reed filed a Petition for Rehearing. They sought clarification from the court about the admission of black children to Roosevelt Junior High School because this order contradicted the language of the opinion recognizing the board's authority to assign pupils to specific buildings. They understood the writ requiring them to admit Victoria Thurman and other eligible black children as an action that placed the authority over the

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[486] Motion for Rehearing, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 2-3. Hereinafter Motion for Rehearing.

[487] Application for Issuance of Peremptory Writ, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 1.

control and management of the schools in the hands of the parents rather than in the board of education. Lamb and Reed provided the court with further information for its consideration.

> On Monday after this decision had been announced [January 28, 1924] a large group of colored pupils from the seventh, eighth and ninth grades appeared at the Roosevelt Building and all demanded admission at this building; very few of the seventh and eighth grade students who are regularly attending school at the Cleveland Building reported for their classes; but they reported to the Roosevelt Building demanding admission to that already overcrowded building. The seventh and eighth grade students were instructed to return to the Cleveland Building; the ninth grade students were instructed to report to the Cleveland Building for the purpose of being enrolled.[488]

The board then went on to explain that, because the records of the students were maintained at the school they last attended, every ninth-grade student was required to enroll at the building where they attended eighth grade "for the purpose of receiving from the principal of that particular building the proper credentials for admittance to the ninth grade. These credentials are then presented to the principal of the building to which the student is assigned by the superintendent."[489] They contended that, because Victoria Thurman refused to go to the Cleveland School to be enrolled, she had never been assigned to a building, and her refusal to comply with the school regulation was why she had not been admitted to a school. Lamb and Reed also informed the court that the ninth grade at the Cleveland School had been discontinued. They requested a rehearing or, alternatively, for the court to the issue a supplemental opinion clarifying its initial opinion.

The Kansas Supreme Court denied Coffeyville's request for a rehearing, but did issue the following statement.

> If the defendants will set about a reassignment of the ninth grade pupils by zoning or districting the city, or by some other reasonable method, as indicated in the opinion, and

[488] Petition for Rehearing, p. 1.
[489] Petition for Rehearing, p. 2.

> will do so in good faith and without regard to color, the difficulties of administration of the school affairs of Coffeyville will largely disappear.[490]

The court also stated that the peremptory writ would be issued and that the board must answer it by February 15, 1924. The clarification that the supreme court provided was that if zoning or districting was used the board of education would not have to admit the black children to a specific junior high school. Presumably, Victoria Thurman could be excluded, provided her assignment to a school was based on the district in which she resided rather than her race. The Thurman-Watts residence was seven or eight blocks from Cleveland and twelve blocks from Roosevelt.

In the absence of specific school zones or districts, the board of education could be compelled and in fact was compelled to admit Victoria Thurman and the other black children to Roosevelt Junior High School. Chief Justice W.A. Johnston issued the following writ on January 24, 1924:

> Whereas you have refused, illegally and still refuse to permit the daughter of the plaintiff, Victoria Thurman, and other children of African descent and color, who are qualified and eligible to admittance to the Roosevelt Junior High School building in the 9th grade, in Coffeyville, Kansas, which is your duty to do, the court has so ordered,
>
> NOW THEREFORE, WE, being willing that speedy justice be given in this behalf to her, the said plaintiff, Cecelia Thurman-Watts, her daughter, Victoria Thurman and others, we do command you and each of you and enjoin you that you immediately upon receipt of this writ, that you and each of you, do admit Victoria and the other children of African descent and color, eligible to the 9th grade, into said 9th grade, in the Roosevelt Junior High School building, Coffeyville, Kansas, and that you refrain from discriminating and segregating said Victoria Thurman and others in said Roosevelt Junior High School Building, and accord to Victoria Thurman and all other eligible, irrespective of color, all the rights of the other pupils of said school, including free access to all departments and equal facilities, in said building, as granted to other students, and we do also command

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[490] *Thurman-Watts*, p. 126.

> that you make known to said court, on the 15th day of February, 1924, how you have executed this writ.[491]

In addition to admitting Victoria and the other black children to the ninth-grade classrooms, this order also demanded that they be allowed the use of all other facilities in the building, such as the domestic science classrooms, the manual training areas, the gymnasium, and the cafeteria.

On February 15, 1924, the Coffeyville Board of Education notified the court that on February 14th, Victoria Thurman and seventeen other children came to the Roosevelt School seeking admission into the ninth grade and that "all of [the] children were duly enrolled and admitted."[492] Although it seemed as if this story was over, the board's acts of resistance continued. According to Victoria Thurman, when the twenty black children arrived at Roosevelt on February 14, 1924, "They were sent to a room. Teacher Bennefield told them they would have to take five tests – three that day, two the next. Nine white children also took the test. Sixteen of the black students failed the tests."[493]

According to affidavits filed by A.I. Decker, J.H. Benefiel, Gertrude Baker, and Mary Cassidy, the Coffeyville School District had used standardized tests to classify ninth grade students for four years. The white children had been required to take the Monroe Standardized Silent Reading Test, the Monroe Timed Sentence Test, the Buckingham Extension of the Ayres Spelling Scale Test, the Monroe General Scale Test, and the Monroe Reasoning Test. On February 14 and 15, Gertrude Baker, the head of the mathematics department and Mary Cassidy,

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[491] Peremptory Writ of Mandamus, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 1. Hereinafter Peremptory Writ of Mandamus.
[492] Return of Defendant's Peremptory Mandamus, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 1.
[493] Affidavit of Victoria Thurman, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924), p. 1.

the head of the English department, administered these same tests to the black students seeking admission to the ninth grade at Roosevelt and to the white pupils who were absent when it was administered prior to January 18, 1924.[494] Of the twenty black children taking the test, only four students passed and "were given ninth grade classification and were admitted to the classes in the Roosevelt Building."[495] A.I. Decker defended the use of these tests because they were "the latest, best and universally approved standard tests, and measure the achievements."[496] He supported the validity of the tests

> Since the tests are standard, the scores for each class having been determined by applying the tests to thousands of children all over the United States, they enabled the teachers to determine how the results of her work compare with that of other teachers in other communities….They … are a great improvement over the haphazard methods of determining classification of pupils using examinations that teachers or superintendents made out [or] more often the teacher's judgment without any guide or standard.[497]

Although Decker intended to make the tests standard across the Coffeyville School System,

> due to the fact that the teachers and superintendent of the colored schools had received no training in giving and scoring these standard tests, no attempt was made by them to give these tests to the colored students until the close of the school term in the spring of 1923. At that time effort was made to give some of these tests to the colored students seeking ninth grade classification but all of the tests were either not given or the results were not delivered to [Decker], and the scoring in many instances was incorrectly made so that when this record was presented to [Decker], he was unable to classify these students.[498]

The board of education also filed affidavits from education experts attesting to the validity of the standardized tests and concurring with Superintendent Decker that they were used throughout the country to classify students.

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[494] Affidavit of Gertrude Baker Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924). Hereinafter Affidavit of Gertrude Baker; Affidavit of Mary Cassidy, Kansas State Supreme Court Records, *Thurman-Watts v. Board of Education*, Case No. 25,305 (Topeka: Kansas State Historical Society, 1924).
[495] Affidavit of Gertrude Baker.
[496] Affidavit of A.I. Decker, p. 1.
[497] Affidavit of A.I. Decker, p. 2.
[498] Affidavit of A.I. Decker, p. 1.

On March 20, 1924, Scott and Van Dyne file an Application for Citation Order of Contempt Against the Defendants and Each of Them, alleging that Coffeyville had "adopted a method to defeat the order of the court and that [the] tests were unfair, unjust, unreasonable and oppressive, and were given for the sole purpose of defeating the order of this Honorable Court… that the very letter of the law of decisions of this honorable court is being viciously and maliciously violated by the defendants, and each of them, especially A.I. Decker, the superintendent."[499] On July 5, 1924, the Kansas Supreme Court filed an Order granting Scott $1,000 for attorney's fees, but disallowing his application for a citation of contempt.

Wright v. Board of Education of Topeka (1930): Provision of Adequate Transportation Not an Abuse of Discretion

George Wright sued the Board of Education of the City of Topeka in the District Court of Shawnee County, requesting that the court issue an injunction allowing his daughter, Whilhemina, to continue attending Randolph school. The Wrights lived in College Hill, which was an area two miles west of Washburn College that had been annexed into the City of Topeka in 1925. At the time annexation was sought, Mr. Duggins and Mr. Derby, trustees of the school district, approached William Wright and asked him to sign a petition in support of the annexation. According to Wright, Mr. Duggins "said they would have to have me. It would take one more name, and if he could get me to sign the petition we would be in the city for school purposes and they were going to build a new school."[500] Initially, William Wright refused to sign the petition because of the impact it would have on the education of his children. Topeka

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[499] Application for Citation Order of Contempt Against the Defendants and Each of Them, Kansas State Supreme Court Records, *Wright v. Board of Education of Topeka*, Case No. 29,324 (Topeka: Kansas State Historical Society, 1930), p. 1.

[500] Abstract of Record, Kansas State Supreme Court Records, *Wright v. Board of Education of Topeka*, Case No. 29,324 (Topeka: Kansas State Historical Society, 1930), p. 5. Hereinafter Abstract of Record.

was a first-class city and operated separate schools for black and white children. Because he lived outside the city limits, Mr. Williams' children attended the College Hill school with the white children.

The following Tuesday or Wednesday, Mr. Duggins brought the petition back to Mr. Wright, assuring him that "the Board had authorized him to say that the old settlers out in that neighborhood their children would continue to go there until they graduated from school."[501] Relying on this promise, Mr. Wright had his wife, Beatrice Wright, sign the petition because the property was in her name.

Randolph, a new school, was built in 1926, and his children attended this school. Wilhemina was the only black child enrolled at Randolph. However, in November of 1928, another black parent who lived in proximity to Randolph, "Maude Rich presented her children for admission to Randolph School."[502] The principal denied her children admission to school, and she filed a lawsuit in the Kansas Supreme Court against the board of education. According to Wright, an agreement was made between Rich and the Topeka board, that provided that if she "disclaimed any discrimination or prejudice against her children…that the Board of Education would in such event immediately remove from attendance at Randolph School the children of George Wright."[503] The board of education denied making such an agreement. The board of education started providing and "maintaining a bus service without charge to pupils or to parents of pupils, by which a bus traveling on a certain route is provided to take these colored children

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[501] Abstract of Record, p. 6.
[502] Counter Abstract and Brief of Appellees, Kansas State Supreme Court Records, *Wright v. Board of Education of Topeka*, Case No. 29,324 (Topeka: Kansas State Historical Society, 1930), p. 3. Hereinafter Counter Abstract and Brief of Appellees.
[503] Counter Abstract and Brief of Appellees, p. 4.

from various parts of the city and deliver them to Buchanan School."[504] Buchanan was the closest black school and was the school that the Wright children would have attended without the agreement between William Wright and the Topeka Board of Education.

The Topeka Board of Education issued the following order on January 7, 1929: "The colored children still attending Randolph and Gage Park Schools be permitted to continue attending those schools until the end of the semester, January 25th, 1929, and thereafter be transferred to Buchanan."[505] The reason for this order was that

> Randolph School is and always has been maintained exclusively for white children, while Buchanan is and always has been maintained by the defendant Board exclusively for colored children and said defendants acting in the utmost good faith and for what they deemed to be the best interest of both the colored and white children have attempted to separate said races in the lower grades.[506]

On January 22, 1929, G.L. Coleman, the principal of Randolph School, and A. J. Stout, the Superintendent of Public Schools of Topeka, Kansas, informed William Wright that at the end of the current term, his children would be transferred to Buchanan School. To reach Buchanan school, Wilhemina would have to travel two miles. The district court issued a restraining order on February 2, 1929, prohibiting the school board, principal, and superintendent from transferring Wilheminia Wright and Preston Trice from Randolph School to Buchanan School.[507] When the school year began in September 1929, the board of education tried to send Wilheminia to Buchanan, contending the restraining order was only valid until the end of the school term in which it was issued. Wilheminia

> was enrolled in Randolph on the first day of school, assigned her course of studies with list of books to be obtained, and was then seven years of age. On the second day of

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[504] Counter Abstract and Brief of Appellees, p. 5.
[505] Abstract of Record, p. 10.
[506] Counter Abstract and Brief of Appellees, p. 10-11.
[507] By the time this case reached the Supreme Court, Wright's son, Preston Trice, completed the sixth grade and was promoted to the seventh grade housed in another school.

> school she was refused admittance, in direct violation of the restraining order…. An officer was sent to arrest Mr. Wright for not sending his child to Buchanan School, which the child had been directed to attend.[508]

The Wrights filed a Motion for an Order of Contempt and before the motion could be heard, the Board of Education admitted Wilhemina to Randolph.

Eugene S. Quinton represented the Wrights and presented two arguments to the court. The first argument was based on the contractual arrangement that Wright made with the board of education at the time the College Hill area was annexed into the City of Topeka. This oral agreement provided that Wright's children, including those not yet in school, would be permitted to continue to attend school in District 22 until they graduated. They also argued that a stipulation was made in the Rich case that benefited the Wright children.

The second argument made by Quinton pertained to the distance that Wilheminia would have to travel to reach Buchanan. Quinton argued that Wilheminia would have to cross twenty streets to arrive at Buchanan School and these streets were "constantly filled with the most potent hazards, the automobile traffic, especially at morning, noon and night."[509] Because the practice at that time was for children to return home at noon for lunch, Quinton contended that each day Wilheminia would have to walk eight miles and cross 106 public streets. He also proposed that, given the two mile distance, it would be impracticable for her to return home for lunch.

On the bus transportation the board of education provide to the children, Quinton argued that the children's health was threatened because the bus did not follow a regular schedule and no shelter was provided to shield the children from inclement weather. Both facts, the walking

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[508] Brief of Appellant, Kansas State Supreme Court Records, *Wright v. Board of Education of Topeka*, Case No. 29,324 (Topeka: Kansas State Historical Society, 1930), p. 6. Hereinafter Brief of Appellant.
[509] Abstract of Record, p. 3.

distance and the inadequacy of the bus service, constituted an unnecessary hardship and subjected "them to perils so obvious and great that their parents would not permit them to incur the hazard necessarily and unavoidably involved in attending [Buchanan] School."[510] In making this argument, Quinton relied on the Kansas Supreme Court's first opinion in *Williams v. Board of Education of the City of Parsons*.

The City of Topeka Board of Education was represented by five attorneys, Bennett R. Wheeler, S.M. Brewster, John L. Hunt, Virgil V. Scholes, and Margaret McGurnaghan. The board of education denied that they had entered into an agreement with Mr. Wright that would have allowed his children to continue to attend school in District No. 22. They contended that they had not authorized Mr. Duggins to act on their behalf and that he lacked the authority to bind them to an agreement with Wright. They also argued that, even if such an agreement had been made, it "was illegal and void and not binding upon the defendants."[511] While they admitted that Mr. Wright's children had been allowed to attend Randolph School for the past two years, their attendance was not due to any agreement between the parties.

On the contract between the board of education and Maude Rich, the board of education denied that an agreement was reached in that case that would have allowed Wright's children to continue to attend Randolph School. They did admit they "entered into a stipulation whereby certain portions of the application for writ of mandamus were eliminated."[512] However, they did not reveal the terms of this stipulation.

The attorneys for the board of education addressed the issue of the distance from the Wright's home to Buchanan School by pointing out that it provided bus transportation to

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[510] Counter Abstract and Brief of Appellees, p. 20.
[511] Counter Abstract and Brief of Appellees, p. 8.
[512] Counter Abstract and Brief of Appellees, p. 8.

Wilhemenia and that the "bus service furnishe[d] good, clean, commodious, safe and prompt transportation."[513] They denied the bus transportation subjected her "to any peril, hazards, impending dangers, risks of severe and probable injuries, or undue exposure to the weather."[514] In support of their position on the safety of the bus transportation, the board of education pointed out that there had been no accidents since the Topeka Railway Company started providing bus transportation in February, 1925.

The board of education denied that by sending Wilheminia Wright to Buchanan she was "deprived of [her right] of the equal protection and enjoyment of educational facilities guaranteed … under the Constitution of the State of Kansas."[515] Buchanan School was "a comparatively new building, in excellent condition, and is modern in every respect, and has the same type of heating and ventilation systems as used in Randolph."[516] They noted that Buchanan was superior to some of the schools in the city established exclusively for white children.

Drawing from forty plus years of experience, the board of education articulated the following reasons why maintaining separate schools for white and black children was in the best interest of both.

1. Prevents friction between children of such age and is conducive to better scholastic attainment and better spirit on the part of both colored and white children;
2. Separation of colored children into separate schools permits such children to have the benefit of colored teachers, who are especially adapted to teach colored children and who are conversant with, appreciate and understand their problems and difficulties better than white teachers;
3. Separation tends to develop leadership among the colored children;
4. Colored teachers of Buchanan School are excellent teachers, each being certified by the State of Kansas to teach in public schools.[517]

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[513] Counter Abstract and Brief of Appellees, p. 9.
[514] Counter Abstract and Brief of Appellees, p. 9-10.
[515] Counter Abstract and Brief of Appellees, p. 10.
[516] Counter Abstract and Brief of Appellees, p. 11.
[517] Counter Abstract and Brief of Appellees, p. 11.

In both this case and the *Reynolds* case the Topeka Board of Education identified preventing friction and quarrels as a rationale for establishing separate schools; however, in neither case did they present evidence of friction or quarrels between the white children and Raoul Reynolds and Wilheminia Wright.

On October 19, 1929, Judge George Kline issued the decision of the District Court of Shawnee County which found in favor of the board of education and set aside the restraining order. Therefore, the Topeka Board of Education could assign Wilheminia Wright to the Buchanan School. Judge Kline did stay the execution of the district court's judgment until October 16, 1929, to provide the Wrights an opportunity to appeal to the Kansas Supreme Court. The Wrights did appeal to the Kansas Supreme Court and on receipt of the appeal, Chief Justice William A. Johnston issued an order staying execution of the district court's decision until the supreme court heard the case.

In the brief he filed with the supreme court, Quinton characterized the order of the district court as "an inhuman enforcement of the law…. for no offense or reason on earth except that she is a colored girl."[518] Quinton did not raise the issue of the contractual agreement in his appeal to the Supreme Court. The only issue he presented for consideration was whether "the defendant's order that the plaintiff attend school at Buchanan school [was] unreasonable, in view of the distance she had to go and the street intersections she would be compelled to cross."[519] Quinton argued that, while first-class cities were authorized to operate separate schools for black and white children, the court should apply the rule of law pronounced in *Williams v. City of Parsons Board of Education*.

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[518] Brief of Appellant, p. 1 and 2.
[519] *Wright v. Board of Education*, 284 P. 363 (1930).

> Where children entitled to school privileges in a city, if required to attend a certain school designated by the board of education, would be exposed to daily dangers to life and limb so obvious and so great that in the exercise of reasonable prudence their parents should not permit them to incur the hazard necessarily and unavoidably involved in such attendance, they should not be compelled to attend the school so designated.[520]

Quinton argued the distance and path that Wilheminia must walk to Buchanan School was so dangerous that it denied her access to "equal educational facilities" and that the board of education's assignment of Wilheminia to Buchanan was an "abuse of discretion."[521] Quinton did not address the fact that the board of education had provided bus transportation to Buchanan for the children residing in that area of Topeka.

The path Wilheminia took to Buchanan required her to cross twenty intersections "filled with the most dangerous and hazardous instruments of death that have ever been known, motor cars."[522] He reported that across the United States during 1929 motor cars had been responsible for an average of 100 deaths per day. Quinton argued motor cars posed a more dangerous threat than the railroad cars involved in Williams because

> where trains have to run upon well defined tracks… Here every individual motor car is a train, bobbing in and out, speeding,….where each motor is an engine, a train, as a rule, without any warning or signals, with nothing certain of which way it is going or going to turn, except as made necessary on one thoroughfare, Kansas Avenue, in the City of Topeka.[523]

Quinton argued that, given the danger, enforcement of the district court's order would be inhuman. Quinton stated the following with regard to the reason given for enforcing the order: "The claim is, she is a colored child. I answer, her soul is white, and 'of such is the Kingdom of Heaven."[524] This statement is interesting because it presents evidence of the class divide that

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[520] Brief of Appellant, p. 2.
[521] Brief of Appellant, p. 3.
[522] Brief of Appellant, p. 9.
[523] Brief of Appellant, p. 9-10.
[524] Brief of Appellant, p. 11.

existed among blacks in Topeka. Buchanan School was located in a section of Topeka referred to as Tennesseetown. This section of Topeka was originally settled by the Exodusters. Cox reported that in 1915 Tennesseetown differed from other black communities in Topeka in its lack of community-based organization, as well as the fact that "there were relatively fewer individuals identified with the black Topeka middle class or elites."[525] Some of the resistance to attending Buchanan may have been based on class differences.

Even though Quinton did not present the issue of the contractual arrangements to the Kansas Supreme Court, the Topeka Board of Education addressed the issue in their brief and stated that because no evidence had been introduced in the district court related to the alleged contract arising from the Rich case, the claim had been dropped by the Wrights. About the agreement made at the time of the annexation of College Hill into Topeka, the board reiterated the position it took at the district court level, contending that Mr. Derby and Mr. Duggins had not been authorized to act on the behalf of the board of education. They also stated that even if the agreement was binding it did not apply to Wilheminia because she was not in school at the time. They also argued that the agreement was ineffectual because "the promise … was made to George Wright to induce him to sign the petition, but he never signed it."[526] Instead, it was signed by his wife, Beatrice.

The board of education framed the second issue as "related chiefly to the terrible hardships of riding in a bus in the city of Topeka."[527] The board argued that their assignment of Wilheminia Wright to Buchanan School was not infringing on her rights because the board had

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[525] Thomas C. Cox, *Blacks in Topeka Kansas, 1865-1915: A Social History* (Baton Rouge: Louisiana State University Press, 1982), p. 151.
[526] Counter Abstract and Brief of Defendant, Kansas State Supreme Court Records, *Wright v. Board of Education of Topeka*, Case No. 29,324 (Topeka: Kansas State Historical Society, 1930), p. 22. Hereinafter Counter Abstract and Brief of Defendant.
[527] Counter Abstract and Brief of Defendant, p. 27

ensured her safety by providing transportation to the school at no expense to her parents. The board then provided the court with the following information about the schools in Topeka. There were four black schools and twenty white schools. There were 6,429 white children and 979 black children of school age in Topeka. The average enrollment was 195 students per black school and 322 students per white school. Five hundred and thirteen students attended Randolph in September 1929 and two hundred and nine students attended Buchanan. The board also pointed out that "there [was] no suggestion that the colored school provided for [Wilheminia Wright] was not equal in every way to the white school which she desired to attend."[528] Therefore the only issue was an objection to the board assigning her to attend Buchanan.

The board attacked Quinton's reliance on the *Williams* case based upon the fact that when the Kansas Supreme Court considered the case on its merits, it had ruled

> The control of city schools, including selection of sites and the distribution of pupils is devolved upon the board of education. The discretion committed to that body is to be exercised, as was said in the opinion denying the motion to quash 'untrammeled by judicial interference.'[529]

The action of the board was clearly within its authority, and it was reasonable that the exercise of its power to assign pupils would result in both white and black pupils having to travel further than some of their peers.

The Kansas Supreme Court issued a one-page opinion written by Justice Harvey. In examining the issue raised by the plaintiff that requiring Wilheminia Wright to walk two miles to school presented a dangerous condition such that the actions of the Board of Education were unreasonable, in upholding the district court's decision, the court stated,

> This contention is taken out of the case when we examine the pleadings for the plaintiff, for the plaintiff alleged that defendant furnishes transportation by automobile bus for

[528] Counter Abstract and Brief of Defendant, p. 29.
[529] Counter Abstract and Brief of Defendant, p. 30.

> plaintiff to and from the Buchanan school without expense to her or her parents, and the answer of defendant admitted that it does so. There is no contention that this transportation is not adequate, appropriate or sufficient.[530]

The supreme court determined that providing transportation to Buchanan School alleviated any dangerous condition that might have existed were Wilheminia required to walk to school and that the board had properly exercised the powers granted to it by the state legislature.

Graham v. Board of Education of Topeka (1941): Dual Junior High School System Not Permissible

On January 29, 1940, Oaland Graham, Jr., presented himself for admission to Boswell Junior High School in the first-class city of Topeka, Kansas. The previous school term, Oaland Graham, Jr., had attended grade 6A at Buchanan School and on January 26, 1940, was promoted to grade 7B. Charles S. Todd, the Boswell principal, denied him admission to Boswell Junior High School on the basis of his race. The same day he was denied admission to Boswell Junior High School, Ulysses A. Graham filed a writ of mandamus in the Kansas Supreme Court, seeking the admission of his son, Oaland Graham, Jr., to Boswell Junior High School.

The City of Topeka Board of Education operated a dual junior high school system, which resulted in white only seventh and eighth grades. The educational model adopted for the white children was a Six-Three-Three Plan, which was used to classify and to assign the white students to the appropriate grade. The application of this plan resulted in white students attending elementary school for the first six grades, attending a junior high school for the next three grades, and spending the last three grades in a high school. For the black children, the board of education adopted what Graham referred to as an Eight-One-Three Plan. Pursuant to this plan, the black children attended an elementary school for the first eight grades, attended the white

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[530] *Wright*, p. 363.

junior high school for the ninth grade, and like the white children went to the high school for their last three grades.

William A. Bradshaw represented the Grahams. Bradshaw raised the following questions for the court's consideration:

> (1) Is Boswell Junior High School in the City of Topeka, Kansas, as organized, a high school within the meaning of [the law authorizing first-class cities to segregate education and the law authorizing the establishment of junior high schools]?
> (2) Can the defendants deny the plaintiff enrollment and school instructions in the 7B grade in Boswell Junior High School in the City of Topeka, Kansas, when the evidence discloses that the educational advantages offered in the 7B grade in the Buchanan School, an elementary school for colored students only, are not equivalent to the educational advantages offered in the same grade in Boswell Junior High School?[531]

The first question sought an expansion of the definition of junior high school, which had been provided in the *Thurman-Watts* decision. The second question provided an alternate route on which the court could make a decision that would permit Oaland Graham, Jr., access to Boswell Junior High School. While the second question addressed issues of equal educational opportunities, the impact of a Kansas Supreme Court decision on this question would have only a local impact (i.e., the educational facilities provided to black junior high school students in Topeka, Kansas were not equal to those provided to the white students of Topeka). However, if the Kansas Supreme Court expanded the definition of high school to include junior high schools, the decision would have a statewide impact and would have narrowed the scope of segregated education in Kansas. By adding seventh and eighth grade to the definition of high school, first-class cities would have authority only to segregate black and white children through the sixth grade, rather than through the eighth grade.

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[531] Brief of Plaintiff, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 1-2. Hereinafter referred to as Brief of Plaintiff.

In making the argument that junior high schools were high schools, Bradshaw argued that in its "organization, administration, and method of instruction, the junior high school [was] identical in all respects to the senior high school."[532] In support of this argument, Bradshaw relied on the rules adopted by the state board of education as published in the *Biennial Report of the Superintendent of Public Instruction*, as well as the *Handbook on Organization and Practices for Secondary Schools of Kansas*. One section of the *Biennial Report* entitled "Growth of the Kansas High Schools" claimed "the secondary school program has been reorganized to include the junior high school."[533] The *Handbook on Organization and Practices for Secondary Schools of Kansas* required junior high schools to submit reports in the same manner as high schools, and where applicable, the high school standards for accreditation were used for junior high schools.

Bradshaw referred the court to the definitions of elementary school, secondary school, and high school provided in *Webster's New International Dictionary* for 1939, 2d edition, as evidence for the proposition that the term high school was synonymous with secondary schools. This argument was central to Bradshaw's legal argument because he was trying to show that in the time that had elapsed between the *Thurman-Watts* case and the *Graham* case, the legislature had redefined the term "high school" through its enactment of Section 72-40a01, which authorized boards of education to establish junior high schools. It was necessary for him to do so because in *Thurman-Watts*, the Kansas Supreme Court stated, that when interpreting the term high school, the definition of "high school" in use at the time the statute was adopted was the one that applied. Ironically, in this case, Bradshaw was making an argument similar to the one made

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[532] Brief of Plaintiff, p. 11.
[533] State Superintendent of Public Instruction. *Thirty-first Biennial Report*. (Topeka, Kansas: State Printing Office, 1938), p. 18.

by the board of education in the *Thurman-Watts* case. He argued the term "high school" should be given the meaning that was in common usage within the current context of the lawsuit.

Webster's International Dictionary provided the following definitions. An "elementary school" was defined as, "In a graded system, a school teaching elementary, especially tool subjects, above the kindergarten and below the secondary."[534] A "secondary school" was defined as "intermediate between elementary and collegiate"[535] and as "a school providing secondary education, as an American high school."[536] The term "high school" meant "in the United States and some other countries, a school composed of the grades above those of the elementary school and offering more advanced studies as those preparatory to college entrance, and studies in technical or manual arts or in business preparation."[537] Bradshaw argued that the junior high school functioned more like high school than an elementary school because it offered a departmentalized curriculum as well as training in domestic and manual arts. Because junior high schools were high schools, they could not be segregated.

The testimony of W.T. Markham, the Kansas State Supervisor of Occupational Information and Guidance, was used by Bradshaw to support the position that junior high schools were more closely aligned to high schools than elementary schools. Markham testified that, when the Kansas State Board of Education adopted the 6-3-3 plan and authorized junior high schools, "They provided for the organization of the program of the junior high schools on a similar plan as the senior high schools with reference to the time and the textbooks which were

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[534] Brief of Plaintiff, p. 14 citing Webster's International Dictionary for 1939, 2d edition, p. 830.
[535] Brief of Plaintiff, p. 14 citing Webster's International Dictionary for 1939, 2d edition, p. 2260.
[536] Brief of Plaintiff, p. 14 citing Webster's International Dictionary for 1939, 2d edition, p. 2261.
[537] Brief of Plaintiff, p. 14 citing Webster's International Dictionary for 1939, 2d edition, p. 1178.

different from the regular textbooks."[538] Markham had served as the Kansas Superintendent of Public Instruction from December 12, 1932, until January 9, 1939, and prior to that was the Kansas State Superintendent of Schools. Markham testified that junior high schools were organized along the same lines as a high school and that the qualifications of a junior high school teacher were more stringent than those of an elementary teacher.

The Topeka Board of Education was represented by J.L. Hunt, Lester M. Goodell, Margaret McGurnaghan, John H. Hunt, and George M. Brewster. Topeka provided the following reasons supporting its argument that the 7th and 8th grades were elementary grades and not high school grades. First, the court must interpret the term by using the meaning of the word at the time the statute was adopted. The statute in question was adopted in 1905. According to the board, California established the first junior high school in 1910. It was 1913 or 1914 before Kansas established junior high schools and "the first junior high school in Topeka was organized in 1914 or 1915."[539] Therefore, at the time the Kansas legislature adopted the statute, it could not have intended to include the seventh and eighth grades in its meaning of high school. The defendants relied on the Thurman-Watts decision, in which the Kansas Supreme Court "clearly held that the words 'high school' as used in the statute under consideration meant the four years of study immediately following the first eight grades, regardless of whether the 6-3-3 or junior high school plan was in use or not."[540] Therefore, junior high schools were not high schools, and Topeka was authorized to segregate the seventh and eighth grades.

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[538] Testimony of W.T. Markham, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 4. Hereinafter referred to as Testimony of W.T. Markham.
[539] Brief of Defendant, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 60. Hereinafter referred to as Brief of Defendant.
[540] Brief of Defendant, p. 61.

The second issue presented by Bradshaw pertained to whether the Eight-One-Three Plan afforded black children the same educational advantages as the Six-Three-Three Plan available only to the white children. He argued, "There [were] at least seventeen substantial educational advantages…offered to white students in Boswell Junior High School in the 7B grade during 1940 that were not offered to colored students in Buchanan."[541] Bradshaw offered the following reasons as indicative of the superior education provided through the use of the Six-Three-Three Plan: departmentalized curriculum, more advanced grading system, extracurricular activities (instrumental music, athletics, and swimming), and facilities (gymnasium and auditorium).

Boswell Junior High School offered a departmentalized curriculum. The departmentalization of the curriculum resulted in junior high school teachers having different responsibilities from the elementary teacher. According to Markham, "The teacher is hired for that subject and teaches it and it only. It might be two subjects, but a teacher in the old eighth grade teaches all the subjects."[542] Junior high school teachers were specialists while elementary teachers were generalists. This resulted in students at Boswell being "taught by nine different teachers,"[543] one teacher for each area of the curriculum. The students who attended Buchanan were taught by one teacher, Mamie Williams, who was responsible for teaching all academic subjects. Buchanan did have separate teachers for manual arts for the boys, domestic science for girls and music.

Mamie Williams taught grades 6A, 7B, 7A at Buchanan School. A veteran teacher of twenty-two years, Mamie Williams held a "Bachelor of Arts from Washburn College with departmental honors in mathematics and German and a Masters of Arts from Columbia with a

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[541] Brief of Plaintiff, p. 22.
[542] Testimony of W.T. Markham, p. 15-16.
[543] Brief of Plaintiff, p. 18.

diploma as a teacher of education."[544] The pedagogy in Miss Williams' classroom was similar in many respects to the pedagogy used in one-room schoolhouses. As the children of one grade level received direct instruction or recited to her, the other two grade levels would work on their assignments. Based on her testimony, this method appears to have been used only for English and mathematics. When teaching the subjects of history and geography, Miss Williams explained,

> It is often taught around a problem, history and geography, we may have a particular project…. We work on different projects. We have a citizenship project we carried throughout the year…. Our last unit had to do with the study of music. We took some time studying records. We took some time studying the works of McDowell and Stephen Foster's songs.[545]

So, while it appears that the white schools were taking up the differentiated curriculum of progressive education, Miss Williams was adapting Dewey's pedagogical model of project-centered experiential learning. Further evidence of this comes from her description of what her students were doing during their study time.

> If they get through with their assignment they can go on to others, they have a library in the room and they get books for reading, reference reports, sometimes we have our projects on, some student particularly interested in art he gets materials and works at drawings and if he is making a chart in some work he works on it. He follows his interests. They are interests I have approved.[546]

Miss Williams allowed her students to follow their own interests and linked their learning and the curriculum to the experiences and interests they brought with them to the classroom.

The grading system used at Boswell differed from that used at Buchanan for promotion and the assignment of grades. Boswell promoted students by subject, rather than by grade level,

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[544] Testimony of Mamie Williams, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 168. Hereinafter referred to as Testimony of Mamie Williams.
[545] Testimony of Mamie Williams, p. 146-47.
[546] Testimony of Mamie Williams, p. 166.

which was the promotion system used at Buchanan. Bradshaw argued this method of promotion was more advantageous because students could move forward in the subjects they passed and repeat only those they had failed. When students were promoted by grade, failing students had to repeat the entire grade. Boswell Junior High School used a standardized letter grade system (A, B, C, D and NP), whereas Buchanan used the grades of S, U, NP, which were assigned based on the individual progress the student had made during the grading period. Bradshaw proposed that Boswell students were "graded on a standard of excellency and proficiency," while Buchanan students were graded based on a system that was "very arbitrary and [depended] only on the effort of the individual pupil."[547] According to Bradshaw, these differences in grading and promotion resulted in substantial advantages for the white children.

Boswell also provided extracurricular activities to students, such as football and basketball. These activities were not available to the Buchanan students. The facilities at Boswell also included a gymnasium and an auditorium. While Buchanan had an auditorium, it was not in a room that had been built for that purpose. There was no gymnasium at Buchanan, nor was there an indoor area that could be used to conduct physical education classes in inclement weather.

By the 1940s, the term manual arts had been replaced by the term industrial arts.[548] However, many of the witnesses in this case still referred to this curriculum as manual arts. On the differences in manual training at the elementary level and the junior high level, Markham testified "the equipment is usually more elaborate and the teaching personnel usually better

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[547] Brief of Plaintiff, p. 33.

[548] Testimony of Charles S. Todd, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 21. Hereinafter referred to as Testimony of Charles S. Todd.

qualified."[549] The Buchanan manual arts teacher testified that he did not have the proper equipment to teach the 7B manual arts curriculum. However, W.W. Scott, the supervisor of industrial arts, testified that Boswell and Buchanan were provided with the same tools and materials.[550]

In support of his legal argument, Bradshaw cited the *Williams* case. He also relied on the United States Supreme Court decision in *State of Missouri ex. rel. Gaines v. Canada*, which was the first education-related legal battled waged by the NAACP in the federal courts.[551] In this case, Lloyd Gaines sought admission to the University of Missouri Law School. He was denied admission, not because he was unqualified, but because of a state statute prohibiting integrated education. He brought suit alleging that Missouri had failed to provide him with separate, but equal educational opportunities. Missouri argued that the provisions of the state law, which would pay tuition for Gaines to attend law school out-of-state, passed the requirements of *Plessy*. The Supreme Court ruled in favor of Gaines, stating that Gaines had not been provided with equal protection of the laws. The court held that, while it was permissible for Missouri to require blacks to attend separate law schools, for the legal education to be equal, it must be received within the state in which the individual wished to practice law. Bradshaw also cited *Pearson v. Murray*, another United States Supreme Court decision. The court held that Maryland violated the Fourteenth Amendment by failing to admit Murray to the University of Maryland law school.[552]

Bradshaw relied on the following precedent:

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[549] Testimony of W.T. Markham, p. 15.
[550] Testimony of W.W. Scott, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 134. Hereinafter referred to as Testimony of W.W. Scott.
[551] *Missouri, ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938).
[552] *Pearson v. Murray*, 103 A.L.R. 706, 717 (1938).

> Where the schools for each race do not furnish similar courses of study or where the provisions for such similar courses do not permit them to be followed under circumstances of equal advantage, it has been generally held that there are not equivalent educational facilities.[553]

The differences between the educational advantages offered the white students at Boswell and those afforded the black children at Buchanan were so vastly different that the Topeka Board of Education failed to provide "equal advantage" and "equivalent educational facilities" to the black children assigned to the 7B grade. Bradshaw cited an Oklahoma case, Jones v. Board of Education, which demanded equal distribution of educational funds. The white schools' curricula included "blacksmithing, auto repairing, printing and other subjects which were not taught in the colored school."[554] The court found "the difference in the curricula of the schools is not such a slight difference as would be warranted by the difference in the two races, but is so unfair, unjust, and unreasonable as to amount to unmistakable discrimination."[555] Bradshaw argued that the differences between the educational facilities at Boswell and Buchanan also resulted in unjust discrimination against the black children.[556]

The Topeka Board of Education countered this argument by relying on the *Reynolds* decision. The Topeka board argued, "the court must bear in mind that *difference alone does not mean discrimination*. There must not only be a difference but there must be a showing of inequality and advantage of one over the other before there can be discrimination."[557] The Topeka board reminded the court that it had stated in Reynolds that "equality and not identity of privileges and rights is what is guaranteed to citizens."[558] The board proposed Graham had

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[553] *Pearson*, p. 717.
[554] Brief of Plaintiff, p. 23.
[555] *Jones v. Board of Education*, 90 Okla. 233, 236.
[556] Brief of Plaintiff, p. 36.
[557] Brief of Defendant, p. 63.
[558] *Reynolds*, p. 692.

failed to prove that substantial inequalities existed and further argued that none existed. The Board took the position that the children at Buchanan received educational opportunities that were equal to those provided to the children at Boswell and any differences that existed in the curriculum and facilities were not substantial enough to warrant a finding by the court of inequality.

The board argued that Buchanan was also departmentalized, just not to the same extent as Boswell. They based this argument on the fact that, in addition to being taught by Mamie Williams, the Buchanan students were taught by separate teachers for industrial arts, household arts, and music. Furthermore, the Topeka board argued, the pupil-to-teacher ratio at Buchanan was 5.5 to 1, as compared to a 16.5 to 1 ratio at Boswell. Based on these ratios, they stated, "It appears that there are more teachers per pupil in the seventh grade at Buchanan, and therefore more time for individual instruction."[559] The Topeka board included the industrial arts teachers as well as the music teacher when calculating the Buchanan ratio. However, Mamie Williams taught all of the other academic subjects to the twenty-two seventh-grade students attending Buchanan. The children went to industrial arts or household arts and music once a week for seventy-five minutes.[560] In addition to the seventh-grade students, Miss Williams had thirteen 6A students in her classroom. The board emphasized that Miss Williams was responsible for thirty-five students, but noted that because the Boswell teachers taught several periods a day, they saw approximately 200 pupils a day. The Topeka board stated that no evidence had been presented that either system was superior. The board also proposed that no evidence had been presented proving the superiority of the grading and promotion system used at Boswell. Given

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[559] Brief of Defendant, p. 73.

[560] Testimony of Ruth Ridley, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 222. Hereinafter referred to as Testimony of Ruth Ridley.

this, the board argued that, while differences between the two schools did exist, they did not amount to substantial inequalities.[561]

The Kansas Supreme Court announced its decision on June 13, 1941. The Kansas Supreme Court considered the issue of the provision of equal educational facilities first and found that Topeka's dual system of junior high schools discriminated against the black children and failed to provide them with equal educational advantages. Justice Allen wrote,

> The school authorities of the city are not required to furnish the benefits of a departmentalized junior high school to its residents, but they cannot be furnished to white children residing within a particular district and be withheld from negro children residing in the same district and having equal qualifications because of their race.[562]

The court found that the departmentalized plan, as well as the differences in facilities and extracurricular activities, afforded the white children an advantage over the black children. The court stated, "the junior high school method of departmentalization is considered to be an advanced and improved method of education,"[563] and distinguished the *Reynolds* case because the facts in *Reynolds* did not reveal any differences with regard to the curriculum or method of instruction. The *Reynolds* case dealt solely with the issue of the newness and size of the new school provided for the white children.

The Kansas Supreme Court did disagree with Graham's argument that junior high schools should be considered high schools and as such could not be segregated. Because the junior high schools did not exist at the time the statute was enacted, the legislature could not have intended to include junior high schools within the definition of high schools. The Kansas Supreme Court stated, "It would seem to be established that the legislature by the use of the word high school in this statute meant to include the grades commonly recognized as high school

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[561] Brief of Defendant, p. 83.
[562] *Graham v. Board of Education of City of Topeka*, 114 P. 2d 313, 318 (Kan. 1941).
[563] *Graham*, p. 317.

grades namely, the ninth, tenth, eleventh, and twelfth grades."[564] The court relied on its previous decision in Thurman-Watts to support this definition of high school.

Unlike the previous decisions of the court, which had been unanimous, Justice Harvey issued a separate opinion. While Justice Harvey concurred with the court in its determination that Topeka had failed to provide the black students with equal educational facilities and opportunities, he disagreed with the court's interpretation of the meaning of high school. Harvey proposed that the court should apply the meaning of that term as it existed in 1868, rather that 1905, because this was the year of the original enactment of the statute authorizing first-class cities to establish separate schools for white and black children. Harvey argued that the statute had always provided school boards with the power to specify how students were to be classified and to determine which grades should be included in high schools. He pointed out that common schools in the 1870s and 1880s "usually consisted of five grades…so, to start a high school at even as early as the sixth grade was neither unheard of nor unlawful"[565] Harvey believed that the junior high school system as used in Topeka resulted in a reorganization of Topeka's high school system. He claimed that the Topeka Board of Education "voluntarily took advantage of [the statute that allowed the organization of junior high schools] and remodeled its school structure so as to provide such high schools for all the white children of the city, but not for the colored children."[566] Because he believed junior high schools were high schools, Harvey dissented from the court's decision holding that first-class cities were authorized to segregate junior high schools because they were not part of the high school system.

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[564] *Reynolds*, p. 318.
[565] *Graham*, p. 319.
[566] *Graham*, p. 320.

While the Kansas Supreme Court determined that Graham was entitled to attend seventh and eighth grade in the junior high school, it did not issue a writ. Instead, the court "retained jurisdiction…for such specific orders as may be necessary." On July 25, 1941, William Bradshaw filed an Application For Consent To Refile and Argue Motion For Damages and Attorney's Fees. In this application, Bradshaw alleged,

> the defendants instead of willingly carrying out the judgment and decision of the court have attempted to avoid the same by employing certain persons at public expense to procure the sentiment of interested parents of colored students as to the advisability and their desire to continue and to maintain the seventh and eighth grades of elementary colored schools in lieu of junior high schools contrary to the decision of this court and too at public expense have printed and circulated written ballots for the purpose of determining the sentiment of interested parents of colored students as to their desire to continue the system complained of by this applicant and previously decided by this court to be unlawful.[567]

After the Supreme Court's decision, three black teachers were fired. As a result of the firings, William S. Bradshaw filed an affidavit with the Kansas Supreme Court on September 3, 1941. These teachers were not the three black teachers at Buchanan who had taught the junior high grades and who had testified in the case. Instead, they were teachers who were related to or had connections with the lawyers or witnesses who participated in the case. Myrtle E. Bradshaw, a veteran teacher of eighteen years in the Topeka schools, was fired and provided with no reason for her termination even though she had consistently received satisfactory ratings. Her brother, William A. Bradshaw, the attorney for the Graham, stated, "No reason exists except that she [was his] sister." Annabel Sawyer was also fired. Miss Sawyer was a nineteen-year veteran teacher who had also received satisfactory ratings. Bradshaw asserted that she was fired because she was the sister of Daniel Sawyer, a witness in the case who had testified about the differences

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[567] Application For Consent To Refile and Argue Motion For Damages and Attorney's Fees, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p.1.

between the educational opportunities provided to children at Buchanan and Boswell. The third teacher who was fired was Ruth Howarth, who was "a friend of Dr. William McKinley Thomas, a prominent colored physician of Leavenworth, Kansas, who wrote a letter condemning the action of certain colored people who were urging the defendant school board to evade the decision of this court."[568] Like Miss Bradshaw and Miss Sawyer, Miss Howarth was a veteran teacher of ten years who had always received satisfactory ratings from the board.

Summary

Through an analysis of the six Kansas Supreme Court decisions on segregated education in first-class cities, this chapter has provided an overview of the development of the second line of legal precedent established in Kansas. Although in opposition to the line of precedent for second-class cities discussed in Chapter Three, both lines of precedent were allowed to coexist and were valid. As the final chapter indicates, the nuances of these legal decisions acted in ways that both protected and dismantled white privilege. The following chapter provides an analysis of the unique legal context of Kansas and contrasts it with the actions that were taking place at the federal level. A discussion of the unique role that *Brown v. Board of Education of Topeka, Kansas* played in the United States Supreme Court's consideration of the legal issues surrounding segregated education is also discussed.

[568] Affidavit of William A. Bradshaw, Kansas State Supreme Court Records, *Graham v. Board of Education of City of Topeka*, Case No. 34,791 (Topeka: Kansas State Historical Society, 1941), p. 2.

CHAPTER FIVE

EQUAL, BUT SEPARATE OR SEPARATE, BUT EQUAL? THE STRUGGLE FOR AN EQUAL EDUCATION

Fifty years ago, in *Brown v. The Board of Education of Topeka, Kansas*, the United States Supreme Court proclaimed the inherent inferiority of separate schools and overturned the "separate, but equal" doctrine. What was heralded as a decision that would provide children of color with equal educational opportunities has resulted in a continued struggle for equal educational opportunities. In Chapter One, when examining *Plessy v. Ferguson*, I discussed the importance of the turning of the phrase "equal, but separate" for determining the standard on which the constitutionality of segregated facilities and segregated practices were to be judged. I proposed that the application of the **equal, but separate** doctrine would have placed primary emphasis on equality and courts would have been forced to consider at the first instance whether a segregated school was equal. Conversely, the application of the **separate, but equal** doctrine often resulted in courts placing primary emphasis on the permissibility of separate facilities. Application of the separate, but equal doctrine was much more palatable to prevailing racial ideologies of the time, which advocated for keeping the races separate. The turning of the phrase in *Plessy* allowed white America to sidestep the issue of equality. How did the legacy of *Plessy* impact not only the *Brown* decision, but also the legal struggle for an equal education that began in Kansas in 1881?

In this chapter, I return to the three research questions presented in Chapter One, as follows:

(1) How were educational practices and policies on the schooling of African Americans produced in Kansas from 1850-1949?

(2) How was a social movement working toward the attainment of equal educational opportunities replaced by a discourse of desegregation?
(3) How did legal discursive practices protect white privilege in the struggle to desegregate education?

I propose that the simplification of the struggle for equality of educational opportunity into the issue of desegregation of education neglected the contingent foundations on which the legitimization of power is constructed, and failed to take into account the shifting and contested terrain of the ideological battle of identity politics in the United States. Understanding how a legal issue is constructed is important because the legal issues presented to the courts, as well as the legal discursive practices that are put into play, influence not only the questions asked, but also the remedies that can be crafted as solutions. By framing the issue as the separation and isolation of the races, the power elite has been able to craft remedies palatable to and consistent with the goals of white privilege. This also allowed the power elite to define the problem as one solely about the politics of socialization and the dismantling of Jim Crow laws that legitimated segregation. Narrowing the focus provided a means through which to divert attention from additional underlying political and economic factors in the allocation of power and economic resources, such as the existence of second class citizenship status and an economic structure dependent on a class of workers that provides a cheap labor force.

The Production of Educational Practices and Policies in Kansas, 1850-1949

In response to my first research question, this section discusses the production of educational practices and policies in Kansas. In his 1889 inaugural address, Kansas Governor Lyman Humphrey noted, "Kansas beautifully exemplifies in her present conditions the philosophy of DeTocqueville that the growth of states bears some marks of their origin; that the

circumstances of their birth and rise affect the whole term of their being."[569] Born amidst the turmoil over slavery, a central issue in Kansas from its early territorial days was the conditions for and degree to which the races were to be kept separate. Once it was decided that blacks would be permitted to reside in Kansas, a dual system of segregated education that required equal educational opportunities was established. This educational system was compatible with the political philosophies and racial ideologies of the white residents of the state. The issue of "equal, but separate" education was one that would be returned to repeatedly over the course of time and is an issue that continues to affect the educational practices and policies of Kansas.

As already noted, the first education law permitted segregation only in first-class cities and resulted in the two lines of legal precedent for the two settings. The dualistic nature of the lines of precedent established by the decisions of the Kansas Supreme Court on segregated education provided an interesting place to explore the role that legal discursive practices played in both the protection of and dismantling of white privilege. The precedents clearly opposed each other – the precedents applicable to second-class cities consistently held that segregated education was not permitted and the precedents dealing with first-class cities consistently upheld the right to segregate education. However, a close examination of the legal records of each of these cases revealed that what the Kansas Supreme Court's decisions had in common was a tendency to narrow, rather than expand, acceptable segregation practices, while still providing a means through which white privilege could reinvent itself.

In 1881, the Kansas Supreme Court declared that second-class cities could not operate segregated schools.[570] Many second-class cities tried to circumvent this precedent by

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[569] Lyman Humphrey, inaugural address, January 14, 1889, "Lyman Humphrey" clippings, Kansas Collection, University of Kansas, Lawrence.
[570] *Board of Education of Ottawa v. Tinnon*, 26 Kan 1 (1881).

establishing separate classrooms for black children within the same school building and by gerrymandering attendance zones. The Kansas Supreme Court could have expanded acceptable practices by legitimizing the positions of the school boards. For example, in *Cartwright* and *Woolridge*, cases in which the school boards attempted to place the black children in separate classrooms, the school boards argued that their actions were authorized by the power granted to them with for the classification of students. Because the supreme court's position on segregation in second-class cities was based on the lack of an express grant of authority from the legislature to segregate schools, they could have determined that the actions of the school board in assigning black pupils to separate classrooms was a reasonable exercise of the powers that the state legislature had granted them.[571] While the legal decisions involving second class cities tended to dismantle white privilege, they also played a role in preserving white privilege because the court rendered decisions based solely on state law and, by refusing to address the federal constitutional issues, foreclosed the possibility of an appeal to the United States Supreme Court. In the *Webb* decision, the Kansas Supreme Court held that the school board had acted arbitrarily in creating the attendance zones and by doing so could sidestep the federal issues involved in the case.[572] Given the involvement of the NAACP in the case as well as the historical context, this action protected white privilege by impeding the NAACP's legal strategy of challenging segregated education at the national level. The *Webb* case was slated to join four other cases working their way through the judicial system challenging the constitutionality of segregated education, which eventually became known as *Brown v. Board of Education of Topeka, Kansas*.[573]

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[571] *Woolridge v. Board of Education of Galena*, 157 P 1184 (Kan. 1916) and *Cartwright v. Board of Education of City of Coffeyville*, 84 P 382 (Kan. 1906).
[572] *Webb v. School District No. 90, Johnson County, et al*, 206 P2d 1066 (Kan. 1949).
[573] Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: The University of North Carolina Press, 1987).

An examination of the Kansas Supreme Court's decisions in the first-class city cases also reveals instances in which white privilege was both preserved and challenged. In the *Reynolds* case, the supreme court upheld the power of school boards in first-class cities to segregate education. Although the Reynold's attorneys presented legal arguments that would have provided grounds on which the supreme court could have invalidated segregated education, the court chose to back down from its previous definition of common schools. The court's position could also be seen as one that served to keep white privilege in check because Reynold's attorneys argued that segregated education should either be permissible throughout the state or not allowed within any jurisdiction.[574] Given the racial ideologies of the early nineteen hundreds, a victory based on this argument might have been short-lived, because the next session of the state legislature could have enacted a law that granted all school boards in the State of Kansas with the power to segregate education. The *Williams* case placed the following parameters around segregated educational practices. First, black schools could not be placed in dangerous locations, and second school boards were bound to make a practical application of the law.[575]

The *Thurman-Watts* decision kept white privilege in check by determining that because ninth grade was included in the definition of the high school at the time the legislature passed the law permitting segregated education, school districts lacked the authority to segregate ninth grade children. However, the court also held that school districts could make use of standardized tests to determine whether a child was ready to advance to the next grade level.[576] While the court's decision preserved the rights of black students to attend the ninth grade with white

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[574] *Reynolds v. Board of Education of Topeka*, 72 P 274 (Kan. 1903).
[575] *Williams v. Board of Education of City of Parsons*, 99 P 216 (Kan. 1908). *Williams v. Board of Education of Parsons*, 106 P 36 (Kan. 1910).
[576] *Thurman-Watts v. Board of Education*, 222 P 123 (Kan. 1924).

children, the educational practice of standardized testing resulted in only four of the twenty-one black students in this situation actually entering the ninth grade. The supreme court also acknowledged the ability of the school district to establish attendance zones for the three junior high schools within the school district. Because Veomia Thurman-Watts lived closer to Cleveland school, this would have, in all likelihood, resulted in her being assigned to the Cleveland school.[577]

On its face, the court's decision in the *Graham* case appeared to deliver a blow to white privilege, because it ruled that the operation of a dual system of junior high schools, one for white children and one for black children, was impermissible. However, the court found only that the dual system of junior high schools used in Topeka failed to provide Oaland Graham with equal educational advantages. The court, by refusing to adopt a definition of junior high school that would have made it part of the high school structure of schooling in Kansas, limited the applicability of this decision to Topeka alone.[578]

The Transmutation of a Social Movement

The second research question that focused on how a social movement seeking equality of opportunity was transmuted into a movement for integration is discussed in this section. Derrick Bell proposed, "Advocates of racial justice should rely less on judicial decisions and more on tactics, actions, and even attitudes that challenge the continuing assumptions of white dominance."[579] Even within a legal context that was fairly receptive to addressing the issue of equal education, legal discursive practices operated in ways that controlled the parameters of the decisions of the Kansas Supreme Court and as a result protected white privilege. One example

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[577] *Thurman-Watts*
[578] *Graham*.
[579] Derrick Bell, The *Brown* Decision: 'A Magnificient Mirage," *Education Week*, 23 (May 19, 2004), p. 42.

of the Kansas Supreme Court's receptiveness to considering the issues on equal educational opportunity was its decision in the *Cartwright* case. The Kansas Supreme Court could have sidestepped consideration of the larger legal issue by deciding the case on a technicality, by ruling that Bud Cartwright was not a proper party of interest because he did not bring the suit as Eva's next friend. However, legal discursive practices operated in ways that protected white privilege because the state court operated in ways that curtailed the consideration of federal constitutional decisions. In legal practice, when courts are faced with making a decision based on local law or federal law, they customarily decide the matter based on state law, if such a decision is possible. The Kansas Supreme Court followed this discursive practice, thus foreclosing appeals of federal constitutional issues.

The social movement in Kansas for equal education was also affected by the *Plessy* decision. Prior to the United States Supreme Court's decision in *Plessy*, the Kansas Supreme Court justices were open about their incredulous attitudes toward segregating children on the basis of race. This was evident from statements such as the following from Justice Valentine in *Tinnon*:

> 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 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. We do not think that the board has any such power.

While the Kansas Supreme Court continued to follow the line of precedent established in *Tinnon,* the justices became more guarded in the language they used in their post-*Plessy* opinions. The Kansas Supreme Court generally restated the precedent that school districts could not segregate education unless they had express authority from the state legislature. The doctrine of *stare decisis* operated in a way that silenced the Kansas Supreme Court justices. The establishment of

the *Plessy* precedent foreclosed the possibility of making statements, such as Valentine's questioning of the ability of a school board to segregate children on the basis of race because such a statement could have been used as the basis for an appeal to the federal courts. However, the Kansas Supreme Court's foreclosure of federal appeals can also be viewed as acts that curtailed the scope of segregated education in Kansas because the ability of second class cities to segregate education was never legitimated in Kansas.

As was evident in *Thurman-Watts* (1924) and *Graham* (1941), the movement to desegregate the schools in Kansas was connected to the efforts of the National Association for the Advancement of Colored People (NAACP). Founded in 1910, the NAACP sought to improve the social, political, and economic conditions of blacks in the United States. While local chapters fought for improvements in their communities at the state level, the national association, through the establishment of the Legal Defense Fund, waged its campaign at the federal level.[580]

Before I turn to a discussion of the federal court decisions on *de jure* segregation, I briefly discuss the role of the NAACP, as well as Howard University Law School, as central to understanding much of the impetus behind the social movement to abolish the separate, but equal doctrine. The 1930s represented a time of deliberation, in the organizational history of the NAACP. Soon after its acquisition of monies from the Garland Fund in 1929, the NAACP hired Nathan Ross Margold to develop a legal framework or strategy to challenge educational inequities.[581] The Margold Report, issued in 1931,

> opened up vistas, especially at places like Howard Law School. It stood back from the flow of litigation and created a counter-flow. It did not restrict itself to narrow or obscure

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[580] Tushnet.
[581] Richard Kluger, *Simple Justice* (New York: Random House, 1975); Tushnet.

> arguments. It stayed very close to the Court's own precedents but tried to find some that the Court had chosen not to recall…in sustaining segregation practices.[582]

The Margold Report proposed a challenge of the "equal" component of the separate, but equal doctrine of the United State's Supreme Court decision in *Plessy v. Ferguson*.[583]

Implementation of the Margold Report did not occur right away with regard to elementary and secondary education because of economics and politics. During the mid-1930s, philosophical differences led to a split within the NAACP between the "conservative" element that sought the abolition of segregation and the "black pride" element that viewed the fight against segregation as antithetical to the self-improvement and self-determinancy of the black community. Walter White and other leaders at the NAACP were associated with the "conservatives." Ralph Bunche, W.E.B. Du Bois, and Roger Baldwin were among the skeptics of the attack on segregation. This philosophical rupture, as well as Du Bois' growing disenchantment with the NAACP, led to his resignation in 1934.

Another influential institution undergoing changes during the 1930s was Howard University. Beginning in 1926 with the appointment of Mordecai Johnson as its president, Howard University began the transformation from "drowsy indifference (to)…the command post of black militancy, and welded to NAACP headquarters in New York, part of the double-edged drive for black equality that would gather strength and confidence for the next three generations."[584] In July, 1929, Charles Houston was appointed head of the Howard Law School. Houston began the process of training black lawyers who were well versed in the differential legal treatment of blacks and who were savvy enough to wage the legal battle to challenge and disrupt the legal discourse. In 1935, Houston was hired as legal counsel to the NAACP and

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[582] Kluger, p. 135.
[583] *Plessy v. Ferguson*, 163 US 537 (1896).
[584] Kluger, p. 123.

along with a cadre of his young attorneys led the legal challenge to the separate, but equal doctrine.

The legal strategy in the early cases was to concede that separate educational facilities were permissible and challenge the failure on the part of the state authorities to provide equal educational opportunities. The first education-related legal battled waged in the federal courts by the NAACP was *Missouri ex. rel. Gaines v. Canada*.[585] In this case, Lloyd Gaines sought admission to the University of Missouri Law school. He was denied admission, not because he was unqualified, but because of a state statute prohibiting integrated education. He brought suit alleging that Missouri had failed to provide him with separate, but equal educational opportunities. Missouri argued that the provisions of the state law, which would pay tuition for Gaines to attend law school out-of-state, passed the requirements of *Plessy*. The Supreme Court ruled in favor of Gaines, stating that Gaines had not been provided with equal protection of the laws. The court held that, while it was permissible for Missouri to require blacks to attend separate law schools, for the legal education to be equal, it must be received within the state in which the individual wished to practice law.

The Court did not consider the separate, but equal doctrine as it pertained to an educational context again until 1948 when it heard the *Sipuel v. Oklahoma State Board of Regents* case.[586] Ada Lois Sipuel applied for admission to the University of Oklahoma Law school, the only one in the state. She was denied admission because the state was planning to open an all-black law school, which she would be eligible to attend. Sipuel did not want to have to wait until the state opened the all-black law school to pursue her legal studies, so she filed suit alleging that the separate, but equal doctrine had been violated. The district court "ruled that the

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[585] *Missouri, ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938).
[586] *Sipuel v. Oklahoma State Board of Regents*, 332 U.S. 631 (1948).

university did not have to open a black law school until it had enough applicants to make it practicable."[587] The decision was upheld by the Oklahoma Supreme Court and appealed to the United States Supreme Court.

The United States Supreme Court ruled that Oklahoma had to provide Sipuel with a legal education that met the requirements of the equal protection clause and that she had to be provided with an education as soon as were applicants from other races. On remand, the Oklahoma Supreme Court provided the university with the following three options: "(1) to admit Miss Sipuel to the white law school or (2) to open up a separate one for her or (3) to suspend the white law school until it saw fit to open one for Negroes."[588] Oklahoma complied with the order by opening up a separate law school for blacks. This law school consisted of roping off an area of the state capitol and providing three law professors. Thurgood Marshall, the NAACP attorney for the case, found this measure unacceptable and brought it back to the U.S. Supreme Court for reconsideration. The Court held that the issue of whether a state could provide a separate law school for blacks was not the original issue before the court, and the actions of the University of Oklahoma's Board of Regents were not seen as an act of defiance. This case is often viewed as a setback to the legal strategy of the NAACP because it established that, as long as a state had an educational opportunity to offer, the requirements of separate, but equal were met. While the legal precedent established in Kansas was not binding on the federal court, this decision starkly contrasted with the position the Kansas Supreme Court had taken in *Tinnon* (1881), *Cartwright* (1906), and *Woolridge* (1916) in which it determined that school districts could not segregate students by building or classroom and meet the mandates of Kansas state law.

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[587] Kluger, p. 259.
[588] Kluger, p. 259.

The next case to reach the United States Supreme Court was *Sweatt v. Painter*.[589] Herman Sweatt applied to attend law school at the University of Texas. The State of Texas had established a black law school located in downtown Houston in the basement of an office building. "It consisted of three smallish basement rooms, three part-time faculty members who were instructors at the Texas law school the rest of the time, and a library of 10,000 books plus access to the state law library in the capitol."[590] Sweatt filed a lawsuit alleging that this makeshift law school was not equal. The issue before the court was whether the separate law school provided an equal education in the following categories: faculty reputation, administrative experience, alumni, reputation in community, and prestige. The court found that the basement law school provided by Texas did not provide Sweatt with an equal educational opportunity and ordered his admission into the University of Texas Law School.

McLaurin v. Oklahoma Board of Regents involved a similar issue, except George McLaurin was seeking admission to graduate school in education. In 1948 the district court, following the precedent established in *Sipuel*, ordered that McLarin be admitted to graduate school as soon as white students were. The solution offered by the State of Oklahoma was to admit black candidates to white colleges and universities when the course of study was not offered at the black colleges; however, "all such instruction of the colored students was to be given 'on a segregated basis' within the university."[591] McLaurin was required to sit in an adjoining anteroom during class, a marked off section of the library, and an alcove adjacent to the cafeteria. The case returned to court. The district court found in favor of the university, and

[589] *Sweatt v. Painter*, 210 S.W. 2d 442 (1947), 339 U.S. 629 (1950).
[590] Kluger, p. 261.
[591] Kluger, p. 268.

the decision was appealed to the Supreme Court.[592] Because of the nature of this case, the challenge was more directly aimed toward "the legality of segregation itself."[593] The Court found that Oklahoma's practices set up inequalities for McLaurin and stated that "state-imposed restrictions which produce such inequalities cannot be sustained."[594] The court ordered an end to the inequalities, but left intact segregation and *Plessy*.

In the next case to reach the United States Supreme Court, the separate, but equal doctrine pronounced in *Plessy* would not withstand the legal challenge mounted against it. A group of five cases came before the Supreme Court challenging segregated education at the elementary and secondary level.[595] The five cases have become known collectively by the name of the Kansas case. As pointed out in Chapter One, the lawyers involved in the *Brown* case identified its role in the issue of the constitutionality of separate education as a factor that made it unique from the other four cases. This uniqueness was derived from the rich legal history developed through the Kansas Supreme Court decisions. The legal cases decided by the Kansas Supreme Court laid the groundwork for the legal issues addressed in *Brown* in that they assisted in the establishment of a context that (1) was amenable to legal challenges to segregated education and (2) provided equal educational advantages to its black school-age children.

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[592] In the interim between the appeal and argument before the Supreme Court, Oklahoma modified the arrangements for McLaurin. He was allowed to sit in the same classroom. Initially, the area in which he was allowed to sit was designated by a railing marked "Reserved for Colored". White students tore the signs down, and the officials responded by designating an unmarked row, which was to be occupied by black students. The university also provided a separate table in the library and the cafeteria for McLaurin's use.

[593] Kluger, p. 283.

[594] Kluger, p. 283.

[595] *Belton v. Gebhart (Bulah v. Gebhart)*, 87 A. 2d. 862 (Del. Ch. 1952); *Briggs v. Elliott*, 98 F. Supp. 529 (1951); *Brown v. Board of Education of Topeka, Kansas*, 98 F. Supp. 797 (1951); *Davis v. County School Board of Prince Edward County*, 103 F. Supp 337 (1952); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In the landmark decision rendered by the United States Supreme Court on May 17, 1954, in *Brown v. Board of Education of Topeka*, Chief Justice Warren wrote the following:

> Segregation with the sanction of the law, therefore, has the tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system....We conclude that in the field of public education the doctrine of "separate, but equal" has no place. Separate educational facilities are inherently unequal.[596]

More importantly, perhaps, the Supreme Court expressly rejected the separate, but equal doctrine announced in *Plessy v. Ferguson*. However, the Supreme Court postponed providing a remedy until the following year. The Court requested the parties to file briefs on what measures would constitute appropriate relief.[597] The remedy fashioned in *Brown II* remanded the cases to the district courts from which they originated with the directive "to take such proceedings and enter such orders as are necessary and proper to admit to public schools on a racially

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[596] Kern Alexander and M. David Alexander, *American Public School Law,* Fourth Edition (Belmont, CA: West/Wadsworth, 1998), p. 455.

[597] The Supreme Court asked the parties to specifically address the following original questions: "4. Assuming it is decided that segregation in the public schools violates the Fourteenth Amendment

> a. would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
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> b. may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from exisiting segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

> a. should this Court formulate detailed decrees in this cases;
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> b. if so, what specific issues should the decree reach;
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> c. should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
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> d. should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?" Footnote 13 of *Brown I* opinion.

nondiscriminatory basis with all deliberate speed the parties to these cases."[598] De jure segregation was declared unconstitutional, and the new legal issue to be defined and bounded became desegregation.[599] Over time, the standard for measuring the success of desegregation efforts became racial balance, as opposed to the quality of education.

The Protection of White Privilege Through Legal Discursive Practices

The final research question addresses how legal discursive practices protected white privilege in the struggle to desegregate education. Between 1881 and 1951, twelve legal cases challenging segregated education were brought into the purview of the Kansas judicial system. The Kansas Supreme Court decided eleven cases and the remaining decision was *Brown*, which was filed in the federal court system. While the extensive legal history of Kansas created the context that made *Brown* unique followed the case to the United States Supreme Court, the long line of state legal precedent was left behind. The doctrine of *stare decisis* negated their applicability to the federal court cases. They were also inapplicable because the legal battle in *Brown* was being waged on the basis of federal constitutional law rather than state law. What was brought into play were the legal discursive practices discussed in Chapter One that protected the property rights and citizenship rights of white privilege. Once again the United States Supreme Court was called on to preserve equality, and once again Kansas found herself in the midst of another struggle over how white privilege would be defined and deployed in this new space of democracy and capitalism.

Each anniversary of the May 17, 1954, *Brown* decision has given rise to a reflection on the failures of school desegregation. For many, it has been a time to acknowledge that the goal

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[598] Kluger, p. 745 quoting *Brown II.*
[599] *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 978 F. 2d 585 (10th Cir. 1992).

of equal educational opportunities has not been achieved. According to Jacqueline Jordan Irvine, "We will not and cannot achieve our national vision by ignoring children with broken dreams and broken promises. Somehow, we must start to think of our future as inextricably linked to the success of poor and minority children, who remain the dispossessed heirs of Jim Crow."[600] To better understand the broken dream and promise of *Brown*, a critical analysis of the "success" of *Brown* is warranted.

The "success" of *Brown* is related to its protection of white privilege. May 30, 2005, will mark the fiftieth anniversary of the decision in *Brown II*. While this anniversary is overshadowed by the decision in *Brown I*, the legal "both/and" space created by the *Brown II* decision provided a mechanism through which white privilege could reinvent itself in ways that **both satisfied** the legal mandates of desegregation **and protected** "white" power and privilege. *Brown I* calls for a celebration of the legal declaration that separate but equal schools are inherently inferior, while *Brown II* defined the inherent inferiority as solely a racial issue rather than a complex social issue involving the intersections of race and economics. Derrick Bell, a critical race legal scholar, classified the *Brown II* decision as a "fall-back decision" that allowed the United States Supreme Court to back away from the promise and possibility of *Brown I*.[601] The Supreme Court backed down and protected white privilege in the following ways. First it declared that racial discrimination in public education should cease and desist "with all deliberate speed."[602] What constituted "all deliberate speed" on the part of the school districts involved in *Brown*? Second, the Supreme Court required the school districts to make "a prompt

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[600] Jacqueline Jordan Irvine, Reflection, *Education Week*, 23 (May 19, 2004), p. 38.
[601] Derrick Bell, p. 42.
[602] *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 (1955), p. 301. Hereinafter *Brown II.*

and reasonable start toward full compliance."[603] Once the "start" had been made, the district courts could grant "additional time…to carry out the ruling in an effective manner." [604] To qualify for this additional time, school districts had to prove that they were acting in good faith and additional time was "necessary in the public interest."[605] The equitable principle of balancing private versus public interests prevailed. Justice Warren wrote, "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with … constitutional principles."[606] The Supreme Court also acknowledged that a period of transition was warranted to establish racially nondiscriminatory school systems. This period of transition granted white privilege a reprieve from immediate implementation of *Brown I* and bought white privilege the time it needed to develop a plan for implementation that served what it defined as the "public interest."

While the *Brown II* decision set into motion the dismantling of segregated education, it also served the function of continuing the legitimation of white privilege. The underlying assumptions of inferiority and cultural deprivation because of race and class are implicit within the language and practices used in desegregation initiatives. The discourse of whiteness permeates many of the assumptions that operate on a deficit model, which views the race and culture from which the student comes as deficient. For example, one common assumption is based on the belief that education is valued more in the white community than it is in the black community. However, African Americans, more than any other dominated group in the United

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[603] *Brown II*, p. 300.
[604] *Brown II*, p. 300.
[605] *Brown II*, p. 300.
[606] *Brown II*, p. 300.

States, embraced education as a means of racial uplift.[607] It was not uncommon for there to be more African American students than spaces to accommodate them.[608] This position presumes that because minority children suffer from cultural and intellectual deprivation, an achievement gap exists. This gap has been caused by the child's abilities, rather than the structural inequities that were prevalent prior to desegregation. This position also assumes black schools were inferior.[609]

Another assumption of desegregation is that, once black children are exposed to and adopt a white middle class culture, they will have an improved self-esteem. According to Edward A. Suchman, John P. Dean, and Robin M. Williams, Jr., "Negro youths are more likely to attain higher standards of academic proficiency and exert their capacities more fully after desegregation because of increased morale, decreased self-hatred, and a fuller sense of sharing the American Dream."[610] Edgar Epps highlighted how the infamous doll study by Kenneth and Mamie Clark has been interpreted as indicative of "racial self-hatred and a low sense of self-worth" and was used as the basis for arguing that black children had low self-esteem.[611] Even when scholars disagreed with the proposition that integration would lead to greater self-esteem, the superiority of whites undergirded their reasoning. "It is hard to see how minority students,

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[607] James D. Anderson, *The Education of Blacks in the South, 1860-1935* (Chapel Hill: The University of North Carolina Press, 1988).
[608]Henry Bullock, *A History of Negro Education in the South: From 1619 to the Present* (New York: Praeger, 1970).
[609] This proposition has been refuted in recent publications by Vanessa Siddle Walker, *Their Highest Potential: An African American School Community in the Segregated South* (Chapel Hill: University of North Carolina Press, 1996); James Anderson, and Van Dempsey and George Noblit, Cultural Ignorance and School Desegregation: A Community Narrative, In Mwalimu J. Shujaa, Ed. *Beyond Desegregation: The politics of quality in African American schools*. (Thousand Oaks, CA: Corwin Press, 1996), pp. 115-137.
[610] Edward A. Suchman, John P. Dean, Robin M. Williams, Jr., *Desegregation: Some Propositions and Research Suggestions*. (New York: Anti-Defamation League of B'nai B'rith, 1958), p. 71.
[611] Epps, p. 303.

after being enmeshed in a situation permitting direct daily comparison with many White classmates who display superior academic performance, could not help but feel discouraged, incompetent, and certain that the classroom is not a place where they can expect to attain praise, reward, and confirmation of their self-worth."[612] The notions of racial inferiority were only heightened when they intersected with issues of class.

From a class perspective, the assumption is one of assimilation. The underlying belief is that minority and poor children benefit from exposure and adaptation to "the middle-class values of the high-achieving White children."[613] Class could also be used to alleviate resistance to integration. "One interpretation...is that where parents are provided with accurate information on achievement and social class of minority schools, they will act rationally over that information minimizing racial consideration. Where they are not provided that information, racial composition may be perceived as a surrogate for quality of education."[614] When the social class of the children is equal, resistance is least likely to occur.

However, assimilation still remained the ultimate goal of desegregation. Edward A. Suchman, John P. Dean, and Robin M. Williams, Jr. claimed, "When improved education and higher occupational levels of Negroes results in a 'style of life' which more closely approximates the dominant white middle-class model, then will the sense of difference between the two groups decrease in intensity."[615] Meritocracy would result in a change in the "style of life," presumably to that of white, middle class America, and the differences between the races would be dissolved because the races would share common values.

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[612] Gerard and Miller, p. 299.
[613] Gerard and Miller, p. 302.
[614] Christine H. Russell, *The Carrot or the Stick for School Desegregation Policy* (Philadelphia: Temple University Press, 1990), pp. 18-19.
[615] Edward A. Suchman, John P. Dean, Robin M. Williams, Jr., p. 16.

The discourse of desegregation also used class cut to across race. Class was a measuring stick to gauge differences within the black community and used to determine which group represented the most reasonable group with whom to deal. "With the exception of brief or sporadic attempts on the part of lower-status minority community members, action taken to effect school desegregation is likely to stem from the higher-status, better educated, and more 'cosmopolitan' minority community members who are aware of past minority group progress sufficiently so that they feel realistically that school desegregation can be achieved."[616] These are also the groups that benefit the most from the practices of the dominant group.[617]

The impact whiteness has had on the discourse of desegregation is the role it has played in not only the development of desegregation practices, but also the evaluation of desegregation. The impact has been that the success of school desegregation efforts is measured not by the quality of the education received by children or even by whether children receive equal education, but by the percentage of minority students in majority-white schools. "The traditional measure of desegregation…reduces efforts to assess the effectiveness of desegregation to little more than a body count rather than an examination of the quality of education available to children in the schools."[618] Additionally, the onus of change has been placed on people of color rather than the dominant group. An example of this may be found in the work of Amy Stuart Wells and Robert Crain.[619] In their discussion of the increased opportunities for college that suburban schools offer students of color, they sidestep an

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[616] Edward A. Suchman, John P. Dean, Robin M. Williams, Jr., p. 73.
[617] Albert Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1965/1957).
[618] Edgar Epps, "The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality." In *The Courts, Social Science, and School Desegregation* edited by Betsy Levin and Willis D. Hawley, pp. 300-313 (New Brunswick, NJ: Transaction Books, 1977), p. 300.
[619] Amy Stuart Wells and Robert L. Crain, *Stepping Over the Color Line: African-American Students in White Suburban Schools* (New Haven: Yale University Press, 1997).

exploration of the transcendence of the politics of color into this "land of opportunity" through policies such as racial tracking. Additionally, they provide numerous examples of the racist attitudes of the white, suburban administrators, teachers, students, and parents, Wells and Crain criticize the city and return students for not taking advantage of the opportunity the transfer policy creates for them. They offer no discussion of how the transfer policy recreates the color line in the suburban school. Because the only students who benefit from the policy appear to be those who are willing to assimilate, the transfer policy appears to perpetuate rather than alleviate the color line. If the suburban schools are unwilling to change their attitudes, the decision to remain in the city may be in the best interest of the students. Why should black city students spend an hour on the bus to arrive at a location where they remain second-class citizens? Thus, the plea for equal education was transmuted into a plea for integration and assimilation and the discourse of desegregation has become synonymous with the discourse of white privilege.

Post-*Brown* Topeka, Kansas: Implications for Kansas Today

The post-*Brown* emphasis on the issue of "separateness" resulted in remedies focused on correcting the inherent "inferiority" of black education as it existed prior to 1950. These remedies focused on racial balance and the demographic characteristics of schools. Said remedies enabled white privilege to reinvent itself and avoid confrontation of the American dilemma of coming to terms with the tensions between a political system premised on democracy and an economic system premised on capitalism.

The United States Supreme Court's pronouncement that segregated schools were inherently inferior also fostered the perpetuation of the myth that all pre-Brown schools provided black children with a sub par education. As the Kansas cases highlight, many black schools provided their students with educations that were equal to and in some instances superior to the

education provided to white children. Most of the black teachers in Topeka had earned master's degrees in education, while their white counterparts had not. As Jerome Morris noted, "Over the past three decades a body of scholarship has emerged that offers a different picture of Black schooling during legalized segregation."[620] These scholars have addressed the post-*Brown* metanarrative of inferiority by offering a counternarrative of successful schools.

What happened in Topeka, Kansas, after the Supreme Court's decision on May 17, 1954? The Topeka Board of Education abolished segregation prior to the United States Supreme Court decision on September 5, 1953: "Be it resolved that it is the policy of the Topeka Board of Education to terminate maintenance of segregation in the elementary grades as rapidly as practicable"[621] However, the plan adopted in 1953 was limited in scope and had little impact on Linda Brown because it called for the immediate integration of two white schools, Randolph and Southwest, located in affluent neighborhoods. "Black elementary students who lived in (these) districts were permitted to attend the white schools."[622] Sumner Elementary was the white school in Linda Brown's neighborhood.

After the United States Supreme Court's decision in *Brown*, the Topeka Board of Education adopted a four-step desegregation plan, which was submitted to the United States

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[620] Jerome E. Morris, Can Anything Good Come from Nazareth? Race, Class, and African American Schooling and Commmunity in the Urban South and Midwest. *American Educational Research Journal*, 41 (No. 1, 2004), p 70; Vivian Gunn Morris and Curtis L. Morris, *The Price They Paid: Desegregation in an African American Community* (New York: Teacher's College Press, 2002); Vanessa Siddle Walker, *Their Highest Potential: An African American School Community in the Segregated South* (Chapel Hill: University of North Carolina Press, 1996); William H. Watkins, Reclaiming Historical Visions of Quality Schooling: The Legacy of Early 20th-Century Black Intellectuals, In Mwalimu J. Shujaa, Ed. *Beyond Desegregation: The Politics of Quality in African American Schools* (Thousand Oaks, CA: Corwin Press, 1996), pp. 5-27.

[621] Karl A. Cole-Frieman, The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation, *The Kansas Journal of Law & Public Policy,* Vol. 4 (No. 1, 1996), p. 28.

[622] *Brown v. Topeka Board of Education*, 671 F. Supp. 1290, 1293 (Kansas 1987).

District Court for the District of Kansas. On October 28, 1955, the United States District Court concluded that Topeka's plan constituted a "good faith effort [and the plan was] approved as a good faith beginning to bring about complete desegregation."[623] The plan Topeka adopted assigned "all children regardless of race to schools in the neighborhoods in which they resided."[624] By September 1, 1961, Topeka had fully implemented its desegregation plan based on a neighborhood school model, and the *Brown* case remained dormant for twelve years.

On September 10, 1973, Evelyn Rene Johnson filed a class action on behalf of the black students who attended schools in East Topeka and North Topeka. This lawsuit alleged that the educational facilities and opportunities afforded to children residing in West and South Topeka were "vastly superior."[625] Although it was settled out of court for $19,500, the filing of the Johnson lawsuit prompted an investigation by the United States Department of Health, Education, and Welfare (HEW). This investigation, *Unified School District #501 v. Weinberger*, resulted in a finding that Topeka schools were not in full compliance with the desegregation order, and HEW began the process of cutting off federal aid to the Topeka schools.[626] *Weinberger* was dismissed by stipulation of the parties on October 20, 1976.

Linda Brown Smith, one of the original plaintiffs in the 1954 *Brown* decision, filed a motion to intervene in the *Brown v. Board of Education of Topeka, Kansas* case on August 22, 1979. Brown Smith, along with seven other parents, sought an order compelling Unified School District #501 to comply with the United States Supreme Court's 1954 order mandating the desegregation of Topeka's schools. The United States District Court found that Topeka had

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[623] *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 139 F. Supp. 468, 470.
[624] Cole-Frieman, p. 29.
[625] *Oliver Brown v. Board of Education of Topeka, Kansas, Shawnee County, United States District Court for the District of Kansas, Case No. T-316*, p. 5.
[626] *U.S.D. #501 v. Weinberger*, 74-160-C5 (1973).

achieved unitary status, even though there were still racially identifiable schools within the district.[627] The district court determined that the racial composition of the schools was due to the demographics of the school district and not the result of segregatively gerrymandering of school attendance zones. However, its decision was overturned in 1992, by the United States Court of Appeals for the Tenth Circuit. The circuit court of appeals declared that Topeka had failed to achieve unitary status because it failed in the areas of faculty, staff, and student assignments.[628] The court of appeals did uphold the district court's finding of no disparities in the facilities, extracurricular activities, curriculum, and transportation provided by the school district.

As has happened in many inner-city urban areas, Unified School District #501 draws from a school-age population predominately minority and poor. During the 1960s and 1970s, a majority of the white populace and middle-class minority populations moved to the western part of the city.[629] The effort to provide equality of opportunity to poor and inner-city students has been thwarted by white privilege. According to bell hooks, "Clearly, just when we should all be paying attention to class, using race and gender to understand and explain its new dimensions, society, even our government, says let's talk about race and racial injustice. It is impossible to talk meaningfully about ending racism without talking about class (and gender)."[630] Derrick Bell noted, "Traditional statements of freedom and justice for all. The usual fare on celebratory occasions serve to mask continuing manifestations of inequality that beset and divide people along lines of color and class. The divisions have been exploited to enable an uneasy social stability, but at a cost that is not less onerous because it is all too obvious to blacks and all but

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[627] *Brown v. Board of Education of Shawnee County, Kansas*, 671 F. Supp 1290 (1987).
[628] *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 978 F. 2d 585 (10th Cir. 1992).
[629] Cole-Frieman, pp. 30-33.
[630] bell hooks, *Where We Stand: Class Matters* (New York: Routledge, 2000), p. 7.

invisible to a great many whites."[631] The discourse of desegregation protected the hegemonic practices of white privilege by allowing it to sidestep how race, class, and gender intersect and impact equal educational opportunities, and focus on numbers, not quality of education. As a result, many impoverished children and children of color are left behind pleading for an equal education.

[631] Bell, p. 43.

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