IN THE

Supreme Court of the United States

October Term, 1949

No. 34

G. W. McLAURIN,

Appellant,

vs.

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION, BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLANT.

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Opinion Below.

No opinion was filed by the court below. Findings of Fact and Conclusions of Law were filed at the close of the first hearing (R. 31-34). Journal entry of Judgment for this hearing was filed October 6, 1948 (R. 34-35). At the close of the hearing on appellant's motion to modify the order and judgment (R. 35-38), Findings of Fact and Conclusions of Law and Judgment were entered on November 22, 1948 (R. 39-44).

Statement of Jurisdiction.

The Supreme Court of the United States has jurisdiction to review this cause on appeal under the provisions of Title 28, United States Code, Section 1253, this being an appeal from an order denying, after notice and hearing, an injunction in a civil action required by an act of Congress to be heard and determined by a district court of three judges for the reason that in this action plaintiff-appellant sought to enjoin the enforcement of statutes of the State of Oklahoma,[1] and to enjoin the enforcement of an order made by an administrative board acting under state statutes.[2]

The District Court for the Wetsern District of Oklahoma sitting as a specially constituted three-judge court rendered a final judgment in this cause sustaining the validity of an order made by an administrative board acting under statutes of the State of Oklahoma after the validity of state statutes and the order had been placed in issue by the appellant on the ground that they were repugnant to the Constitution of the United States.

Application for appeal was presented on January 18, 1949 (R. 45) and was allowed on the same day (R. 108). Probable jurisdiction was noted by this Court on November 7, 1949 (R. 111).

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[1] Title 28, United States Code, Section 2281.

[2] Title 28, United States Code, Section 2281; See: *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290.

The State Statutes and Administrative Order, the Validity of Which Is Involved.

The Oklahoma Statutes, the validity of which are involved are Sections 455, 456 and 457 of Title 70 of the Oklahoma Statutes (1941) which provide in part as follows:

70 O. S. 1941, Section 455, makes it a misdemeanor, punishable by a fine of not less than $100 nor more than $500 for

> "any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction,"

and provides that each day same is to be maintained or operated "shall be deemed a separate offense".

70 O. S. 1941, Section 456, makes it a misdemeanor, punishable by a fine of not less than $10 nor more than $50 for any instructor to teach

> "in any school, college or institution where members of the white race and colored race are received and enrolled as pupils for instruction,"

and provides that each day such an instructor shall continue to so teach "shall be considered a separate offense".

70 O. S. 1941, Section 457, makes it a misdemeanor punishable by a fine of not less than $5 nor more than $20 for

> "any white person to attend any school, college or institution, where colored persons are received as pupils for instruction,"

and provides that each day such a person so attends "shall be deemed a distinct and separate offense".

After the hearing and judgment in this case the Oklahoma Legislature repealed these statutes and enacted similar statutes which contained the following proviso:

> " * * * that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis. Segregated basis is defined in this Act as classroom instruction given in separate classrooms, or at separate times."

These statutes are set out in full in the Appendix.

At the hearing for a preliminary injunction the Court held that "insofar as any statute or law of the State of Oklahoma denies or deprives this plaintiff admission to the University of Oklahoma for the purpose of pursuing the courses of study he seeks, it is unconstitutional and unenforceable". The Court, however, refused to issue preliminary injunction (R. 34).[3]

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[3] "The court is of the opinion that insofar as any statute or law of the State of Oklahoma denies or deprives this plaintiff admission to the University of Oklahoma for the purpose of pursuing the course of study he seeks, it is unconstitutional and unenforceable. This does not mean, however, that the segregation laws of Oklahoma are incapable of constitutional enforcement. We simply hold that insofar as they are sought to be enforced in this particular case, they are inoperative" (R. 33).

Order by Board of Regents of University of Oklahoma, a State Board, Acting Pursuant to State Statutes, the Validity of Which Is Involved.

Subsequent to the above order of the Court and the filing of a motion for further relief by the plaintiff, the defendant Board of Regents of the University of Oklahoma acting as a state board pursuant to the statutes of Oklahoma adopted an order which appears in the minutes of said board as follows:

> "That the Board of Regents of the University of Oklahoma authorize and direct the President of the University, and the appropriate officials of the University, to grant the application for admission to the Graduate College of G. W. McLaurin in time for Mr. McLaurin to enrol at the beginning of the term, under such rules and regulations as to segregation as the President of the University shall consider to afford to Mr. G. W. McLaurin substantially equal educational opportunities as are afforded to other persons seeking the same education in the Graduate College, and that the President of the University promulgate such regulations" (R. 97).

In refusing to enjoin the enforcement of this order the Court held as a matter of law that: "The Oklahoma statutes held unenforceable in the previous order of this Court have not been stripped of their validity to express the public policy of the State in respect to matters of social concern * * * " (R. 42).

The Court refused to enjoin the enforcement of either the statutes or the order, dismissed the complaint of the plaintiff, and rendered judgment for the defendants (R. 43-44).

Statement of the Case.

On the 5th day of August, 1948, appellant filed in the United States District Court for the Western District of Oklahoma a complaint required to be heard and determined by a three-judge court as provided by the then existing Section 266 of the Judicial Code seeking a preliminary and permanent injunction against the Oklahoma State Regents for Higher Education, the Board of Regents of the University of Oklahoma and the administrative officers of the University of Oklahoma enjoining them from enforcing Sections 455-457 of the Oklahoma statutes of 1941 under which the plaintiff and other qualified Negro applicants were excluded from admission to the courses of study offered only at the Graduate School of the University of Oklahoma.

The complaint alleged that the appellant, G. W. McLaurin, was qualified in all respects for admission to the Graduate School of the University of Oklahoma but was denied admission solely because of race or color pursuant to the statutes of the State of Oklahoma and the orders of the Board of Regents of the University of Oklahoma acting pursuant to said statutes. Motion was made for a preliminary injunction. A hearing was held on the motion for preliminary injunction upon an agreed statement of facts in which all of the material facts were admitted and agreed upon. It was admitted that appellant, McLaurin, was qualified in all respects other than race or color for admission to the University of Oklahoma and that the courses he desired were offered by the State of Oklahoma only at the University of Oklahoma (R. 20-21).

On the 6th day of October, 1948, the three-judge court filed a journal entry which said in part: "it is ordered and

decreed that insofar as Sections 455, 456 and 457, 70 O. S. 1941, are sought to be applied and enforced in this particular case, they are unconstitutional and unenforceable". The Court, however, refrained from granting any injunctive relief but retained jurisdiction of the subject matter for entering any further orders as might be deemed proper (R. 34-35).

On the 7th day of October, 1948, appellant filed a motion for further relief alleging that despite the prior ruling of the court, appellant had again been denied admission to the Graduate School of the University of Oklahoma and requested that the court enter an order requiring appellees to admit appellant to the "graduate school of the University of Oklahoma for the purpose of taking courses leading to a doctor's degree in education, subject only to the same rules and regulations which apply to other students in said school" (R. 38).

At the hearing on the motion for further relief it appeared that the appellant has been admitted to the Graduate School of the University of Oklahoma but on a segregated basis. At this hearing counsel for both parties agreed in open court as to the essential facts.[4]

Judge MURRAH summed up the agreement as to essential facts as follows:

> "Judge Murrah: The 13th of October admitted to the University of Oklahoma and to the courses which he sought to pursue in his application to the University proper officials on January 28, 1948, that he was admitted to the same classes that other students pursuing these courses, under the same instructors, and that he was assigned a permanent desk or chair

[4] It has been the policy of the lower court to secure agreements between counsel rather than to use testimony insofar as possible (R. 53).

in an anteroom to the main classroom where other students were seated, that the Exhibits 1 to 5, which have been introduced into evidence, fairly represent the physical conditions under which he was admitted, and where he now sits and now pursues his course of study.

"It is further admitted that he can from this position see the instructor and hear the lecture, that he can see all or most of his fellow students, and that he is not obstructed in listening to the lecture or pursuing his course, except under conditions which may be hereinafter discussed.

* * * * * *

"Now it is further agreed that he is admitted to the library at the University of Oklahoma where all other students are admitted and on the same conditions, except that he is assigned a permanent desk on the landing above the second floor of the library, and that he is required by the administrative rules to occupy this desk while using the library, and in so doing he is required to leave his desk, go to the librarian, I suppose, and get the books he wishes, take them to his desk and use them there, while other students pursuing the same courses and using this library, go into the library, select the books they wish and take them home or any place that they may wish to pursue their studies" (R. 56).[5]

It was admitted that Negroes constitute the only group which is segregated in the University of Oklahoma (R. 63-64) and McLaurin testified as to the conditions of segregation to which he had been subjected and the effect of such segregation upon him as a student (R. 58-63).

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[5] The exhibits referred to appear in the Record on pages 92-96. The order of the Board of Regents of the University of Oklahoma of October 10, 1948 which required the maintenance of rules and regulations as to segregation in the admission of the appellant appears in the Record at page 97.

The issue in the second hearing was clearly set forth in the motion for further relief (R. 35-38) and during the hearing (R. 50).

On the 22d day of November, 1948, the three-judge court issued Findings of Fact, Conclusions of Law and Journal Entry. In the Conclusions of Law, the Court held:

1. That the United States Constitution "does not authorize us to obliterate social or racial distinctions which the State has traditionally recognized as a basis for classification for purposes of education and other public ministrations. The Fourteenth Amendment does not abolish distinctions based upon race or color, nor was it intended to enforce social equality between classes and races".

2. "It is the duty of this court to honor the public policy of the State in matters relating to its internal social affairs quite as much as is our duty to vindicate the supreme law of the land."

3. "The Oklahoma statutes held unenforceable in the previous order of this court have not been stripped of their vitality to express the public policy of the State in respect to matters of social concern."

4. "We conclude therefore that the classification, based upon racial distinctions, as recognized and enforced by the regulations of the University of Oklahoma, rests upon a reasonable basis, having its foundation in the public policy of the State, and does not therefore operate to deprive this plaintiff of the equal protection of the laws" (R. 41-42).

The journal entry denied the relief prayed for, dismissed the complaint and entered judgment for the appellees (R. 44).

Subsequent to the hearing and judgment in the lower court, appellant, McLaurin, was permitted to go into the

regular classroom and to sit in a section surrounded by a rail on which there was a large sign stating "Reserved for Colored". At the beginning of the last semester, February, 1950, the rail and sign were removed. Appellant is now permitted to eat in the students' cafeteria but is required to sit at a segregated table. He is permitted to use the main library but only on a segregated basis.

Question Presented.

The Statement as to jurisdiction heretofore filed in this Court presented the following question:

Whether in providing graduate education in a state university the state may exclude a Negro student from the classroom and require him to participate in classes through an open doorway maintaining a spacial separation from other students?

Errors Relied Upon.

The District Court erred:

1. In refusing to enjoin the defendants as state officers from enforcing Sections 455, 456 and 457 of the Oklahoma Statutes of 1941 upon the ground that the enforcement of said statutes violated the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and Title 8, Sections 41 and 43 of the United States Code.

2. In refusing to enjoin the defendants as state officers from enforcing the order of defendant Board of Regents of the University of Oklahoma requiring the segregation of plaintiff from all other students of the University of Oklahoma solely because of race or color upon the ground that said order is a violation of the equal protection and due

process clauses of the Fourteenth Amendment to the Constitution of the United States and Title 8, Sections 41 and 43 of the United States Code.

3. In ruling as a matter of law that the claim of the plaintiff to an education in a state institution on a non-segregated basis without distinction as to race or color was not a constitutional right but a mere matter of public policy of the State in regard to its internal social affairs.

4. In ruling as a matter of law that the plaintiff's right to public education without racial distinction, segregation or ostracism by the State of Oklahoma was a matter of the internal social affairs of the State of Oklahoma controlled solely by the public policy of the State and was not a right protected by the Constitution of the United States.

5. In ruling as a matter of law that the Oklahoma Statutes previously held by the Court to be unconstitutional and unenforceable could nevertheless be used as a constitutional basis for subsequent orders of the defendants to segregate plaintiff from all other students and thereby ostracize him solely because of race and color.

6. In ruling as a matter of law that state statutes previously declared unconstitutional as applied to plaintiff by state officers could be applied as a source of public policy to authorize the segregation of plaintiff from all other students of the University of Oklahoma solely because of race or color.

7. In ruling as a matter of law that the order requiring the segregation of plaintiff from the other students solely because of race or color rested "upon a reasonable basis and did not deprive the plaintiff of the equal protection of the laws or the right to liberty as guaranteed by the Constitution".

8. In ruling as a matter of law, in the absence of any evidence whatsoever to establish reasonableness of the classification, that the order requiring the segregation of the plaintiff from all other students solely because of race or color was a classification which rested upon a reasonable basis and did not violate the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

9. In ruling as a matter of law that the Fourteenth Amendment does not prohibit the State of Oklahoma from making racial distinctions among its citizens in the performance of its governmental function of providing public education at the graduate school level.

Summary of Argument.

The first hearing in this case involved the validity of the statutes of the State of Oklahoma which required complete exclusion of appellant from the University of Oklahoma solely because of race and color. The second hearing involved the enforcement of an order of the Board of Regents of the University of Oklahoma requiring the segregation of appellant within the University of Oklahoma. Both of the hearings involved the refusal of the appellees to permit the appellant to attend classes at the University of Oklahoma subject only to the same rules and regulations which apply to other students similarly situated.

In this case the obvious purpose of racial segregation in public education is made clearer than in any other case presented to this Court. To admit appellant and then single him out solely because of his race and to require him to sit outside the regular classroom could be for no purpose other than to humiliate and degrade him—to place a badge of inferiority upon him. His admission destroyed whatever

reason or policy which might have theretofore existed for requiring white and Negro students to attend separate institutions.

This case involves the efforts of the appellant, a Negro, to obtain graduate education at the University of Oklahoma subject only to the same rules and regulations which apply to other students in said school" (R. 38). He has been denied that right because of his race and color; "simply that, and nothing more". This the Constitution forbids. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."[6] "Discriminations based on race alone are obviously irrelevant and invidious",[7] and therefore arbitrary and unreasonable. Their imposition upon any citizen by any agency of government is reconcilable neither with due process of law[8] nor with the equal protection of the laws.[9]

This Court, while recognizing the right of the state to make reasonable classifications, has consistently held that such classifications must be based upon some real or substantial difference in relation to a legitimate legislative end which has pertinence to the statute's objective.[10] The

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[6] *Hirabayashi* v. *United States,* 320 U. S. 81, 100.

[7] *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, 203.

[8] *Buchanan* v. *Warley,* 245 U. S. 60, 82.

[9] *Shelley* v. *Kraemer,* 334 U. S. 1.

[10] *Dominion Hotel* v. *Arizona,* 249 U. S. 265; *Maxwell* v. *Bugbee,* 350 U. S. 525; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Great Atlantic Tea Co.* v. *Grojean,* 301 U. S. 412; *Queenside Hills Co.* v. *Saxl,* 328 U. S. 80; *Kotch* v. *Board River Port Pilot Commissioner,* 330 U. S. 552; *Groessart* v. *Cleary,* 335 U. S. 464.

State of Oklahoma has shown neither a real nor substantial difference nor the pertinence of alleged racial differences to graduate education. Where alleged differences on which a classification is based do not in fact exist, or cannot be reasonably or rationally related to the legislative objectives, the classification violates the equal protection clause.[11]

However, the lower court in this case considered that it was under a duty "to honor the public policy of the state in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land" (R. 42). The relief was then denied on the ground that: "We conclude therefore that the classification, based upon racial distinctions, as recognized and enforced by the regulations of the University of Oklahoma, rests upon a reasonable basis, having its foundation in the public policy of the State and does not therefore operate to deprive this plaintiff of the equal protection of the laws" (R. 42).

This decision is in direct conflict with the prior decisions of this Court with respect to the power of a state to classify in general as well as its prohibitions against governmentally imposed racial classifications.

The appellees rely solely upon the asserted validity of the separate but equal doctrine which they have extended to graduate education. This doctrine should be subjected to critical analysis and if found to be applicable to graduate education should be rejected by this Court as being in direct conflict with the intent and purpose of the Fourteenth Amendment and other decisions of this Court.

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[11] *Quaker City Cab Co* v. *Pennsylvania,* 277 U. S. 389; *Southern R. R. Co.* v. *Greene,* 216 U .S. 400; *Truax* v. *Raich,* 239 U. S. 33; *Smith* v. *Cahoon,* 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535.

ARGUMENT.

I.

The exclusion of appellant from the regular classroom and the requirement of spacial segregation solely because of race and color is in violation of the Fourteenth Amendment.

The appellant herein having been admitted to the Graduate School of the University of Oklahoma, pursuant to an order of the court below, was thereupon compelled by the appellees to physically separate himself from the other students in his classroom solely because of his race and color. He was further required by appellees to physically segregate himself in the use of library facilities and in the students' cafeteria solely because he is a colored person of Negro ancestry. The appellees, in compelling appellant to take advantage of a course of study and physical facilities in perceptible isolation, solely because of his race and color, have effected a classification, the basis of which is clearly repugnant to constitutional guarantees of equal protection.

The basic purpose and intent of the equal protection clause of the Fourteenth Amendment was to prohibit a state from denying to its Negro citizens any rights given by the state to its white citizens. *Strauder* v. *West Virginia,* 100 U. S. 303; *Shelley* v. *Kraemer,* 334 U. S. 1. Another purpose was to insure that all persons similarly situated would receive like treatment and that no special groups or classes be singled out for favorable or discriminatory treatment, *Southern Railway* v. *Greene,* 216 U. S. 400; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Maxwell* v. *Bugbee,* 250 U. S. 525.

The secondary purpose is broader in scope than the first since it is not primarily concerned with racial distinctions but with discrimination generally. In determining whether state legislation subserves the second purpose, this Court has not prohibited all, but only certain types of legislative distinctions. On the other hand, racial classifications for governmental action are subjected to a more rigid test. The racial classification in this case meets neither test.

A. The limitation on a state's right to classify for legislative purposes.

This Court in interpreting the scope of equal protection has long recognized and approved the necessity for legislative classification as an indispensable concomitant of orderly government. *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499. It has upheld reasonable classification even though incidental discrimination was an inevitable result. *Metropolitan Ins. Co.* v. *Brownell,* 294 U. S. 580; *Puget Sound Power and Light Co.* v. *Seattle,* 291 U. S. 619; *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Patsone* v. *Penn,* 232 U. S. 138; *Clark* v. *Kansas City,* 176 U. S. 114. But this Court has not, even in approving such classification, given sanction without examination and scrutiny.[12] This Court has, in accordance with this procedure applied the familiar general test of constitutionality applicable to these cases, *i. e.,* a test which requires that the legislative classification be found to be based upon some real or substantial differences between classes which are relevant to the legitimate legislative end which is the object of the statute. *Dominion Hotel* v. *Arizona,* 249 U. S. 265; *Maxwell* v. *Bugbee, supra; Continental Baking Co.* v. *Woodring,* 286 U. S. 353; *Great Atlantic Tea Co.* v. *Grojean,* 301 U. S. 412; *Queenside Hills*

[12] Tussman & ten Broek, *The Equal Protection of the Laws,* 37 Calif. Law Review 341 (1949).

Co. v. *Saxl,* 328 U. S. 80; *Kotch* v. *Board River Port Pilot Commissioner,* 330 U. S. 552; *Groessart* v. *Cleary,* 335 U. S. 464. If the differences are not reasonably perceptible, or are not relevant to the legislative end, the classification violates that which the equal protection clause secures. *Quaker City Cab. Co.* v. *Penn,* 277 U. S. 389; *Southern RR. Co.* v. *Greene,* 216 U. S. 400; *Truax* v. *Raich,* 239 U. S. 33; *Smith* v. *Cahoon,* 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Skinner* v. *Oklahoma,* 316 U. S. 535.

This formula has been consistently followed by this Court without deviation since the adoption of the Fourteenth Amendment as the most effective method of giving life and substance to the equal protection clause while at the same time leaving to the states freedom to deal with problems of everyday government.

In this case Oklahoma has singled out one group of its citizens to be segregated from all other citizens in the enjoyment of governmental facilities. This is not a case of voluntary separation on the part of either the Negro or non-Negro students, it is governmentally imposed segregation. Such a classification must either meet the test set out above or be declared unconstitutional. To test the constitutionality of this classification we must examine the objective Oklahoma is attempting to accomplish in offering educational facilities for graduate education and determine what relevance, if any, race, ancestry or skin pigmentation may have to such objective.

The Objectives of Public Education.

As a way of life, we are dedicated to a system which places reliance upon rational persuasion rather than upon force and coercion.[13] It is our belief that given a choice,

[13] For a discussion of differences between ours and a totalitarian system and discussion of national interest in elimination of racial discrimination see: Lusky, *Minority Rights and the Public Interest,* 52 Yale Law Journal 1 (1942).

our citizenry will choose the rational and wise. *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Hague* v. *C. I. O.,* 307 U. S. 496. Mr. Justice BRANDEIS, in a concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 375, stated this basic philosophy succinctly when he said:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; that in its government the deliberative forces should prevail over the arbitrary." [14]

For that reason, our society is dedicated to the fullest personal and political freedom of the individual. In order to make certain that our citizens are equipped to make rational decisions and thus maintain and preserve our democratic institutions, it is vital that through the medium of education their individual skills, values, belief in the basic tenets of democracy be developed. So important has this become that education is no longer left solely to the parent or to a few philanthropists.[15] It has become one of the

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[14] Cf. *Schneiderman* v. *United States,* 320 U. S. 118, 120 (1943):

> "While it is our high duty to carry out the will of Congress, in the performance of this duty we should have a jealous regard for the rights of petitioner. We should let our judgment be guided so far as the law permits by the spirit of freedom and tolerance in which our nation was founded, and by the desire to secure the blessings of liberty in thought and action to all those upon whom the right of American citizenship has been conferred by statute, as well as to the native born. And we certainly should presume that Congress was motivated by these lofty principles."

See also: *Baumgartner* v. *U. S.,* 322 U. S. 665; *Hartzel* v. *U. S.,* 322 U. S. 680.

[15] "The Plight of the Private Colleges and What to do About it" by Algo D. Henderson, October, 1949 issue of *The Educational Record,* published by the American Council on Education.

highest functions of state government.[16] Thus, the forty-eight states have almost uniformly undertaken the function of providing educational benefits at a minimum cost to all in order that they might endeavor to develop the fullest intellectual and moral qualities and to thereby insure the most effective participation in the responsibility and duties of citizenship.

Horace Mann described the purpose of education in a democratic society as follows:[17]

> "Education must be universal * * * The theory of our government is—not that all men, however unfit, shall be voters—but that every man, by the power of reason and the sense of duty, shall become fit to be a voter. Education must bring the practice as nearly as possible to the theory. As the children now are, so will the sovereigns soon be. How can we expect the fabric of the government to stand, if vicious materials are daily wrought into its framework. Education must prepare our citizens to become municipal officers, intelligent jurors, honest witnesses, legislators, or competent judges of legislation—in fine, to fill all the manifold relations of life. For this end, it must be universal."

Mortimer J. Adler, professor of law at the University of Chicago, states the purpose in these terms.[18]

> "Liberal education is developed only when a curriculum can be devised which is the same for all men,

[16] At common law, the parent's control over his child extended to education of the child. The parent's common law rights and duties in this regard "have been generally supplemented by constitutional and statutory provisions, and it is now recognized that education is a function of the government". 47 Am. Jur. Schools, Section 6, page 299.

[17] *Horace Mann—His Ideas and Ideals* by Joy Elmer Morgan, Natl. Home Foundation, Washington, D. C., 1936, page 98.

[18] *Education for Freedom, a Series of Radio Lectures,* sponsored and published by the Education for Freedom, Inc., New York: 1943. Other lectures by Mark Van Doren and Dr. Robert M. Hutchins, among others, also included pertinent remarks on this subject.

> and should be given to all men, because it consists in those moral and intellectual disciplines which liberate men by cultivating their specially rational power to judge freely and to exercise free will. * * *
>
> " * * * Only when all young men and women are prepared by liberal education for the responsibilities of citizenship, and the obligations of the moral and intellectual life, will the world community come into existence. Without it world peace is impossible."

Education is not only a component part of true democratic living, but is the very essence of and medium through which democracy can be effected. The intent of the framers of the Fourteenth Amendment was indicated in the 43rd Congress in 1874 by these words: " * * * that all classes should have the equal protection of American law and be protected in their inalienable rights, *those rights which grow out of the very nature of society, and the organic law of this country.*" [19] In 1943, an eminent sociologist and economist, Dr. Karl Mannheim, then Professor of Economics at London School of Economics, said:

> "Finally, there is a move towards a true democracy arising from dissatisfaction with the infinitesimal contribution guaranteed by universal suffrage, a democracy which through careful decentralization of functions allots a creative social task to everyone. The same fundamental democratization claims for everyone a share in real education, one which no longer seeks primarily to satisfy the craving for social distinction, but enables us adequately to understand the pattern of life in which we are called upon to live and act." [20]

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[19] Congressional Globe, Forty-third Congress, May 22, 1874.

[20] Mannheim, Karl, "Diagnosis of Our Time", Oxford University Press, 1944, page 177.

Finally, in 1947, seventy-three years after the 43rd Congress, the President's Committee on Higher Education took an unequivocal position against segregation in education. In terms of a definition of the role played by education the Report said:

> " * * * the role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or to weaken their liberties." [21]

Mr. Justice FRANKFURTER stated in *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 216, 217:

> "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."

It is, therefore, evident that the objective of public education is to equip our citizens with information and skills in order that they may effectively participate in our democratic processes. Public education is no longer a privilege of the few. It is no longer a minor function of government. It is one of the most important of governmental functions.

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[21] Report of the President's Commission on Higher Education, *Higher Education for American Democracy,* Govt. Printing Office, Washington, 1947, Vol. I, page 5.

Neither Race, Ancestry Nor Skin Pigmentation of Students Has Any Pertinence to the Objectives of Public Education.

The requirement of spacial segregation in education in Oklahoma is based solely on race or color, "simply that and nothing more." Solely because appellant is a Negro he has been denied rights enjoyed as a matter of course by all other qualified students.[22] Appellant's individual rights are lost in the racial group classification.

Appellees have so far made no effort to show any relevancy between compulsory racial segregation and the lawful objectives of public education. On the other hand, it is evident that the State of Oklahoma, while professing equality within a segregated system, has in fact consistently maintained the objective of inequality insofar as Negroes are concerned. Prior to 1948, Negroes were completely excluded from graduate and professional training.[23] After the decision in the *Sipuel* case the appellees continued the exclusion of Negroes from graduate and professional schools. The conditions under which appellant was admitted after the first order in this case was a continuation of the same policy of inequality.

The practice of racial segregation has sometimes been rationalized by the claim that there are inherent differences between the races. This essential racist view assumes that minorities belong to inferior races, and that racial intermixture results in the degeneracy of the superior race. After an exhaustive study of all scientific data referring to

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[22] Counsel for all parties agreed that: "the only group of citizens attending the University of Oklahoma who are segregated are Negroes" (R. 63).

[23] *Sipuel* v. *Board of Regents, et al.,* 332 U. S. 631.

the intellectual capacity of different racial groups, an expert witness testified in another pending case to this effect:

> "The conclusion then, is that differences in intellectual capacity or inability to learn have not been shown to exist as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice."[24]

One of the leading sociologists in the field of race relations has pointed out: "there is not one shred of scientific evidence for the belief that some races are biologically superior to others, even though large numbers of efforts have been made to find such evidence."[25] There is no rational basis, no factual justification for segregation in education on the grounds of race or color. The racist premise is completely invalid, and no act of segregation based upon it can be upheld as reasonable.[26]

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[24] Testimony of Dr. Robert Redfield in *Sweatt* v. *Painter, et al.,* October Term, 1949, No. 44.

[25] Rose, Arnold M., *America Divided: Minority Group Relations In the United States,* published by Knopf, New York City, 1948.

[26] Otto Klineberg, *Race Differences,* page 343, 1935; Montague, M. F. A., *Man's Most Dangerous Myth—The Fallacy of Race,* Columbia University Press, New York, 1945, page 188, "The Black and White of Rejections for Military Service", American Teachers Association, August, 1944, page 29; Otto Klineberg, *Negro Intelligence and Selective Migration,* New York, 1935; J. Peterson & L. H. Lanier, *Studies in the Comparative Abilities of Whites and Negroes,* Mental Measurement Monograph, 1929; W. W. Clark, *Negro Children,* Educational Research Bulletin, Los Angeles, 1923.

Compulsory Racial Segregation in Public Education Is an Arbitrary and Unlawful Classification Within the General Limitations Upon Right of States to Classify Its Citizens.

This Court had no hesitancy in striking down compulsory residential segregation predicated upon racial theories:

> "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited."[27]

State ordained segregation having no rational foundation is a particularly invidious policy which needlessly penalizes Negroes, demoralizes others, and tends to destroy democratic institutions. If the racial factor has no scientific basis, then the ills suffered as a result of racial segregation in graduate education are doubly harmful. We have pointed out above the purposes and objectives of education. In light of those objectives, segregation is an abortive factor to the full realization of the objective of education.

First, segregation prevents both the Negro and white student from obtaining a full knowledge and understanding of the group from which he is separated, thereby infringing upon the inherent rights of an enlightened citizen. It has been scientifically established that no child at birth pos-

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[27] *Buchanan* v. *Warley,* 245 U. S. 60, 81; see also: *Shelley* v. *Kraemer, supra.*

sesses either an instinct or even a propensity towards feelings of prejudice or superiority. These attitudes, when and if they do appear, are but reflections of the attitudes and institutional ideas evidenced by the adults about him.[28] The very act of segregation tends to crystallize and perpetuate group isolation, and serves, therefore, as a breeding ground for unhealthy attitudes.[29]

Secondly, a feeling of distrust for the minority group is fostered in the community at large, a psychological atmosphere which is most unfavorable to the acquisition of a proper education. Still another result of segregation in education with respect to the general community is that it accentuates imagined differences between Negroes and others.[30]

The uncontradicted testimony of the appellant in this case shows the effect of racial segregation upon him in his effort to obtain an education (R. 58-63). As a matter of fact, the effect on McLaurin is the inevitable result of compulsory segregation and there is a corresponding harmful

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[28] Robert E. Park, *The Basis of Prejudice, The American Negro,* the Annals, Vol. 140, pages 11-20 as cited in *The Negro in the United States* by E. Franklin Frazier, McMillan Co., New York, 1949, page 668; Elsworth Faris, The chapter on "The Natural History of Race Prejudice", from *The Nature of Human Nature,* New York, 1937, page 354.

[29] Bruno Lasker, *Race Attitudes in Children,* New York, 1949, page 48; Caroline F. Ware, "The Role of the Schools in Education for Racial Understanding", 12 Journal of Negro Education No. 3, pp. 421-431 (1944); Robert R. Moton, *What the Negro Thinks* (Garden City, N. Y., 1929), page 13; Howard Hale Long, "Psychogenic Hazards of Segregated Education of Negroes", The Journal of Negro Education, Vol. IV, No. 3, July, 1935, page 343; see also: Charles S. Johnson, Patterns of Segregation (1943), Pt. II, "Behavioral Response of Negroes to Segregation and Discrimination".

[30] As stated by Gunnar Myrdal in *An American Dilemma,* New York, 1944, Vol. 1, page 625: "But they are isolated from the main body of whites, and mutual ignorance helps reinforce segregative attitudes and other forms of race prejudice."

effect on the non-segregated group and society in general. Deutscher and Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion,* 26 Journ. of Psychology 259 (1948); Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do to the Individual and to His Relationships With Other People?* 29 Mental Hygiene 189 (1945); McLean, *Psychodynamic Factors in Racial Relations,* 244 Annals of the American Academy of Political and Social Science 159, 161 (March, 1946).

Qualified educators, social scientists, and other experts have uniformly expressed their realization of the fact that "separate" is irreconciliable with "equality".[31] There can be no equality since the very fact of segregation establishes a feeling of humiliation and deprivation to the group considered to be inferior.[32]

Probably the most irrevocable and deleterious effect of segregation upon the minority group is that it imposes a

[31] Gunnar Myrdal, *An American Dilemma,* New York, 1944, Vol. 1, page 580; Charles S. Johnson, *Patterns of Segregation,* New York, 1943, page 4, 318; Charles S. Mangum, Jr., *The Legal Status of the Negro,* Chapel Hill, 1940; Report of the President's Committee on Civil Rights, "To Secure These Rights", Government Printing Office, Washington, 1947; Report of the President's Commission on Higher Education, "Higher Education for American Democracy", Vol. I, Government Printing Office, Washington, 1947. Max Deutscher and Isidor Chein (with the assistance of Natalie Sadigur), "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion". The Journal of Psychology, 1948, 26, 259-287.

[32] Carey McWilliams, "Race Discrimination and the Law", Science and Society, Vol. IX, No. 1, 1945: 56 Yale Law, 1947, pages 1051-1052, 1059; Bond, "Education of the Negro in the American Social Order", 1934, page 385; Moton, "What the Negro Thinks", 1922, page 99; Bunche, "Education in Black and White", 5 Journal of Negro Education, 1936, page 351; Long, "Some Psycho-Genic Hazards of Segregated Education of Negroes", 4 Journal of Negro Education, 1935, pages 336-343; Henrich, "The Psychology of Suppressed People", 1937, page 52; Dollard, "Caste and Color in a Southern Town", 1937, pages 269, 441; Young, "America's Minority Peoples", 1932, page 585.

badge of inferiority upon the segregated group.[33] This badge of inferior status is recognized not only by the minority group, but by society at large. As Myrdal has pointed out:

> "Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington's famous remark that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white southern and northern observers. Throughout this book, we have been forced to notice the low economic, political, legal and moral standards of Southern whites—kept low because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain 'superior' to the held-down Negroes." [34]

A definitive study of the scientific works of contemporary sociologists, historians and anthropologists conclusively document the proposition that the intent and result of segregation are the establishment of an inferiority status. And a necessary corollary to the establishment of this value

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[33] Hugh H. Smythe, "The Concept of 'Jim Crow' ", *Social Forces,* Vol. 27, No. 1, Oct., 1948, page 48: " 'Jim Crow' as used in a sociological context thus indicates for a specific social group the Negro's awareness of his badge of inequality which he learns through the operation of a 'Jim Crow' concept in his every day living. This pattern of existence has become so much a part of the nation's social structure that it has become synonymous with the words 'segregation' and 'discrimination', and at times when 'Jim Crow' is indexed some authors have indexed it as a cross reference for these terms."

[34] Gunnar Myrdal, op. cit., Vol. I, page 644.

judgment is the deprivation suffered by both the minority and majority groups.[35]

[35] Baruch, *Glass House of Prejudice,* William Morrow and Co., 1946, pages 66-76, Gallagher, Buell G., *American Caste and the Negro College,* Columbia University Press, 1938, page 94: "Wherever possible, the caste line is to keep *all* Negroes below the level of the lowest whites. This is the first and deepest meaning of 'separate but equal' ". Page 105: "Not the least important aspect of the caste system is its results in seriously malconditioning the individuals whose psychological growth is strongly affected by a caste divided society. These influences are not limited to the Negro caste. They stamp themselves upon the dominant caste as well"; LaFarge, John, *The Race Question and the Negro,* New York, Longmans Green & Co., 1945, page 159: "Segregation, as a compulsory measure based on race, imputes essential inferiority to the segregated group. Segregation, since it creates a ghetto, brings in the majority of instances, for the segregated group, a diminished degree of participation in those matters which are ordinary human rights, such as proper housing, educational facilities, police protection, legal justice, employment, * * * Hence it works objective injustice. So normal is the result for the individual that the result is rightly termed inevitable for the group at large"; James, *"The Philosophy of William James",* 1925, page 128: "Properly speaking, *a man has as many social selves as there are individuals who recognize him* and carry an image of him in their mind. To wound any one of these images is to wound him"; Loescher, Frank S., *"The Protestant Church and the Negro",* Association Press, 1948. "(Segregation) is, in itself, an implication of inferiority, an inferiority not only of status but of essence, of being"; Thompson, "Mis-education for Americans", Survey Graphic, Vol. 36, Jan., 1947, page 119: "Education for segregation, if it is to be effective, must perpetuate beliefs which define the Negro's status as inferior, which emphasize superficial differences, or which in any way suggest that the Negro is a lower order of being and therefore should not be expected to be treated like a white person". Page 120: "Mis-education for segregation has deleterious effects on both Negroes and whites. It requires mental and emotional gymnastics on both sides to adjust (or attempt to adjust) to the many logical and ethical contradictions of segregation. The situation is crippling to the personalities of both Negro and white Americans"; Ware, "The Role of the Schools in Education for Racial Understanding", 12 Journal of Negro Education, 421 (1944), page 424: "A segregated school system presents almost insuperable obstacles. In such a system the social situations may be made worse by vicious attitudes, or uplifted by sympathetic ones. But the sheer fact of segregation stands as an eternal reminder to every white child, every day, that the Negro or Mexican children are being kept away from his school"; *Segregation in Washington,* A Report of the National Committee on Segregation in the Nation's Capital, November, 1948, pages 76, 77.

There is no compensatory value to society as a result of the ills suffered from segregation. As we have pointed out above, segregation in education has produced deleterious effects upon both the majority and minority groups. We have similarly found that the only logical premise upon which segregation *could* be based—*i. e.*, the existence of differences in intellectual ability as between the races—has been completely discredited by scientific studies. It would appear then, that the only remaining rationale for segregation is that although it might be admitted that racial segregation has no validity, the prevailing customs and mores require that segregation be broken down in a gradual manner.[36] However, all available data which refers to instances where segregation did exist but was subsequently broken down, controvert this assumption.

The experiences of states with a racial and social policy similar to that of Oklahoma demonstrate that this policy may be abandoned at least at the graduate and professional level to the advantage of all concerned. The University of Maryland has admitted Negroes into its law school since 1935. Negroes have freely attended the University of West Virginia since 1939. The University of Arkansas in 1947 admitted a Negro to its law school on a segregated basis. Before the term had ended, it had abandoned the segregation, and now Negroes are attending its law school and School of Medicine just like any other students. The University of Delaware was opened to Negroes, as is the University of Kentucky. In September, 1949, a Negro was admitted into the University of Texas School of Medicine. In all instances there was considerable initial resistance by governmental officials to the abandonment of segregation.

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[36] See Note 46 Mich. L. Rev. 639 (1948).

Yet in each instance the experiment has been beneficial and successful.[37]

In the absence of any scientific basis for enforced racial segregation, there can be no relationship between alleged racial differences and the lawful objectives of public education. Applying the recognized standard for measuring the constitutionality of general classifications it is clear that the classification in this case fails to meet that standard.

B. Classifications by governmental agencies based solely on race or ancestry are particularly odious to our principles of equality.

The compulsory racial segregation in this case not only fails to meet the test as to general state classifications but it is also in direct conflict with the special test as to racial and religious classifications. As to those matters which are not usually the subject of state regulation because specifically prohibited by the federal constitution, this Court has required the application of another and more stringent examination into constitutionality, *i. e.,* there must be a conclusive showing of actual differences and pertinence must be justified.[38] *United States* v. *Carolene Products Co.,*

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[37] Editorial Note, *Journal of Negro Education,* December, 1949, pages 5-6. See also: Charles H. Thompson, *Separate But Not Equal, The Sweatt Case,* 33 Southwest Review, 105, 111 (1948). Frazier, *The History of the Negro in the United States* (1950), chap. 17.

[38] It is sometimes said that where the governmental action is based upon race or color, there is presumption of unconstitutionality. See Tussman and ten Broek, op. cit. *supra* footnote 12; Note, 36 Col. L. Rev. 283 (1936); 40 Col. L. Rev. 531 (1940); 41 Yale L. J. (1931); Hamilton & Broden, *The Special Competence of the Supreme Court,* 50 Yale L. J. 1319; 1349-1357 (1941). This appears to be similar to the Court's placement of freedom of speech, press, assembly and religion in a preferred position. See, *e. g., Marsh* v. *Alabama,* 326 U. S. 501, 508; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 739.

304 U. S. 144, note 4; *Hirabayashi* v. *United States,* 320 U. S. 81. This Court has allowed invasion of this latter area only when an overwhelming public necessity was clearly shown to exist. *Korematsu* v. *United States,* 323 U. S. 214; *Hirabayashi* v. *United States, supra.* In the absence of an overwhelming public necessity, this Court has never allowed governmental regulation of this constitutionally prefererd area and has nullified all such unreasonable and irrational classifications.

The end sought herein by the Oklahoma legislature and the appellee is the higher education of its citizens. It is now well established that a state in providing higher education for its citizenry must afford equal protection and equal opportunity to all under constraint of the equal protection clause of the Fourteenth Amendment. Therefore what relevancy race has to the objective sought and what are the real differences between appellant and his classmates which justify the classification here made are the questions to which this Court would ordinarily seek answers. In this instance, however, it is entirely unnecessary to seek an answer, for the appellees admit that appellant's race is the only difference between appellant and his classmates and they have never contended that race has any relevancy to higher education. The usual inquiry into these matters is thus eliminated and the question involved is reduced to an inquiry as to whether race or color alone may be made the basis of a classification by the state.

This Court has said that race or color may not, in view of the equal protection clause of the Fourteenth Amendment, be made the basis of classification by the state. Distinctions among citizens under contraint of state power which are based solely upon the race or color of such citizens have incurred such constitutional odium that they are

presumptively void. This Court has, in recent decisions, vigorously disparaged and censored them.

In *Hirabayashi* v. *United States, supra,* Mr. Justice STONE speaking for the Court said at 100:

> "Distinctions between citizens solely because of their ancestry are by their very nature odius to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Mr. Justice MURPHY concurring at page 110, said:

> "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals."

In *Nixon* v. *Herndon,* 273 U. S. 536, Mr. Justice HOLMES stated for the Court at 541:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is * * * clear * * * that color cannot be made the basis of a statutory classification."

In *Steele* v. *L. N. R. R. Co.,* 323 U. S. 192, Mr. Justice MURPHY concurring with the majority which had condemned the use of Congressional authority to discriminate against Negro workers said at 209:

> "Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate. * * * A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn * * *."

In *Korematsu* v. *United States,* 323 U. S. 214, Mr. Justice BLACK said at 216:

> "* * * all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." [39]

In *Oyama* v. *California,* 332 U. S. 633, Justices BLACK and DOUGLAS concurring with the majority added at 649:

> "* * * we have recently pledged ourselves to cooperate with the United Nations to 'promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

In *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, the Court said via Mr. Justice BLACK at 418:

> "It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."

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[39] See: *Shelley* v. *Kraemer, supra; Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210. Although not directly in point, are also links in the development of this principle.

The only occasions on which this Court has sustained such classifications have been those occasions on which it has been conclusively demonstrated that an overwhelming public necessity compelled it. *Hirabayashi* v. *United States, supra, Korematsu* v. *United States, supra.* No overwhelming public necessity is claimed here.[40]

While Chief Justice TANEY, in the case of *Dred Scott* v. *Sandford,* 60 U. S. 393, 407, decreed that Negroes had "for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect"; this Court after the adoption of the Fourteenth Amendment held that the Amendment was framed and adopted to protect the colored race, which had long been regarded as an "inferior and subject race" against all state action designed "to perpetuate the distinctions that had before existed". *Strauder* v. *West Virginia,* 100 U. S. 303, 306.

The separation of McLaurin from the other students can have but one purpose—to give notice to McLaurin, his fellow students and the world at large, that the State of Oklahoma has decreed that McLaurin belongs to an "inferior order" and is "altogether unfit to associate with the white race" in their mutual efforts to secure an education. This position while in complete accord with the doctrine of the *Dred Scott* case is in direct opposition to the purpose and intent of the Fourteenth Amendment as set forth in *Strauder* v. *West Virginia* and more recent cases cited above.

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[40] The Court below sustained the classification relying solely upon some vague, undefined notions of state public policy.

C. The public policy of Oklahoma of requiring racial segregation in graduate public education is in direct conflict with the federally protected right of appellant to be free from state imposed racial distinctions.

The decision of the lower court has a very narrow basis: "We conclude, therefore, that the classification, based upon racial distinctions, as recognized and enforced by the regulations of the University of Oklahoma, rests upon a reasonable basis, having its foundation in the public policy of the State, and does not therefore operate to deprive this plaintiff of the equal protection of the laws" (R. 42).

The preceding sections have discussed the absence of rational basis for the classification in this case. As to the question of state public policy in regard to peace and order, this Court has consistently held that this is no justification for the denial of constitutional rights to which one would otherwise be entitled. In *Buchanan* v. *Warley,* 245 U. S. 60, the State of Kentucky attempted to justify its ordinance segregating whites and Negroes into separate blocks on the ground that unless this was done riots and disorder might result. That argument this Court dismissed with this statement:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution," page 81.

In *Shelley* v. *Kraemer,* 334 U. S. 1, this Court reaffirmed this principle that the preservation of public peace and good order does not suffice to excuse unconstitutional governmental action which effects a classification or distinction based upon race. See also: *Bridges* v. *California,* 314 U. S. 252; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Morgan* v. *Virginia,* 328 U. S. 373; *Thornhill* v. *Alabama,* 210 U. S. 88; *Whitney* v. *California, supra.*

II.

The separate but equal doctrine should be subjected to critical analysis and if found to be applicable to this case should be overruled.

The District Court held that:

> "The Constitution from which this court derives its jurisdiction does not authorize us to obliterate social or racial distinctions which the State has traditionally recognized as a basis for classification for purposes of education and other public ministrations. The Fourteenth Amendment does not abolish distinctions based upon race or color, nor was it intended to enforce social equality between classes and races. * * * It is only when such distinctions are made the basis for discrimination and unequal treatment before the law that the Fourteenth Amendment intervenes. * * * It is the duty of this court to honor the public policy of the State in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land" (R. 42).

The cases cited by the Court in support of the separate but equal doctrine were: *Plessy* v. *Ferguson,* 163 U. S. 537; *Cummings* v. *United States,* 175 U. S. 528; *Gong Lum* v. *Rice,* 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

A. The problem with which *Plessy* v. *Ferguson* dealt is fundamentally different from the problem presented here.

In *Plessy* v. *Ferguson,* a Louisiana statute, which required the separation of the races in railroad coach accommodations, was held to be a proper exercise of state au-

thority under the Fourteenth Amendment as long as the facilities provided for Negroes were equal to those provided for whites. It is true that the Court cited several state cases condoning racial segregation in educational facilities, but the decision itself was necessarily limited to the problem before it.

Equality of transportational facilities presents an entirely different question from that of equality of educational opportunities, which is involved here. In transportation, the primary considerations are the type of comfort and convenience, courtesy, fare, speed, time of arrival and departure. In determining whether equality of opportunity has been offered in education, one must consider the learning process, the types of offerings provided, the necessity of education to the development of citizenship, loyalties and devotion to democratic beliefs, and the development of an individual as a personal and national asset; in short the whole function of education in a democracy. This necessarily requires consideration of psychological, sociological and spiritual factors in addition to pure physical measurements. Moreover, even as to transportation the application of *Plessy* v. *Ferguson,* has been considerably curtailed by *Morgan* v. *Virginia, supra,* and *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28.[41]

It is to be remembered that *Plessy* v. *Ferguson* came to this Court for review of a judgment on a demurrer and that the sole question for consideration was a bare legal proposi-

[41] We believe that the Court's decision in *Plessy* v. *Ferguson,* even as limited to the subject matter of transportation, was wrongly decided. The pernicious effect of that decision on transportation, as has been stated above, has been considerably curtailed by virtue of *Morgan* v. *Virginia, supra,* and *Bob-Lo Excursion Co.* v. *Michigan, supra.* It is our hope that decision by this Court in *Henderson* v. *United States,* October Term, 1949, now pending, will overrule that case.

tion as to the extent of state power. When that case was decided, this Court had had no experience in dealing with the type of question raised, and might have believed in all sincerity that assimilation of the Negro in American culture was impossible and that the experiment which the Fourteenth Amendment was launching was liable to end in tragic failure. Experience has since demonstrated that such fears were groundless, and that individual development is determined by opportunity and not by race. In addition, the Court had before it no facts to show that racial discrimination would be the natural result of the application of the "separate but equal" formula, and it presumed that no such discriminatory effect would result. There this Court said at 550, 551:

> " * * * so far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and the traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislature."

The record in this case, on the other hand, conclusively shows that the separation of the races in Oklahoma with regard to the availability of graduate education produces in-

equality of treatment and of opportunity, and that such inequality is a direct concomitant of this separation. Whatever may be the view as to the correctness of the decision in *Plessy* v. *Ferguson,* there are such intrinsic differences between the question dealt with there and those now being raised that it will be of little assistance in determining whether the equal protection clause prohibits compulsory racial segregation in graduate education.

B. This is not an appropriate case for the application of the doctrine of *stare decisis.*

If *Plessy* v. *Ferguson,* and the other cases relied upon by the Court below are definitive of the law presently applicable to this case, we would urge that they be discarded in light of changed conditions and of the necessity for different rules to meet new conditions. As Mr. Justice DOUGLAS said:

> "The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts." [42]

We submit, however, that the cases cited by respondents do not govern this case, and that, therefore, we do not need to meet the problem of the impact of the doctrine of *stare decisis* on the question raised herein.

A discussion of the cases will demonstrate, we believe, that they have no pertinence to the instant problem.

Cummings v. *Board of Education supra,* is cited as adopting the "separate but equal" formula in the face of

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[42] Douglas, *Stare Decisis,* 49 Col. L. Rev. 735 (1949).

the fact that the Court specifically states that this problem was not before it.

> "It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate, and grammar schools, in the management of which the rule as to the separation of the races is enforced. We must dispose of the case as it is presented by the record."[43]

Berea College v. *Kentucky*, 211 U. S. 45, involved the constitutionality of a Kentucky statute which made it unlawful for any person or corporation to operate a school or college which received both Negroes and whites as pupils. This Court upheld the constitutionality of the statute but was careful to state that it was not considering the validity of its application to individuals.[44] Therefore, at most, this decision stands for the proposition that a state may prohibit corporations from accepting students of both races in the same institution without doing violence to the guarantees of the Fourteenth Amendment.[45] Even this proposition now seems questionable. At any rate, there is little doubt that a state may exercise greater power in its dealings with corporations than it is permitted in its relations with an individual.

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[43] At pages 543, 544.

[44] At page 54.

[45] In granting privileges and advantages which it may withhold, a state may exact conditions which it, under ordinary circumstances, would be unable to do. See: *Hamilton* v. *Board of Regents*, 293 U. S. 245.

In *Gong Lum* v. *Rice, supra,* a Chinese child was denied admission to a white school in her district. She contended that the state could not group her with Negroes for the purpose of determining what public school she could attend. No question was raised concerning the power of the state to adopt and enforce a racial classification.[46] The gravamen of plaintiff's contention was that if whites had the authority and the power to protect themselves against contact with Negroes, who were regarded as peculiar and inferior beings, then Chinese should have the same prilivege.

> "Of course it is the white, or Caucasian race, that makes the laws and construes and enforces them. It thinks that in order to protect itself against the infusion of the blood of other races its children must be kept in schools from which other races are excluded. The classification is made for the exclusive benefit of the law making race. * * *
>
> "If there is danger in the association [with Negroes], it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against * * * "[47]
>
> " * * * The White race protects itself against conditions that would require social contact [with Negroes]. This, as the Mississippi courts say, to preserve the integrity of the Caucasian race. But has not the Chinese citizen the same right to protection that the Causasian citizen has? * * * Can we arrogate to ourselves the superior right to so organize the public school system as to protect our racial integrity without regard to the interests or welfare of citizens of other races?"[48]

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[46] Brief of Plaintiff-in-Error filed here at page 14 concedes this authority.

[47] Id. at 9 and 10.

[48] Id. at 13, 14.

> "It appears, too, from the discussions in the cases and by the note writers that the courts have taken cognizance of the fact that the [Negro] is not desired as a social equal by he (sic) members of the White race, and, therefore, the White race has made its laws with a view to preventing such social contact as would have a tendency to foster social relations and social equality. But this same precaution, taken with respect to its own children, is omitted when it comes to dealing with the children of the other races." [49]

This Court felt that the question raised had been settled by *Plessy* v. *Ferguson.* In that we think it was in error. Mr. Chief Justice TAFT was of the opinion, apparently, that once plaintiff conceded that the state could classify on the basis of race, which petitioner denies in this case, there was no basis for the argument that it could not classify Chinese and Negroes together for the purpose of receiving public educational advantages. At any rate, *Gong Lum* v. *Rice,* cannot be a precedent for the application of the *Plessy* v. *Ferguson* formula in the field of education when that question was not before the Court.

In *Missouri ex rel. Gaines* v. *Canada, supra,* the question presented was whether the State of Missouri had denied to petitioner the equal protection of the laws in excluding him, because he was a Negro, from the only law school maintained by the state. That same question was initially presented to the court below in this case. Although the "separate but equal doctrine" was mentioned, the Court only held that it was a denial of equal protection to provide edu-

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[49] Id. at 17.

cational advantages for whites and deny these advantages to Negroes. That decision is no authority for the contention that the application of the "separate but equal" doctrine to a state's educational system complies with the requirements of the Fourteenth Amendment.

In *Sipuel* v. *Board of Regents, supra,* this Court decided that a state was under an obligation to afford to Negroes whatever educational advantages it offered whites and at the same time. In the argument here, counsel stated that the constitutionality of the state's segregation laws was not an issue in the case. For that reason when an original writ of mandamus was sought in the same case, *sub nom. Fisher* v. *Hurst,* 333 U. S. 147, on the grounds that the setting up of a segregated school was a denial of equal protection, the Court refused to consider the question.

In none of the cases, therefore, has the "separate but equal doctrine" been in fact applied to determine the reach of the equal protection clause in the relationship of a state to the individual. Moreover, in none of these cases has the doctrine been reexamined. There are no precedents, therefore, to which this Court must give weight which hold that the "separate but equal" doctrine is a valid measure of the individual's entitlement to equal treatment with respect to the educational advantages a state offers. Therefore, we are left only with *Plessy* v. *Ferguson,* which, as we have pointed out, did not involve educational facilities, as a precedent for the application of the "separate but equal doctrine" in determining the reach of state power under the limitations of the Fourteenth Amendment. And, it is submitted, that case is not applicable to this problem.

III.

If this Court considers *Plessy* v. *Ferguson* applicable here, that case should now be reexamined and overruled.

We have set out in a preceding section of this brief the reasons for our contention that *Plessy* v. *Ferguson* is not pertinent to the issues herein raised, and that decision may be reached here without its being considered. However, if the Court should be of the opinion that decision here cannot be reached without disposing of *Plessy* v. *Ferguson*, then, we submit, *Plessy* v. *Ferguson* should be reexamined and overruled.

A. In *Plessy* v. *Ferguson* the Court did not properly construe the intent of the framers of the Fourteenth Amendment.

1. *The Court improperly construed the Fourteenth Amendment as incorporating a doctrine antecedent to its passage and a doctrine which the Fourteenth Amendment had repudiated.*

In *Plessy* v. *Ferguson* the Court was required to interpret the recently adopted Fourteenth Amendment. In finding its intent and purpose a method was used which was both unusual and fallacious. A series of state cases, but chiefly *Roberts* v. *Boston*, 5 Cush. (Mass.) 198, were cited as sources for reading the "separate but equal" formula into the Fourteenth Amendment.[50] In that case, decided in

[50] Other state cases cited include *People* v. *Gallagher*, 93 N. Y. 438; *Ward* v. *Flood*, 48 Cal. 36; *State, Garnes* v. *McCann*, 21 Ohio St. 210; *Lehew* v. *Brummell*, 103 Mo. 546; *Cory* v. *Carter*, 48 Ind. 337; *Dawson* v. *Lee*, 83 Ky. 49. It is interesting to note that all these states have now abolished segregation in public schools with the exception of Kentucky. Even there, however, Negroes are attending the graduate and professional schools of the University of Kentucky.

1849, prior to the adoption of the Fourteenth Amendment, a Negro girl contended that Boston authorities could not require her to attend a segregated school.[51] The Supreme Court of Massachusetts held that her exclusion from the regular school did not violate any of her rights under the state constitution, since the city had made provision for her education at a separate school equal to the school maintained for whites. This case is the basic source for the finding in *Plessy* v. *Ferguson* that the Fourteenth Amendment condoned racial segregation on a "separate but equal" basis.

It should be remembered that when *Roberts* v. *Boston, supra,* was decided, it was believed that Negroes were inferior sub-human beings who could never be equal to whites, and Mr. Chief Justice TANEY in *Scott* v. *Sandford,* 19 How. 393, wrote that belief into the fundamental law.[52]

The Thirteenth, Fourteenth and Fifteenth Amendments repudiated the Dred Scott decision. These constitutional provisions were primarily intended to raise the Negro to a status equal to that of whites, to free and protect him from any stigma, degradation or discrimination which his race, color or previous condition of servitude might otherwise invite. *Strauder* v. *West Virginia, supra.* Yet in interpreting one of the constitutional provisions defining this new status, the *Plessy* v. *Ferguson* Court looked for its intent and meaning in a pre-Fourteenth Amendment philosophy—a philosophy which the new Amendment specifically repudiated.[53] Since these were new rights which had

[51] Her attorney was Charles Sumner, later one of the persons chiefly responsible for drafting and steering through Congress the Thirteenth, Fourteenth and Fifteenth Amendments and Civil Rights Legislation passed thereunder.

[52] Historians credit this decision as one of the causes of the Civil War. See: Frazier, op. cit. *supra* note 37.

[53] See Cong. Globe, 42nd Cong., 2d Sess. 3261 (1872); Cong. Globe, 43rd Cong., 1st Sess. 4081, 4082, 4116 (1874).

been created, the intent of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments should have been the primary sources for determining their meaning and purpose. Had this method been followed, modern scholars are of the opinion that the Court would necessarily have concluded that the "separate but equal" doctrine was directly contrary to objectives which the Fourteenth Amendment was meant to accomplish.[54]

2. *The framers of the Fourteenth Amendment and of the contemporaneous civil rights statutes expressly rejected the constitutional validity of the "separate but equal" doctrine.*

This Court often recognizes the pertinence and value of an analysis of the intent of the framers of constitutional and statutory law in aid of their interpretation and application.[55]

Accordingly, it is appropriate in reevaluating the "separate but equal" doctrine as enunciated in *Plessy* v. *Ferguson* to refer directly to the official statements of the men who were responsible for the drafting of the Fourteenth Amendment and the legislation passed shortly thereafter to implement it.

It became clear shortly after the ratification of the Thirteenth Amendment that it was too limited in scope to

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[54] The brief on the merits of the Committee of Law Teachers Against Segregation in Legal Education filed as *amici curiae* in the case of *Sweatt* v. *Painter,* October Term, 1949, No. 44, does a careful and comprehensive analysis of the question. It is their conclusion that the framers of the Fourteenth Amendment meant to prohibit segregation. *Tussman & ten Broek,* opt. cit. *supra* note 12, at 342, *et seq.,* indicate that they have reached the same conclusion. See also: Note, 49 Col. L. Rev. 629 (1949) to the same effect. Needless to say we believe that Mr. Justice HARLAN'S dissent in *Plessy* v. *Ferguson* was the correct approach to the question.

[55] See, *e. g., United States* v. *American Trucking Assn.,* 310 U. S. 534; *The Church of the Holy Trinity* v. *United States,* 143 U. S. 457.

insure that the Negro would be able to achieve the equality and freedom from discrimination which were among its major purposes.[56] The Congress in 1866 set about combatting the so-called Black Codes enacted by the southern states, which limited the rights of Negroes to own property, institute law suits, testify in any proceedings, and imposed more severe penalties on Negroes than on whites for the same offenses. This legislative effort culminated in the Civil Rights Act of 1866, but in the process of its enactment the Congress became involved in a complicated semantical debate over the meaning of the term "civil rights". The bill itself emerged as a specific corrective only to certain named abuses and failed to resolve the general problems of equality and segregation.[57]

Eventually, it became apparent through the debates on the Civil Rights Act of 1866 that a new constitutional amendment was necessary to eliminate all "discrimination between citizens on account of race or color in civil rights".[58] To avoid the interpretative refinements of "civil rights" which had plagued the Congress, the more comprehensive "equal protection of the laws" was used as the key phrase for the statement of the basic principle.

Little can be found in the congressional debates relating to the Amendment itself which throws any light on the questions of interpretation here involved. The Amendment passed both houses easily. But the fifth section of the Amendment authorized implementary legislation, and by the time the Amendment was ratified new waves of discriminatory state legislation throughout the South required the 42nd Congress to face the task of shaping new practical statutory remedies. The extended debates of this Congress

[56] Flack, *The Adoption of the Fourteenth Amendment,* Ch. 1 (1908).

[57] Id., pages 21, 25, 29.

[58] Cong. Globe, 39th Cong., 1st Sess., 1290, 1293 (1866).

and of its successor, which finally carried through the passage of the Civil Rights Act of 1875,[59] are of great value in ascertaining the contemporary views and the "constitutional intent" of the men who drafted the Amendment.[60] The public statements of these men are particularly persuasive in respect to the "separate but equal" doctrine, for this question was clearly presented, extensively debated, and conclusively resolved in these hearings. If *Plessy* v. *Ferguson, supra,* is the foundation of the theory of civil rights, which holds that a Negro is afforded the equal protection of the laws if he gets merely a technical, segregated "equality", then it is highly relevant here to go behind that decision in order to demonstrate that the men who were responsible for the Fourteenth Amendment and its accompanying legislation expressly rejected the theory and all of its implications.

The bill sponsored by Senator Sumner of Massachusetts was primarily concerned with the prohibition of discrimination in conveyances, inns, theatres and schools. By its language it was explicit that no segregation, no separation of these facilities was to be countenanced. It was pointed out many times that the bill did not permit the establishment of separate facilities even though they might be "equal".

Senator Sumner said:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the

[59] The bill passed the Senate on February 27, 1875, by a vote of 36 to 26, and was approved by the President on March 1st. See Flack, op. cit. *supra* note 56, at 277.

[60] See Fairman and Morrison, *Does The 14th Amendment Incorporate the Bill of Rights,* 2 Stanford Law Rev. 5 (1949).

> contrivance by which a transcedent right, involving a transcendent duty, is evaded * * * Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instance with the spirit of Slavery, and this decides its character. It is Slavery in its last appearance." [61]

Senator Pease of Mississippi at a later date, shortly before the bill was passed in the 43rd Congress, states in unequivocal terms:

> "The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. * * * There has been a great revolution in public sentiment in the South during the last three or four years, and I believe that today a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education. * * * I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a state south of the Mason and Dixon's line that will abolish its school system. * * * I say that whenever a state shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made it is a distinction the intent of which is to foster a commitment of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.
>
> " * * * because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination." [62]

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[61] Cong. Globe, 39th Cong., 1st Sess., 382, 383 (1865).
[62] Cong. Globe, 43rd Cong., 1st Session, page 4153 (1874).

In the course of these discussions of the "separate but equal" doctrine its proponents urged upon their colleagues various state court decisions which had followed it, viz., *Roberts* v. *Boston* and *State, Garnes* v. *McCann, supra.* These cases were expressly rejected as unsound and inconsistent within the meaning and purpose of the equal protection clause.[63] Yet these are the decisions which form the principal judicial foundation for this Court's decision in *Plessy* v. *Ferguson.*

By a vote of 26 to 21 the Senate of the 42nd Congress concluded that "separate but equal" schools, if established under the aegis of the state or by force of state law, were a violation of the Fourteenth Amendment. This judgment, since it came from the men who best knew why the Amendment was drafted and what they intended it to accomplish, should be highly persuasive. It should certainly cast doubt upon the soundness of the *Plessy* decision.

These Senators of 1874 and 1875 are among the most cogent and eloquent advocates of the petitioner's cause in this Court.[64] In rejecting the "separate but equal" theory,

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[63] See Cong. Globe, 42nd Cong., 2nd Sess. 3261 (1872); Cong. Globe, 43rd Cong., 1st Sess. 4081, 4082, 4116 (1874).

[64] This is what the Bill meant to Senator Howe of Wisconsin, Cong. Globe, 43rd Cong., 1st Sess. 4147 (1874):

> "* * * the simple justice of the provisions of this bill is self-evident.
>
> "What are they? A command is proposed that no citizen the United States shall be excluded from the accommodations of inns, of public highways, of public schools, nor shall their remains be excluded from resting in public burial grounds notwithstanding they are black. That is all. A national decree is proposed that a citizen shall have the right to travel along the public thoroughfares if he pays his fare, and shall have a right to send his children to the public schools if he meets the charges, although he is not white. That is all. It lays not an ounce of weight upon any man of color but it lifts burdens from some. That is the bill."

Senator Boutwell explained why the concept itself was a contradiction in terms, and a practical impossibility:

> " * * * To say, as is the construction placed upon so much of this bill as I propose to strike out, that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people without regard to race or color, shall be assimilated in ideas, personal, political, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results; and therefore, I say, if it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to tolerate such schools. * * * And inasmuch as we have in this country 4,000,000 colored people, I assume that it is a public duty that they and the white people of the country with whom they are to be associated in public affairs shall be assimilated and made one in the fundamental idea of human equality. Therefore, where it would be possible to establish different schools, I am against it as a matter of public policy.
>
> "But throughout the larger part of the South it is not possible to establish separate schools for black children and for white children, that will furnish means of education, suited to the wants of either class; and therefore in all that region of the country it is a necessity that the schools shall be mixed in order that they shall be of sufficient size to make them useful in the highest degree; and it is also important that they should be mixed schools, in order that the prejudice which now pervades portions of our people shall be uprooted by the power of general taxation."[65]

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[65] Cong. Rec. 4158, 43rd Cong., 1st Sess. (1874).

Senator Frelinghuysen searched the underlying principles of our government in replying to his opponents:

> "If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind of his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.
>
> "The objection of such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.
>
> "The objection to the law in its effect on society is that 'a community is seldom more just than its laws;' and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.
>
> "Then, too, we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites. The whites are and will be the dominent race and rule society. The value of the principle of equality in government is that thereby the strength inures to the benefit of the weak, the wealth of the rich to the relief of the poor, and the influence of the great to the protection of the lowly. It makes the fabric of society a unit, so that the humbler patrons cannot suffer without the more splendid parts being injured and defeated. This is protection to those who need it. And it is just that it should be so; for of what value is the wealth and talent and influence of the individual if you isolate him from society? Great as he may be, he is the debtor to society. Let him pay.
>
> "Sir, if we did not intend to make the colored race full citizens, if we propose to place them under

> the ban of any legalized disability or inferiority, and there to hold them, we should have left them slaves."[66]

One Senator prophesied that under the "pretense of what is called equality" the result would be to "grind out every means of education that the colored man can have".[67] This same fear was echoed by Mr. Justice HARLAN in his dissenting opinion in *Plessy* v. *Ferguson.*[68]

The doctrine of separate but equal treatment is in direct conflict with all other decisions of this Court invalidating governmentally imposed distinctions based on race or ancestry. It is contrary to the intent of the Fourteenth Amendment. *Plessy* v. *Ferguson* furnishes the only support for the doctrine. We believe that a reexamination of this decision will require that it be overruled.

Conclusion.

The District Court stated: "It is the duty of this court to honor the public policy of the State in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land." The right to public graduate education in a public institution on an equal basis with all other applicants is not a matter within the category of "internal social affairs". Appellees' reluctant action in admitting McLaurin to the graduate school, and at the same time subjecting him to the type of segregation which is in many respects more vicious than that in the usual separate schools, places before this Court the question of state notions of equality as against the clear intent of the Fourteenth Amendment.

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[66] Id. at 3452.

[67] Cong. Rec. 4173, 43rd Cong., 1st Sess. (1874), Mr. Edwards of Vermont.

[68] *Plessy* v. *Ferguson, supra,* at 552.

Most of those states which have traditions and practices similar to Oklahoma in enforcing racial discrimination refused in 1866 and 1867 to ratify the Fourteenth Amendment, because it was felt, and correctly, that the Amendment would require them to accord to Negroes the same rights accorded to white persons. Their policy, since the adoption of the Fourteenth Amendment, has been to continue the policy of refusing to recognize their Negro citizens as equal to other citizens. By means of discriminatory registration and voting practices, by unequal enforcement of criminal laws, and rigid segregation patterns, these states have continued to thwart the true purposes of the Fourteenth Amendment.

This Court has been prevented from passing upon the question here involved because these states have, in the past, refused to give even a semblance of equality. *Missouri ex rel. Gaines* v. *Canada; Sipuel* v. *Board of Regents.* Now that the issue is clearly presented, this Court is urged to reaffirm the principle that governmentally enforced racial classifications are unconstitutional.

WHEREFORE, it is respectfully submitted that the judgment of the Court below should be reversed.

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February 25, 1950.

APPENDIX A.

Oklahoma Statutes in Effect at Time of Hearing and Judgment in Lower Court.

70 O. S. 1941, Section 455. It shall be unlawful for any person, corporation or association of persons, to maintain or operate any *college,* school or institution of this state where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such *college,* school or institution in violation hereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and each day such school, college or institution shall be open and maintained shall be deemed a separate offense. (L. 1913, ch. 219, p. 572, art. 15, Section 5.)

70 O. S. 1941, Section 456. Any instructor who shall teach in any school, college or institution where members of the white race and colored race are received and enrolled as pupils for instruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars for each offense, and each day any instructor shall continue to teach in any such *college,* school or institution, shall be considered a separate offense. (L. 1913, ch. 219, p. 572, art. 15, Section 6.)

70 O. S. 1941, Section 457. It shall be unlawful for any white person to attend any school, college or institution, where colored persons are received as pupils for instruction, and any one so offending shall be fined not less than five dollars, nor more than twenty dollars for each offense, and each day such person so offends, as herein provided, shall be deemed a distinct and separate offense; provided, that nothing in this article shall be construed as to prevent any private school, *college* or institution of learning from maintaining a separate or distinct branch thereof in a different locality. (L. 1913, ch. 219, p. 572, art. 15, Section 7.)

APPENDIX B.

Statutes Adopted by Oklahoma Legislature After Hearing and Judgment in Court Below.

Section 9. **Repealing Clause.** Chapter 1, and Chapters 3 to 13, inclusive and Chapters 15 to 20, inclusive, and Chapters 22 to 27, inclusive, and Chapters 29 to 31, inclusive, and Sections 21 to 34, inclusive, and Section 36, Section 39, and Sections 661 to 684, inclusive, of Title 70, Oklahoma Statutes 1941, and Chapter 14 of Title 74, Oklahoma Statutes 1941, and Chapters 5 to 26, inclusive, and Chapters 27 to 31, inclusive, and Chapter 45a, of Title 70, Oklahoma Session Laws 1943, and Chapter 10 of Title 68, Oklahoma Session Laws 1944, and Chapter 21 of Title 70, Oklahoma Session Laws 1944, and Chapters 2 to 9, inclusive, and Chapters 27 to 31, inclusive, of Title 70, Oklahoma Session Laws 1945, and Chapters 6 to 19, inclusive, and Chapters 22 to 23a, inclusive, and Chapters 23c to 31f, inclusive, of Title 70, Oklahoma Session Laws 1947, and Sections 3 to 7, inclusive, of Article I, and Articles II and III, of Chapter 21, Title 70, Oklahoma Session Laws 1947, Section 32 of Chapter 10a Title 74 Oklahoma Session Laws of 1947, and all other laws and parts of laws in conflict with the provisions of this Act are hereby repealed. All other laws and statutory provisions that are applicable to public schools, school districts and governing boards thereof, and other matters dealt with in this Act and that are not inconsistent with any of the provisions of this Act, shall continue to be applicable thereto and shall not be held to be repealed by any of the provisions of this Act.

Section 10. **Effective Date of Act.** The provisions of this Act shall not become operative until July 1, 1949.

CHAPTER 15—Separate School For Races.

HOUSE BILL No. 405.

AN ACT relating to the instruction and attendance of the colored race in colleges or institutions of higher education of the State established and/or used by the white race; amending 70 O. S. 1941 §§ 455, 456 and 457; repealing all Acts or parts of Acts, in so far as same are in conflict with this Act or the public policy revealed thereby; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. **Mixed Schools—Exceptions.** 70 O. S. 1941 § 455 is hereby amended to read as follows:

§ 455. It shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution in violation hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), and each day such school, college or institution shall be open and maintained shall be deemed a separate offense. Provided, that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such col-

leges or institutions of higher education upon a segregated basis. Segregated basis is defined in this Act as classroom instruction given in separate classrooms, or at separate times. The provisions of this Section are subject to Section Four (4) hereof.

Section 2. **Teaching in Mixed Schools—Exceptions.** 70 O. S. 1941 § 456 is hereby amended to read as follows:

§ 456. Any instructor who shall teach in any school, college or institution where members of the white race and colored race are received and enrolled as pupils for instruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for each offense, and each day any instructor shall continue to teach in any such college, school or institution shall be considered a separate offense. Provided, that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis, as defined in this Act. The provisions of this Section are subject to Section Four (4) hereof.

Section 3. **White Persons Attending Colored Schools—Exceptions.** 70 O. S. 1941 § 457 is hereby amended to read as follows:

§ 457. It shall be unlawful for any white person to attend any school, college or institution where colored per-

sons are received as pupils for instruction, and any one so offending shall be fined not less than Five Dollars ($5.00), no more than Twenty Dollars ($20.00) for each offense, and each day such person so offends, as herein provided, shall be deemed a distinct and separate offense; provided, that nothing in this Article shall be so construed as to prevent any private school, college or institution of learning from maintaining a separate or distinct branch thereof in a different locality. Provided, that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis, as defined in this Act. The provisions of this Section are subject to Section Four (4) hereof.

Section 4. **Oklahoma State Regents for Higher Education—Certificate.** For the purposes of this Act, a certificate to the President of any college or institution of higher education by the Oklahoma State Regents for Higher Education or by the executive Officers of said Board, certifying that any course or courses given at such college or institution of higher education established for and/or used by the white race are not given at colleges or institutions of higher education of this State established for and/or used by the colored race shall be deemed conclusive proof of such fact in any criminal proceeding in the Courts of Oklahoma against the administrative officers of such college or institution, or against the faculty or against the students thereof

for the violation of the provisions of any of the three (3) preceding Sections hereof.

Section 5. **Repealing Clause.** All acts or parts of acts, in so far as same are in conflict with this Act or the public policy revealed thereby, are hereby repealed.

Approved June 9, 1949. Emergency.

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