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A NINETEENTH-CENTURY PRECURSOR OF *BROWN V. BOARD OF EDUCATION*: THE TRIAL COURT OPINION IN THE KANSAS SCHOOL SEGREGATION CASE OF 1881

INTRODUCTORY NOTE

The transition from slavery to freedom plainly required more than abolition, but the extent of that further step—what the Fourteenth Amendment means, or ought to mean, on matters of race—was left deliberately vague in 1866 and has been controversial ever since. One obvious question, whether the remade Constitution prohibited state laws requiring racial segregation, did not reach the United States Supreme Court until *Plessy v. Ferguson*¹ in 1896. By that time the question was no longer new. The argument against legally imposed segregation, based initially on state-law grounds, had been developing since the 1840s in two parallel lines of cases, one involving public schools, the other railroad and steamboat accommodations. With the ratification of the Fourteenth Amendment in 1868, the antisegregation argument took on a federal constitutional dimension. Thereafter, the case against state-sponsored segregation in either setting typically included an assertion that laws requiring the separation of the races constituted a denial of equal protection.²

Although the nineteenth-century opponents of segregation won a number of significant legal victories, the constitutional argument based on the Fourteenth Amendment was notoriously unsuccessful. Courts *upholding* Jim Crow laws naturally held that the equal protection clause imposed no bar to segregation: they denied that “equality” meant “identity,” and they pointed to the widespread practice of segregation in northern states and the District of Columbia as evidence that the country at large shared their understanding.³ That the judicial defenders of segregation should take this view of the Fourteenth Amendment was only predictable. More disconcerting to modern observers has been the striking fact that nineteenth-century courts *overturning* legal segregation in schools or transportation elected for the most part to rest their decisions on common law or statutory requirements, scarcely alluding to the new

1. 163 U.S. 537 (1896).

2. See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* chs. 2-6 (1992).

3. Representative decisions on these points included *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871), and *Cory v. Carter*, 48 Ind. 327 (1874).

constitutional command that might have been thought to offer a more attractive ground of decision.

The most comprehensive study of the nineteenth-century school segregation decisions identifies only one published judicial opinion—an obscure decision of a county court in Pennsylvania—asserting federal constitutional grounds to support a holding that segregated schools were illegal.⁴ Much better known, and much more representative of the antisegregation decisions, is the opinion of the Kansas Supreme Court in *Board of Education v. Tinnon*.⁵ By a 2-1 vote, over the angry dissent of future United States Supreme Court Justice David J. Brewer, the Kansas court ruled that the city of Ottawa, Kansas had no legal authority “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.”⁶ But the opinion by Justice Daniel M. Valentine based the court’s decision exclusively on a technical argument about the extent of municipal authority under the Kansas school statutes. After referring, sympathetically and at some length, to a possible constitutional ground of decision in the Fourteenth Amendment, Justice Valentine pointedly declined to rely on it:

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 more complete jurisdiction.⁷

Even those judges, like Valentine, most receptive to an expansive interpretation of the new federal guarantee of racial equality appeared sometimes to doubt the substance of the constitutional promise.

The judge who originally tried the case, N. T. Stephens of the Franklin County District Court, had written a more confident opinion. That opinion, however, took him where the state supreme court was unwilling to follow.

The Ottawa School Board announced in the fall of 1880 that, after a

4. See J. MORGAN KOUSSER, *DEAD END: THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS* 21-22 (1986). The published opinion explaining an antisegregation decision on constitutional grounds is Commonwealth *ex rel.* Allen v. Davis, 10 Weekly Notes of Cases 156 (C.P. Crawford County, Pa. 1881), “less an important precedent than a straw in a brief but strong anti-racist wind.” KOUSSER, *supra* at 22. The case would certainly be unknown today were it not for Professor Kousser’s discovery. *Allen v. Davis* lost its immediate significance when Pennsylvania amended its statutes to prohibit segregated schools. The decision was never appealed to a higher court, and the opinion quickly dropped from view.

5. *Board of Educ. of Ottawa v. Tinnon*, 26 Kan. 1 (1881).

6. *Id.* at 16.

7. *Id.* at 18.

lapse of several years, it was reestablishing a separate "colored school" for children in the elementary grades. A group of militant black parents determined to challenge the decision in court. Elijah Tinnon, who had been part of a successful effort to desegregate Ottawa's schools as recently as 1876, brought suit on behalf of his son Leslie against the school board and its superintendent, William Wheeler, to compel Leslie's admission to the classes in the main school building.⁸ On January 18, 1881, Judge Stephens issued an order directing that Leslie Tinnon be admitted to the regular public school. The school board, according to Judge Stephens, lacked the authority to conduct a racially segregated school—not because of any inadequacy of the Kansas statutes, which (as Stephens expressly found) gave the board plenary authority, but because the Fourteenth Amendment forbade the practice.

The district court opinion in *Tinnon v. Wheeler* is the earliest discoverable judicial statement that the Fourteenth Amendment prohibited legal segregation of public schools. With a single exception already noted,⁹ it was the only such holding in the nineteenth century. The opinion is important for its substance as well. Judge Stephens squarely confronted the "separate but equal" argument that necessarily underlay the legal defense of segregation, offering a response that made effective use of Supreme Court precedent (*Railroad Co. v. Brown*¹⁰ in particular) and that anticipated, in spirit and approach, some passages of Justice John Marshall Harlan's dissenting opinion in *Plessy*.¹¹ Because the opinion was published only in local newspapers, and because the Kansas Supreme Court, in affirming the judgment, did not refer to the lower court opinion, a significant piece of legal history has been heretofore unknown.

Nelson Timothy Stephens, the author of the district court opinion, was born in upstate New York on November 2, 1820. From the age of twenty-four he practiced law in Moravia, N.Y., a small town midway between Ithaca and Auburn. When Abraham Lincoln summoned the Congress and called up state militias on April 15, 1861, Stephens locked his law office and marched off to war at the head of a troop of volunteers

8. For the background of the school segregation controversy in Ottawa, and the limited effect of the judicial decisions of 1881 outlawing segregation, see KULL, *supra* note 2, at 100-07.

9. See *supra* note 4.

10. *Washington, A. & G. R.R. v. Brown*, 84 U.S. (17 Wall.) 445 (1873).

11. Compare Stephens' exasperated concluding observation in *Tinnon v. Wheeler* ("It is evident as to the purpose of the rule.") with Harlan's well-known remarks about the purpose of Louisiana's separate car law: "The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks to compel the latter to keep to themselves No one would be so wanting in candor as to assert the contrary." *Plessy*, 163 U.S. at 557.

from Moravia. Invalided some five months later, Captain Stephens returned to law practice in Auburn, where he was troubled with lingering ill health; eventually he gave up his profession and moved west with his wife and family, settling in Lawrence, Kansas in 1868. After spending a number of years in semiretirement as a gentleman farmer, Stephens was drawn back into law practice, representing Kansas municipalities in litigation over the most controversial issue of the day, the repudiation of "railroad aid" municipal bonds. Stephens was elected District Judge of Franklin County on the Republican ticket in 1876; he served in that office from January 1877 until his death on December 29, 1884.¹²

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12. These notes on Judge Stephens' career are drawn from a memorial by his daughter, the classicist and author Kate Stephens, published in 14 KANSAS HIST. COLLECTIONS 23, 23-58 (1918).

THE SCHOOL QUESTION.¹³
JUDGE STEPHENS' DECISION.

Leslie Tinnore vs. W. Wheeler, et al.

The city of Ottawa, in this State, is a city known under the Statutes as a city of the second class. It has within its limits a large class of children of school age who are children of free white parents, also a far less number of children of school age who are children of African descent, known as Negroes.

The Board of Education of said city have provided rooms and teachers for the education of the free white children, and they have also provided for the free education of said colored children, separate and apart from said white children, rooms and teachers in every respect equal to those furnished said white children; but said colored children are not allowed to attend the schools provided for white children, nor are said white children allowed to attend the colored children's school.

The relator, a child of school age, of African descent, a resident within said city, and entitled to attend school as a scholar therein, presented himself at the school provided for white children and demanded admittance thereunto, and leave to attend as a scholar, but was refused on the grounds that he was a person of African descent and that a rule of the Board of Education prohibited his admission for that reason. He now asks the mandatory writ of this court to compel such admission.

The Statute provides (Gen'l Statutes, page 846, section 151):

In each city governed by this act 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, when school-room accommodations are insufficient, exclude for the time being, children between the ages of five and seven years.

Sec 158, Gen'l Stat., p. 847.—

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

13. The following text is transcribed from *The School Question — Judge Stephens' Decision*, DAILY REPUBLICAN (Ottawa, Kan.), Jan. 19, 1881, at 2. (The opinion was reprinted in the paper's weekly edition the following day.) For greater legibility, the longer extracts in the opinion have been set off as block quotations. No other alterations have been made to the text, and its typographical errors have been left uncorrected. Obvious errors in the newspaper report include the name of the plaintiff (*Tinnore* for *Tinnon*) and the misspelled citations to *Strauder v. West Virginia*.

the educational interests of the city demands the same, and to exercise the sole control of the schools and school property of the city.

These sections are all the laws of the State necessary to cite to show the State policy in reference to the subject matter of inquiry. They provide for a system of free schools and in cities of the second class give to the Board of Education plenary power over them. They can organize a system of graded schools, establish a high school, and exercise sole control over the schools and school property. This, it seems to me confers a power broad enough to authorize the action of the School Board complained of in this case, and were there no other questions to be considered the case might be here dismissed.

It is alleged that the order of the School Board prohibiting the colored children from attending the school where white children are taught is in contravention of the true intent and meaning of the 14th amendment to the Constitution of the United States, and is therefore void. And it is further contended that as there is organized a system of free schools for all children of school age, that all children have of right the privilege of enjoyment thereof, as well for the instruction to be obtained from the teachers as for the benefits to be obtained from social intercourse and example set by those brought up in a more refined manner.

This latter consideration may be dismissed with the simple remark that no one ought to have the right, even for the great purpose of public education, to thrust his own vulgarity upon and compel its association with people of better manners; and children virtuously brought up ought to have the right of exemption from contaminating influences, let them come from whatever source they may.

The other question, as to the effect of the 14th Constitutional Amendment upon the order of the School Board, is a question of far graver import. That amendment provides:

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 laws 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.

This provision of the Constitution received an interpretation in the cases known as the Slaughter-House cases, 16 Wallace 36, and also in the case of *Strander vs. West Virginia*, 10 Otto 303.

In the first mentioned case, Judge Bradley, in a dissenting opinion, uses this language:

A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace as a means of enjoying all the rights and privileges enjoyed by other citizens. * * * If a man be denied full equality before the law he is denied one of the essential rights of citizenship as a citizen of the United States.

Mr. Justice Miller, in delivering the opinion of the court said: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes, as a class, or on account of their race, will ever be held to come within the purview of this provision."

In *Strander vs. West Virginia*, the following language was used by the court, speaking through Mr. Justice Strong:

It (the 14th amendment) ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, (evidently referring to the newly-made citizens who, being citizens of the United States, are declared to be also citizens of the State in which they reside.) It ordains that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right most valuable to the colored race. The right to exemption from unfriendly legislation against them, distinctively as colored: Exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.

In *Railroad Co. v. Brown*—17 Howard, U. S. 445—the court held that in an enactment granting certain privileges to a railroad company it was provided that no person shall be excluded from the cars on account of color; that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively for white persons, and in fact were the very cars which were at certain times assigned exclusively to white persons. That discriminations on account of color must cease, and the colored and white race in the use of cars be placed on an equality."

In the case at bar the School Board of the city of Ottawa have enacted a rule within the letter of the authority given them by the State law; that rule is the legislation of which the relator complains. It is a rule plainly discriminating against the relator on account of his race or color, pointing out himself and others of his class, by reason of their color, as not being eligible to school privileges with white children.

It is no answer to the proposition to say that white children are excluded from the African school room. It is evident as to the purpose of the rule. Under the construction the Supreme Court of the United States has put upon the 14th amendment of the constitution it is evident to every mind that the Legislature of the State of Kansas had no power to confer authority upon the School Board of the city of Ottawa to make the order complained of. The rule itself is a violation of the rights conferred by the 14th amendment, and is inoperative and void.

It follows that a peremptory writ must issue in this case pursuant to a prayer therefor. No costs will be given either party.