IN THE

Supreme Court of the United States

October Term, 1947

No. 369

ADA LOIS SIPUEL,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, GEORGE L. CROSS, MAURICE H. MERRILL, GEORGE WADSACK and ROY GITTINGER,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR PETITIONER

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Opinion of Court Below

The opinion of the Supreme Court of Oklahoma appears in the record filed in this cause (R. 35-51) and is reported at ____ Okla. ____, 180 P. (2d) 135.

Jurisdiction

Jurisdiction of this Court is invoked under Section 237b of the Judicial Code (28 U. S. C. 344b) as amended February 13, 1925.

The Supreme Court of Oklahoma issued its judgment in this case on April 29, 1947 (R. 51). Petition for rehearing was appropriately filed and was denied on June 24, 1947 (R. 61). Petition for Certiorari was filed on September 20, 1947, and was granted by this Court on November 10, 1947.

SUMMARY STATEMENT OF THE MATTER INVOLVED

1. Statement of the Case

Petitioner is a citizen and resident of the State of Oklahoma. She desires to study law and to prepare herself for the legal profession. Pursuant to this aim, she applied for admission to the first-year class of the School of Law of the University of Oklahoma, a public institution maintained and supported out of public funds and the only public institution in the state offering facilities for a legal education. She was denied admission. Her qualifications for admission to this institution are undenied, and it is admitted that petitioner, except for the fact that she is a Negro, would have been accepted as a first-year student in the School of Law of the University of Oklahoma, which is the only state institution offering instruction in law.

Upon being refused admission solely on account of her race and color, petitioner applied to the District Court of Cleveland County, Oklahoma, for a writ of mandamus against the Board of Regents of the University of Oklahoma; George L. Cross, President; Maurice H. Merrill, Dean of the Law School; Roy Gittinger, Dean of Admissions; and George Wadsack, Registrar, to compel her admission to the first-year class of the School of Law on the same terms and conditions afforded white applicants seeking to matriculate therein (R. 2). The writ was denied

(R. 21) and on appeal this judgment was affirmed by the Supreme Court of the State of Oklahoma on April 29, 1947 (R. 51). Petitioner duly entered a motion for a rehearing (R. 54) which was denied on June 24, 1947 (R. 61), whereupon petitioner now seeks in this Court a review and reversal of the judgment below.

The action of respondents in refusing to admit petitioner to the School of Law was predicated upon the grounds that: (1) such admission was contrary to the constitution, law and public policy of the state; (2) that scholarship aid was offered by the state to Negroes to study law outside of the state; and, (3) that no demand had been made upon the Board of Regents of Higher Education to provide such legal training at Langston University, the state institution affording college and agricultural training to Negroes in the state.

The Supreme Court of Oklahoma held that:

> "We conclude that petitioner is fully entitled to education in law with facilities equal to those for white students, but that the separate education policy of Oklahoma is lawful and is not intended to be discriminatory in fact, and is not discriminatory against plaintiff in law for the reasons above shown.
>
> "We conclude further that as the laws in Oklahoma now stand this petitioner had rights in addition to those available to white students in that she had the right to go out of the state to the school of her choice with tuition aid from the state, or if she preferred she might attend a separate law school for Negroes in Oklahoma.
>
> "We conclude further that while petitioner may exercise here preference between those two educa-

> tional plans, she must indicate that preference by demand or in some manner that may be depended upon, and we conclude that such requirement for notice or demand on her part is no undue burden upon her.
>
> "We conclude that up to this time petitioner has shown no right whatever to enter the Oklahoma University Law School, and that such right does not exist for the reasons heretofore stated" (R. 51).

In this Court petitioner reasserts her claim that the refusal to admit her to the University of Oklahoma solely because of race and color amounts to a denial of the equal pretection of the laws guaranteed under the Fourteenth Amendment to the Federal Constitution in that the state is affording legal facilities for whites while denying such facilities to Negroes.

2. Statement of Facts

The facts in issue are uncontroverted and have been agreed to by both petitioner and respondents (R. 22-25). The following are the stipulated facts:

The petitioner is a resident and citizen of the United States and of the State of Oklahoma, County of Grady and City of Chicakasha, and desires to study law in the School of Law in the University of Oklahoma for the purpose of preparing herself to practice law in the State of Oklahoma (R. 22).

The School of Law in the University of Oklahoma is the only law school in the state maintained by the state and

under its control (R. 22). The Board of Regents of the University of Oklahoma is an administrative agency of the state and exercises over-all authority with reference to the regulation of instruction and admission of students in the University of Oklahoma. The University is a part of the educational system of the state and is maintained by appropriations from public funds raised by taxation from the citizens and taxpayers of the State of Oklahoma (R. 22-23).

The School of Law of the University of Oklahoma specializes in law and procedure which regulate the government and courts of justice in Oklahoma, and there is no other law school maintained by public funds of the state where the petitioner can study Oklahoma law and procedure. The petitioner will be placed at a distinct disadvantage at the Bar of Oklahoma and in the public service of the aforesaid state with respect to persons who have had the benefit of unique preparation in Oklahoma law and procedure offered at the School of Law of the University of Oklahoma unless she is permitted to attend the aforesaid institution (R. 23).

The petitioner has completed the full college course at Langston University, a college maintained and operated by the State of Oklahoma for the higher education of its Negro citizens (R. 23).

The petitioner made due and timely application for admission to the first-year class of the School of Law of the University of Oklahoma on January 14, 1946, for the semester beginning January 15, 1946, and then possessed and still possesses all the scholastic and moral qualifications required for such admission (R. 23).

On January 14, 1946, when petitioner applied for admission to the said School of Law, she complied with all of the

rules and regulations entitling her to admission by filing with the proper officials of the University an official transcript of her scholastic record. The transcript was duly examined and inspected by the President, Dean of Admissions, and Registrar of the University (all respondents herein) and was found to be an official transcript entitling her to admission to the School of Law of the said University (R. 23).

Under the public policy of the State of Oklahoma, as evidenced by constitutional and statutory provisions referred to in the answer of respondents herein, petitioner was denied admission to the School of Law of the University of Oklahoma solely because of her race and color (R. 23-24).

The petitioner, at the time she applied for admission to the said School of Law of the University of Oklahoma, was and is now ready and willing to pay all of the lawful charges, fees and tuitions required by the rules and regulations of the said university (R. 24).

Petitioner had not applied to the Board of Regents of Higher Education to prescribe a school of law similar to the School of Law of the University of Oklahoma as a part of the standards of higher education of Langston University and as one of the courses of study thereof (R. 24).

It was further stipulated between the parties that after the filing of this case, the Board of Regents of Higher Education: (1) had notice that this case was pending; and, (2) met and considered the questions involved herein; and, (3) had no unallocated funds on hand or under its control at the time with which to open up and operate a law school and has since made no allocations for such a purpose (R. 24-25).

Assignment of Errors

The Supreme Court of Oklahoma erred:

(1) In holding that the separate education policy of Oklahoma is lawful and is not intended to be discriminatory in fact, and is not discriminatory against plaintiff in law for the reasons above shown.

(2) In holding that as the laws in Oklahoma now stand this petitioner had rights in addition to those available to white students in that she had the right to go out of the state to the school of her choice with tuition aid from the state, or if she preferred she might attend a separate law school for Negroes in Oklahoma.

(3) In holding that while petitioner may exercise her preference between those two educational plans, she must indicate that preference by demand or in some manner that may be depended upon, and that such requirement for notice or demand on her part is no undue burden upon her.

(4) In holding that petitioner has shown no right whatever to enter the Oklahoma University Law School, and that such right does not exist for the reasons heretofore stated.

(5) In affirming the judgment of the trial court.

Question Presented

The Petition for Certiorari in the instant case presented the following question:

Does the Constitution of the United States Prohibit the Exclusion of a Qualified Negro Applicant Solely Because of Race from Attending the Only Law School Maintained By a State?

OUTLINE OF ARGUMENT

I

The Supreme Court of Oklahoma erred in not ordering the lower court to issue a writ requiring the respondents to admit petitioner to the only existing law school maintained by the state.

II

This Court should re-examine the constitutionality of the doctrine of "separate but equal" facilities.

A. Reference to this doctrine in the *Gaines* case has been relied on by state courts to render the decision meaningless.

B. The doctrine of "separate but equal" facilities is without legal foundation.

C. Equality under a segregated system is a legal fiction and a judicial myth.

1. The general inequities in public educational systems where segregation is required.

2. On the professional school level the inequities are even more glaring.

D. There is no rational justification for segregation in professional education and discrimination is a necessary consequence of any separation of professional students on the basis of color.

III

The doctrine of "separate but equal" facilities should not be applied to this case.

Summary of Argument

Petitioner here is asserting a constitutional right to a legal education on par with other persons in Oklahoma. This right can be protected only by petitioner's admission to the law school of the University of Oklahoma, the only existing facility maintained by the state. Petitioner, therefore, sought a mandatory writ requiring her admission to the University of Oklahoma. The state courts have refused to grant the relief sought principally because of statutes requiring the separation of the races in the state's school system. Petitioner contends that the questions presented in this appeal were settled by this Court in *Missouri ex rel. Gaines* v. *Canada* and that her case both as to facts and law comes within the framework of the *Gaines* case.

Petitioner, however, is forced to raise anew the issue considered settled by that decision chiefly because the opinion in the *Gaines* case was amenable to an interpretation that this Court admitted the right of a state to maintain a segregated school system under the equal but separate theory even where, as here, no provision other than the existing facility which is closed to Negroes is available to petitioner. Reference to this doctrine has not only beclouded the real issues in cases of this sort but in fact has served to nullify petitioner's admitted rights.

Petitioner is entitled to admission now to the University of Oklahoma and her right to redress cannot be conditioned upon any prior demand that the state set up a separate facility. The opinion in *Gaines* case is without meaning unless this Court intended that decision to enforce the right of a qualified Negro applicant in a case such as here to admission *instanter* to the only existing state facility. The

equal but separate doctrine has no application in cases of this type. The *Gaines* decision must have meant at least this and should be so clarified. Beyond that petitioner contends that the separate but equal doctrine is basicly unsound and unrealistic and in the light of the history of its application should now be repudiated.

ARGUMENT

I

The Supreme Court of Oklahoma Erred in Not Ordering the Lower Court to Issue a Writ Requiring the Respondents to Admit Petitioner to the Only Existing Law School Maintained by the State.

Petitioner's constitutional right to a legal education arose at the time she made application, as a qualified citizen, for admission into the state law school. This privilege extends to all qualified citizens of Oklahoma and the denial thereof to this petitioner constitutes a violation of the Fourteenth Amendment to the United States Constitution. That the action of respondents, constituting the Board of Regents of the University of Oklahoma, must be regarded as state action has conclusively been established in a long line of decisions by this Court, and is not in issue in this case.

It is admitted that: (1) petitioner was qualified to enter the law school at the time application was made; that she was qualified at the time this case was tried and is now qualified; (2) the law school at the University of Oklahoma is the only existing facility maintained by the state for the instruction of law; (3) petitioner has been denied admission to the University law school solely because of race and color; (4) respondents herein are state officials. There is no question but that if petitioner were not a Negro she would have been admitted to the University of Oklahoma Law School.

That petitioner had a clear right under these facts to have the writ issued requiring these respondents to admit her into the State law school was expressly established by this Court in *Missouri ex rel. Gaines* v. *Canada.*[1]

The Supreme Court of Oklahoma in affirming the lower court's denial of the writ relied upon (1) the segregation laws of the state requiring separate educational facilities for white and Negro citizens; and, (2) that as a result of these segregation statutes a duty was placed upon the petitioner to make a "demand" for the establishment of a separate law school at some time in the future before applying to the University Law School. This new duty as a condition precedent to the exercise of her right to a legal education is placed upon petitioner solely because of the segregation statutes of Oklahoma.

The writ was not issued and petitioner has not been admitted to the only existing law school because the Supreme Court of Oklahoma committed error in not following the *Gaines* case, but adopting just the opposite point of view which has deprived petitioner of her constitutional right not to be discriminated against because of race and color. Under the facts in this case the writ should have been issued.

In the *Gaines* case, petitioner (1) was qualified to seek admission into the state law school in Missouri; (2) the law school at Missouri was the only law school maintained by the State for the instruction of law; (3) Gaines was denied admission to the law school solely on account of race and color; and, (4) respondents in the *Gaines* case were state officers. There, this Court held that, despite the finding of the Supreme Court of Missouri that a policy of segregation in education existed in the State, a provision for out-of-state aid for Negro students did not satisfy the Four-

[1] 305 U. S. 337 (rehearing denied 305 U. S. 676).

teenth Amendment and Gaines was declared entitled to be admitted into the state law school "in the absence of other and proper provisions for his legal training within the state." This Court recognized the fact that no prior demand had been made upon the Curators of Lincoln University to set up a separate law school for Negroes.[2]

The Oklahoma Supreme Court erroneously relies upon the *Gaines* case for the proposition that "the authority of a State to maintain separate schools seems to be universally recognized by legal authorities" (R. 39). Mr. Chief Justice HUGHES adequately answered this argument as follows:

> "The admissibility of laws separating races in the enjoyment of privileges afforded by the state rests wholly upon the quality of privileges which the laws give to separated groups within the state."[3]

The Oklahoma Supreme Court held that the segregation laws of the State prevent petitioner from entering the only state law school:

> "It seems clear to us that since our State policy of separate education is lawful, the petitioner may not enter the University Law School maintained for white pupils" (R. 44).

The court concluded that this separation policy is not discriminatory against petitioner (R. 51). The reasons advanced for this conclusion have been adequately met in the *Gaines* case and disposed of favorably to petitioner herein.

In seeking to justify the policy of segregation, which provides no law training for Negroes within the State, the Oklahoma Supreme Court also relies upon out-of-state

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[2] 305 U. S. 337, 352.

[3] *Ibid.*, at p. 349.

scholarship aid—a point completely *dehors* the record in this case. The court stated:

> "If a white student desires education in law at an older law school outside the State, he must fully pay his own way while a Negro student from Oklahoma might be attending the same or another law school outside the State, but at the expense of this State.
>
> "It is a matter of common knowledge that many white students in Oklahoma prefer to and do receive their law training outside the State at their own expense in preference to attending the University law school. Perhaps some among those now attending the University Law School would have a like preference for an older though out-of-state school but for the extra cost to them.
>
> "Upon consideration of all facts and circumstances it might well be, at least in some cases, that the Negro pupil who receives education outside the state at state expense is favored over his neighbor white pupil rather than discriminated against in that particular" (R. 43).

On this point the *Gaines* case is clear:

> "We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color."[4]

Under the facts in this case such a policy applied to petitioner is unconstitutional and the suggested substitutes of requiring her to elect either out-of-state aid, or demand that a new institution be erected for her, are inadequate to meet the requirements of equal protection of the law. This additional duty of requiring petitioner to make a demand upon

[4] 305 U. S. 337, 349.

the Board of Higher Education of Oklahoma to establish a separate law school before being able to successfully assert a denial by the state of her right to a legal education comes by virtue of the segregation statutes of Oklahoma. Clearly this duty devolves only upon Negroes and not upon white persons and is in itself discriminatory.

There is a striking similarity between the decisions of the state courts in the *Gaines* case and this case on the question of the petitioner's alleged duty to make a "demand" for a separate law school as a condition precedent to application to the existing law school.

In the *Gaines* case, the Supreme Court of Missouri stated: "Appellant made no attempt to avail himself of the opportunities afforded the Negro people of the State for higher education. He at no time applied to the management of the Lincoln University for legal training."[5]

In the decision of the Oklahoma Supreme Court in this case, the court stated:

> "Here petitioner Sipuel apparently made no effort to seek in law in a separate school" (R. 47).

A further similarity exists in the statutes of the two states, neither of which could reasonably be interpreted to place a mandatory duty upon the governing body to supply facilities for a legal education to Negro students within the state although the Supreme Court of Oklahoma declared that had petitioner applied for such legal education, "it would have been their duty to provide for her an oppor-

[5] 113 S. W. 2d 783, 789 (1937). In the face of this clear statement of the facts by the Missouri Court in the *Gaines* case, the Oklahoma court stated that the facts were completely contrary: "Thus, in Missouri, there was application for and denial of that which could have been lawfully furnished, that is, law education in a separate school . . . " (R. 45).

tunity for education in law at Langston or elsewhere in Oklahoma" (R. 45). In the *Gaines* case, the statute (Section 9618, Missouri Revised Statute 1929) provides that the Board of Curators of Lincoln University were required so to reorganize that institution as to afford for Negroes "training up to the standard furnished by the state university of Missouri whenever necessary and practicable in their opinion." This Court interpreted that statute as not placing a mandatory duty upon the Missouri officials.

In Oklahoma, the 1945 amendments provided, in Section 1451 B, that the Board of Regents of Oklahoma Agricultural and Mechanical College should control Langston University and should "do any and all things necessary to make the university effective as an educational institution for Negroes of the State."

In addition, the Oklahoma Constitution, Article XIII-A, section 2, provides in part:

> "The Regents shall constitute a co-ordinating board of control for all State institutions described in section 1 hereof, with the following specific powers: (1) it shall prescribe standards of higher education applicable to each institution; (2) it shall determine the function and courses of study in each of the institutions to conform to the standards prescribed; . . ."

These vague provisions, lacking even the comparison with the standards of the "white" university which were present in the Missouri statute, were construed by the state court as placing a mandatory duty upon the Board of Regents to provide education in law for petitioner within the State of Oklahoma. Such a duty was not found by the

court to come directly from the statute but to flow from the requirement of the segregation policy of the state itself.

The Supreme Court of Oklahoma in construing its statutes concerning higher education held that these statutes placed a mandatory duty upon the State Regents for Higher Education to establish a Negro law school upon demand:

> "When we realize that and consider the provisions of our State Constitution and Statutes as to education, we are convinced that it is the mandatory duty of the State Regents for Higher Education to provide equal educational facilities for the races to the full extent that the same is necessary for the patronage thereof. That board has full power, and as we construe the law, *the mandatory duty to provide a separate law school for Negroes upon demand or substantial notice* as to patronage therefor." (Italics ours—R. 50.)

The Supreme Court of Missouri in construing its statutes as to higher education for Negroes concluded that:

> "In Missouri the situation is exactly opposite (to Maryland). Section 9618 R. S. 1929 authorizes and requires the board of curators of Lincoln University 'to reorganize said institution so that it shall afford to the Negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable in their opinion.' This statute *makes it the mandatory duty of the board of curators to establish a law school in Lincoln University whenever necessary or practical.*" (Italics ours—113 S. W. 2d 783, 791.)

This Court in passing upon the construction of the Supreme Court of Missouri of its statutes stated:

> "The state court quoted the language of Section 9618, Mo. Rev. Stat. 1929, set forth in the margin,

> making it the mandatory duty of the board of curators to establish a law school in Lincoln University 'whenever necessary and practicable in their opinion.' This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute'' (305 U. S. 337, 346-347).

Further evidence that the Supreme Court of Oklahoma completely ignored the opinion of this Court in the *Gaines* case appears from the misstatement of fact that Gaines actually applied for admission to a separate Negro school in Missouri where there was no law school in existence. On this point the Oklahoma Supreme Court stated:

> ''The opinion does not disclose the exact nature of his (Gaines) communication or application to Lincoln University, but since Gaines was following through on his application for and his efforts to obtain law school instruction in Missouri, *we assume he applied to Lincoln University for instruction there in the law.*'' (Italics ours—R. 44.)
>
> ''This he did when he made application to Lincoln University as above observed, but this petitioner Sipuel wholly failed to do'' (R. 46).
>
> ''Apparently petitioner Gaines in Missouri was seeking first that to which he was entitled under the laws of Missouri, that is education in law in a separate school'' (R. 47).

The actual facts, as this Court indicated in its opinion in the *Gaines* case, are that Gaines only applied to the University Law School maintained by the State. The record in the *Gaines* case clarifies this point:

> ''Q. Now you never at any time made an application to Lincoln University or its curators or its offi-

> cers or any representative for any of the rights, whatever, given you by the 1921 statute, namely, either to receive a legal education at a school to be established in Lincoln University or, pending that, to receive a legal education in a school of law in a state university in an adjacent state to Missouri, and Missouri paying that tuition,—you never made application for any of those rights, did you? A. No sir.'' [6]

Mr. Chief Justice HUGHES in the *Gaines* opinion quite correctly states the facts:

> ''In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training.'' [7]

The Supreme Court of Oklahoma has shown no valid distinction between this case and the *Gaines* case. Their efforts to distinguish the two cases are shallow and without merit. In refusing to grant the relief prayed for in this case the State of Oklahoma has demonstrated the inevitable result of the enforcement of the doctrine of ''separate but equal'' facilities, viz, to enforce the policy of segregation without any pretext of giving equality.

II

This Court Should Re-Examine the Constitutionality of the Doctrine of "Separate But Equal" Facilities.

A. *Reference to This Doctrine in the* Gaines *Case Has Been Relied on by State Courts to Render the Decision Meaningless.*

Petitioner herein is seeking a legal education on the same basis as other students possessing the same qualifi-

[6] Transcript of Record *Gaines* v. *Canada, et al.* No. 57, October Term, 1938, p. 85.

[7] *Missouri ex rel. Gaines v. Canada,* 305 U. S. 337, 352.

cations. The State of Oklahoma in offering a legal education to qualified applicants is prohibited by the Fourteenth Amendment from denying these facilities to petitioner solely because of her race or color. Although the Fourteenth Amendment is a prohibition against the denial to petitioner of this right, it is at the same time an affirmative protection of her right to be treated as all other similarly qualified applicants without regard to her race or color.

Respondents rely upon Oklahoma's segregation statutes as grounds for the denial of petitioner's rights. In order to bolster their defense, they seek to place upon petitioner the duty of taking steps to have established a separate law school at an indefinite time and at an unspecified place without any guarantee whatsoever as to equality in either the quantity or quality of these theoretical facilities.

The "separate but equal" doctrine, based upon the assumption that equality is possible within a segregated system, has been used as the basis for the enforcement of the policy of segregation in public schools. The full extent of the evil inherent in this premise is present in this case where the "separate but equal" doctrine is urged as a complete defense where the state has not even made the pretense of establishing a separate law school.

In the first reported case on the right of a qualified Negro applicant to be admitted to the only existing law school maintained by the state, the Court of Appeals of Maryland, in the face of a state policy of segregation, decided that the Fourteenth Amendment entitled the Negro applicant to admission to the only facility maintained:

> "Compliance with the Constitution cannot be deferred at the will of the state. Whatever system it adopts for legal education now must furnish equality of treatment now."[8]

[8] *Pearson* v. *Murray,* 169 Md. 478, 182 A. 590 (1936).

The second case involving this point reached this Court on a petition for a writ of certiorari to the Supreme Court of Missouri.[9] The facts in the *Gaines* case were similar to those in the *Pearson* case except that there was no statutory authorization for the establishment of a separate law school for Negroes in Maryland, whereas the State of Missouri contended that there was statutory authorization for the establishment of a separate law school with a provision for out-of-state scholarships during the interim.

This Court, in reversing the decision of the Supreme Court of Missouri (which affirmed the lower court's judgment refusing to issue the writ of mandamus), held that the offering of out-of-state scholarships pending possible establishment of a Negro law school in the future within the state, did not constitute equal educational opportunities within the meaning of the Fourteenth Amendment. Mr. Chief Justice HUGHES, in the majority opinion held: "that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State."[9a] This issue, as framed by the Court, made unnecessary to its decision any holding as to what the decision might be if the state had been offering petitioner opportunity for a legal education in a Negro law school then in existence in the state.

At the time of its rendition, the *Gaines* decision was considered a complete vindication of the right of Negroes to admission to the only existing facility afforded by the state, even in the face of a state policy and practice of segregation. This decision, in fact, was considered as being at least as broad and as far reaching as *Pearson* v. *Murray,*

[9] *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.
[9a] 305 U. S. 337, 352.

supra. This apparently was the intent and understanding of the Court itself, for Mr. Justice McReynolds, in a separate opinion, construed the opinion as meaning that either the state could discontinue affording legal training to whites at the University of Missouri, or it must admit petitioner to the only existing law school.

The Court's reference to the validity of segregation [10] laws and its discussion of whether or not there was a mandatory duty upon the Board of the Negro College in Missouri to establish the facilities demanded in a separate school, however, has created unfortunate results. Because of this language, courts in subsequent cases, while purporting to follow the *Gaines* decision, have in reality so interpreted this decision as to withhold the protection which that case intended.

When the *Gaines* case was remanded to the state court after decision here, the Missouri Supreme Court, in quoting from this Court's opinion, placed great reliance upon that portion of the opinion which said:

> "We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University *in the absence of other and proper provision for his legal training within the State.*"

By then, Section 9618 of the Missouri Statutes Annotated had been repealed and reenacted and was construed as placing a mandatory duty upon the Board of Curators of the Lincoln University (the Negro college) to establish a law school for Negroes. The court concluded that the issu-

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[10] "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 344.

ance of the writ would be denied if, by the time the case was again tried, the facilities at Lincoln University were equivalent to those of the University of Missouri and gave the state until the following September to establish such facilities. If they were not equivalent, the writ would be granted. Said the court:

> "We are unwilling to undertake to determine constitutional adequacy of the provision now made for relator's legal education within the borders of the state by the expedient of coupling judicial notice with a presumption of law . . . " (131 S. W. 2d 217, 219-220.)

Hence, the Missouri Supreme Court in the second *Gaines* case construed the opinion of this Court as not requiring the admission of the petitioner to the existing law school but as giving to the State of Missouri at that late date the alternative of setting up a separate law school in the future. In the event the state exercised that option, petitioner would have the right to come into court and test the equality of the provisions provided for him as compared with those available at the University of Missouri. If no facilities were available or those available were unequal, he would then be entitled to admission to the University of Missouri law school.

Petitioner filed his application for writ of mandamus in the *Gaines* case in 1936. The case reached this Court in 1938. It was then returned to the Supreme Court of Missouri, and a decision rendered in August 1939. Thereafter, the state was given an additional several months to set up a law school. Then, petitioner would be entitled to come in again and test the equality of the provisions. Presumably, therefore, by 1941, four years after he asserted his right to admission to the Law School of the University of Mis-

souri, petitioner might get some redress. During this period of time, white students in the class to which he belonged would have graduated from law school and would have been a year or perhaps more in the actual practice of law.

Shortly after the *Gaines* case, another suit was started by a Negro based upon the refusal of the registrar of the University of Missouri to admit her to the School of Journalism, it being the only existing facility within the state offering a course in journalism. Suit was brought in the U. S. District Court seeking damages and was dismissed. The District Court adopted the construction of Section 9618 of Missouri Statutes Annotated, which the State Supreme Court had followed in the second *Gaines* decision, and it found that the statute placed a mandatory duty on the Board of Curators of Lincoln University to set up a School of Journalism for Negroes *upon proper demand.*

In answering plaintiff's contention that the rights she asserted had been upheld by this Court in the *Gaines* case, the District Court said:

> " . . . While this court is not bound by the State court's construction of the opinion of the Supreme Court, much respect is due the former court's opinion that the Gaines case did not deprive the State of a reasonable opportunity to provide facilities, demanded for the first time, before it abrogated its established policy of segregation." [11]

And in dismissing the case, it stated the following as what it felt her rights to be under the holding of this Court in the *Gaines* case:

> "Since the State has made provision for equal educational facilities for Negroes and has placed the

[11] *Bluford* v. *Canada,* 32 F. Supp. 707, 710 (1940).

> mandatory duty upon designated authorities to provide those facilities, plaintiff may not complain that defendant has deprived her of her constitutional rights until she has applied to the proper authorities for those rights and has been unlawfully refused. She may not anticipate such refusal."[12]

Thus, the District Court construed the *Gaines* case as requiring a petitioner to apply to the board of the Negro college where a statutory duty was placed upon them to provide the training desired and await their refusal before he could assert any denial of equal protection, even in the face of the patent fact that there was only one facility in existence at the time of application which was maintained exclusively for whites.

The next case was *State ex rel. Bluford* v. *Canada,* 153 S. W. (2d) 12 (1941). Petitioner in this case sought by writ of mandamus to compel her admission to the School of Journalism at the University of Missouri. The court denied the writ on the ground that the state could properly maintain a policy of segregation and that its right to so do had this Court's approval. Section 9618 of the Missouri Statutes Annotated was again construed as placing upon the Board of Curators of Lincoln University a mandatory duty to establish facilities at Lincoln University equal to those at the University of Missouri. The court held that although no School of Journalism was available there, the board was under a duty to open new departments on demand and was entitled to a reasonable time after demand to establish the facility. Only after a demand of the board of the Negro college and a refusal within a reasonable time, or an assertion by the board that it was unable to establish the facility demanded, would admission of a Negro to the existing facility be granted. This decision construed the

[12] 32 Fed. Supp. 707, 711.

Gaines case as meaning that a Negro must not only first make a demand upon the board of the Negro school, but that there must either be an outright refusal or failure to establish the facilities within a reasonable time before a petitioner could successfully obtain redress to which he was entitled under the *Gaines* decision.

In 1942, in the case of *State ex rel. Michael* v. *Whitham* (165 S. W. (2d) 378), six Negroes sought by writ of mandamus admission to the graduate and professional schools of the University of Tennessee. The cases were consolidated, and while pending, the state passed a statute on February 13, 1941, Chapter 43 of the Public Acts of 1941, which stated in part as follows:

> "Be it enacted by the General Assembly of the State of Tennessee, That the State Board of Education and the Commissioner of Education are hereby authorized and directed to provide educational training and instruction for Negro citizens of Tennessee equivalent to that provided at the University of Tennessee for white citizens of Tennessee."

The court held that the Board of Education was under a mandatory duty to establish graduate facilities and professional training for Negroes equivalent to that at the University of Tennessee upon demand and a reasonable advance notice. The statute, the court held, provided a complete and full method by which Negroes may obtain educational training and instruction equivalent to that at the University of Tennessee.

As the *Gaines* case was there construed, a Negro seeking professional or graduate training offered whites at the State University must: (1) first make a demand for training in a separate school of the Board charged with the duty of providing equal facilities for Negroes; and, (2) give that Board

a reasonable time thereafter to set up the separate facility before a petitioner could successfully bring himself within the holding of the *Gaines* case. Even the mere statutory declaration of intent adopted while the case was pending, although unfulfilled, was found by the Tennessee Supreme Court to be an adequate answer to petitioner's assertion of a denial of equal protection. And this even though this Court had clearly and conclusively disposed of that contention in the *Gaines* case.

Finally, the State of Oklahoma, relying upon these latter decisions, refused to admit petitioner to the law school of the University of Oklahoma on the grounds that the segregation statutes of Oklahoma are a complete bar to petitioner's claimed right to attend the only law school maintained by the state and that she must, therefore, make a demand on certain officials to establish a separate law school for her.

The Supreme Court of Oklahoma, therefore, construed the decision in the *Gaines* case as follows: "The reasoning and spirit of that decision of course is applicable here, that is, that the state must provide either a proper legal training for petitioner in the state, or admit petitioner to the University Law School. But the very existence of the option to do the one or the other imports the right or an opportunity to choose the one of the two courses which will follow the fixed policy of the state as to separate schools, and before the courts should foreclose the option the opportunity to exercise it should be accorded" (R. 47).

At the very least the *Gaines* case means, we submit, that a state cannot bar a qualified Negro from the only existing facility in spite of its policy of segregation. Moreover, the burden of decision as to whether the segregated system will be maintained is upon the state and not upon an aggrieved

Negro who seeks the protection of the federal constitution. As a party whose individual constitutional rights have been infringed, petitioner is entitled to admission to the law school of the University of Oklahoma now. Any burden placed upon her which is not required of other law school applicants is a denial of equal protection. Her rights cannot be defeated nor her assertion thereof be burdened by requiring that she demand a state body to provide her with a legal education at some future time. The state is charged with the responsibility of giving her equal protection at the time she is entitled to it. The shams and legalism which have been raised to bar her right to redress must not be allowed to stand in the way.

The basic weakness of the *Gaines* decision was that while recognizing that petitioner's only relief and redress was admission to the existing facility, the opinion created the impression that this Court would give its sanction even in cases of this type, to a state's reliance upon the "equal but separate" doctrine. This Court, therefore, must reexamine the basis for its statement asserting the validity of racial separation which statement has been used to deny to petitioner the protection of the constitutional right to which she is entitled.

B. *The Doctrine of "Separate But Equal" Is Without Legal Foundation.*

Classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws, and this Court has struck down statutes, ordinances or official policies seeking to establish such classifications. In the decisions concerning intrastate transportation and public education, however, this Court appears to have adopted a different and anti-

thetical constitutional doctrine under which racial separation is deemed permissible when equality is afforded. An examination of these decisions will reveal that the "separate but equal" doctrine is at best a bare constitutional hypothesis postulated in the absence of facts showing the circumstances and consequences of racial segregation and based upon a fallacious evaluation of the purpose and meaning inherent in any policy or theory of enforced racial separation.

Many states have required segregation of Negroes from all other citizens in public schools and on public conveyances. The constitutionality of these provisions has seldom been seriously challenged. No presumption of constitutionality should be predicated on this non-action. A similar situation existed for many years in the field of interstate travel where state statutes requiring segregation in interstate transportation were considered to be valid and enforced in several states for generations and until this Court in 1946 held that such statutes were unconstitutional when applied to interstate passengers.[13]

The Thirteenth, Fourteenth and Fifteenth Amendments were adopted for the purpose of securing to a recently emanicipated race all the civil rights of other citizens.[14] Unfortunately this has not been accomplished. The legislatures and officials of the southern states have, through legislative policy, continued to prevent Negro citizens from obtaining their civil rights by means of actions which only gave lip service to the word "equal." One of the most authoritative studies made of the problem of the Negro in the United States points out that:

> "While the federal Civil Rights Bill of 1875 was declared unconstitutional, the Reconstruction Amend-

[13] *Morgan* v. *Virginia,* 328 U. S. 373.
[14] *Strauder* v. *West Virginia,* 100 U. S. 303.

ments to the Constitution—which provided that the Negroes are to enjoy full citizenship in the United States, that they are entitled to 'equal benefit of all laws,' and that 'no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States'—could not be so easily disposed of. The Southern whites, therefore, in passing their various segregation laws to legalize social discrimination, had to manufacture a legal fiction of the same type as we have already met in the preceding discussion on politics and justice. The legal term for this trick in the social field, expressed or implied in most of the Jim Crow statutes, is 'separate but equal.' That is, Negroes were to get equal accommodations, but separate from the whites. It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination. Again the Southern white man is in the moral dilemma of having to frame his laws in terms of equality and to defend them before the Supreme Court—and before his own better conscience, which is tied to the American Creed—while knowing all the time that in reality his laws do not give equality to Negroes, and that he does not want them to do so." [15]

In one of the early cases interpreting these amendments it was pointed out that: "At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws

[15] Gunnar Myrdal, *An American Dilemma* (1944), Vol. 1, pages 580, 581.

might be enacted or enforced to perpetuate the distinctions that had before existed. Discrimination against them had been habitual. It was well known that, in some States, laws making such discriminations then existed, and others might well be expected. . . . They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the 14th Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation." [16]

Mr. Justice STRONG in this opinion also stated: "The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." [17]

It is unfortunate that the first case to reach this Court on the question of whether or not segregation of Negroes was a violation of the Fourteenth Amendment should come during the period immediately after the Civil War when

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[16] *Strauder* v. *West Virginia, supra,* at 306.
[17] *Ibid.*

the Fourteenth Amendment was regarded as a very narrow limitation on state's rights.

The first expression by this Court of the doctrine of "separate but equal" facilities in connection with the requirements of equal protection of the law appears in the case of *Plessy* v. *Ferguson.*[18] That case involved the validity of a Louisiana statute requiring segregation on passenger vehicles. The petitioner there claimed that the statute was unconstitutional and void. A demurrer by the State of Louisiana was sustained, and ultimately this Court affirmed the judgment of the Louisiana courts in holding that the statute did not violate the Thirteenth Amendment nor did it violate the Fourteenth Amendment. Mr. Justice BROWN in his opinion for the majority of the Court pointed out that:

> "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude . . . " (163 U. S. 537, 543).

Mr. Justice BROWN, in continuing, stated that the object of the Fourteenth Amendment was to enforce absolute equality before the law but:

> " . . . Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. . . . "[19]

[18] 163 U. S. 537, 543.
[19] *Id.* at page 543.

It should be noted that this case was based solely on the pleadings, and that there was no evidence either before the lower courts or this Court on either the reasonableness of the racial distinctions or of the inequality resulting from segregation of Negro citizens. The plaintiff's right to "equality" in fact was admitted by demurrer. The decision in the *Plessy* case appears to have been based upon the decision of *Roberts* v. *Boston,* 5 Cush. 198 (1849), a case decided before the Civil War and before the Fourteenth Amendment was adopted. In the *Plessy* case, the majority opinion cites and relies upon language in the decision in the *Roberts* case and added: "It was held that the powers of the Committee extended to the establishment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools." [20]

Mr. Justice HARLAN in his dissenting opinion pointed out that:

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed such legislation as that here in question is inconsistent, not only with that equality of rights

[20] *Id.* at pages 544-545.

> which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States" (163 U. S. 537, 554-555).
>
> and
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> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race" (163 U. S. 537, 559).

More recent decisions of the Supreme Court support Mr. Justice HARLAN's conclusion.[21] In re-affirming the invalidity of racial classification by governmental agencies, Mr. Chief Justice STONE speaking for the Court in the case of *Hirabayashi* v. *United States* stated: "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."[22]

In the same case, Mr. Justice MURPHY filed a concurring opinion in which he pointed out that racial distinctions based on color and ancestry "are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war."[23]

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[21] *Hirabayashi* v. *United States,* 320 U. S. 81.
[22] *Id.* at page 100.
[23] *Id.* at page 110.

Mr. Justice MURPHY in a concurring opinion in a case involving discrimination against Negro workers by a railroad brotherhood acting under a federal statute (Railway Labor Act) pointed out:

> "Suffice it to say, however, that this constitutional issue cannot be lightly dismissed. The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. 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. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.
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> "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. 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 Constition that abhors it, to expose and condemn it whereever it appears in the course of a statutory interpretation."[24]

The doctrine of "separate but equal" treatment recognized in *Plessy* v. *Ferguson* was arrived at not by any study or analysis of facts but rather as a result of an *ad hominem* conclusion of "equality" by state courts. As a matter of fact, this Court has never passed directly upon the question of the validity or invalidity of state statutes requiring the

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[24] *Steele* v. *L. N. R. R. Co.*, 323 U. S. 192, 209.

segregation of the races in public schools. The first case on this point in this Court is *Cummings* v. *Richmond County Board of Education.*[25] The Board of Education of Richmond County, Georgia, had discontinued the only Negro high school but continued to maintain a high school for white pupils. Petitioner sought an injunction to restrain the board from using county funds for the maintenance of the white high school. The trial court granted an injunction which was reversed by the Georgia Supreme Court and affirmed by this Court. The opinion written by Mr. Justice HARLAN expressly excluded from the issues involved any question as to the validity of separate schools. The opinion pointed out:

> "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" (175 U. S. 528, 543).

In the case *Gong Lum* v. *Rice,*[26] the question was raised as to the right of a state to classify Chinese as colored and to force them to attend schools set aside for Negroes. In that case the Court assumed that the question of the right to segregate the races in its educational system had been decided in favor of the states by previous Supreme Court decisions.

The next school case was the *Gaines* case which has been discussed above. In that case this Court without making an independent examination of the validity of the doctrine of "separate but equal" facilities stated: "The state has sought to fulfill that obligation by furnishing equal facili-

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[25] 175 U. S. 528.
[26] 275 U. S. 78.

ties in separate schools, a method the validity of which has been sustained by our decisions." This Court cited as authority for this statement the decisions which have been analyzed above.

Segregation in public education helps to preserve and enforce a caste system which is based upon race and color. It is designed and intended to perpetuate the slave tradition sought to be destroyed by the Civil War and to prevent Negroes from attaining the equality guaranteed by the federal Constitution. Racial separation is the aim and motive of paramount importance—an end in itself. Equality, even if the term be limited to a comparison of physical facilities, is and can never be achieved.

The only premise on which racial separation can be based is that the inferiority and the undesirability of the race set apart make its segregation mandatory in the interest of the well-being of society as a whole. Hence the very act of segregation is a rejection of our constitutional axiom of racial equality of man.

The Supreme Court in *Plessy* v. *Ferguson,* as we have seen, without any facts before it upon which to make a valid judgment adopted the "separate but equal" doctrine. Subsequent cases have accepted this doctrine as a constitutional axiom without examination. Hence what was in reality a legal expedient of the Reconstruction Era has until now been accepted as a valid and proved constitutional theory.

C. *Equality Under a Segregated System Is a Legal Fiction and a Judicial Myth.*

There is of course a dictionary difference between the terms segregation and discrimination. In actual practice, however, this difference disappears. Those states which

segregate by statute in the educational system have been primarily concerned with keeping the two races apart and have uniformly disregarded even their own interpretation of their requirements under the Fourteenth Amendment to maintain the separate facilities on an equal basis.

1. The General Inequities in Public Educational Systems Where Segregation Is Required.

Racial segregation in education originated as a device to "keep the Negro in his place", *i. e.,* in a constantly inferior position. The continuance of segregation has been synonymous with unfair discrimination. The perpetuation of the principle of segregation, even under the euphemistic theory of "separate but equal", has been tantamount to the perpetuation of discriminatory practices. The terms "separate" and "equal" can not be used conjunctively in a situation of this kind; *there can be no separate equality.*

Nor can segregation of white and Negro in the matter of education facilities be justified by the glib statement that it is required by social custom and usage and generally accepted by the "society" of certain geographical areas. Of course there are some types of physical separation which do not amount to discrimination. No one would question the separation of certain facilities for men and women, for old and young, for healthy and sick. Yet in these cases no one group has any reason to feel aggrieved even if the other group receives separate and even preferential treatment. There is no enforcement of an inferior status.

This is decidedly not the case when Negroes are segregated in separate schools. Negroes *are* aggrieved; they *are* discriminated against; they *are* relegated to an inferior position because the entire device of educational segregation has been used historically and is being used at present to

deny equality of educational opportunity to Negroes. This is clearly demonstrated by the statistical evidence which follows.

The taxpayers' dollar for public education in the 17 states and the District of Columbia which practice compulsory racial segregation was so appropriated as to deprive the Negro schools of an equitable share of federal, state, county and municipal funds. The average expense per white pupil in nine Southern states reporting to the U. S. Office of Education in 1939-1940 was almost 212% greater than the average expense per Negro pupil.[27] Only $18.82 was spent per Negro pupil, while the same average per white pupil was $58.69.[28]

Proportionate allocation of tax monies is only one criterion of equal citizenship rights, although an important one. By every other index of the quality and quantity of educational facilities, the record of those states where segregation is a part of public educational policy clearly demonstrates the inequities and second class citizenship such a policy creates. For example, these states in 1939-1940 gave whites an average of 171 days of schooling per school term. Negroes received an average of only 156 days.[29] The average for a white teacher was $1,046 a year. The average Negro teacher's salary was only $601.[30]

The experience of the Selective Service administration during the war provides evidence that the educational inequities created by a policy of segregation not only deprive

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[27] *Statistics of the Education of Negroes (A Decade of Progress)* by David T. Blose and Ambrose Caliver (Federal Security Agency, U. S. Office of Education, 1943). Part I, Table 6, p. 6.

[28] *Ibid.,* Table 8.

[29] *Biennial Surveys of Education in the United States. Statistics of State School Systems,* 1939-40 and 1941-42 (1944), p. 36.

[30] Blose and Caliver, *op. cit., supra* note 9, Part 1, p. 6, Table 7.

the individual Negro citizens of the skills necessary to a civilized existence and the Negro community of the leadership and professional services it so urgently needs, but also deprive the state and nation of the full potential embodied in the intellectual and physical resources of its Negro citizens. In the most critical period of June-July 1943, when the nation was desperately short of manpower, 34.5% of the rejections of Negroes from the armed forces were for educational deficiencies. Only 8% of the white selectees rejected for military service failed to meet the educational standards measured by the Selective Service tests.[31]

Lest there be any doubt that this generalization applies to Oklahoma as well, let us look at the same data for the same period with respect to this state. We find that 16.1% of the Negro rejections were for educational deficiency, while only 3% of the white rejections were for this reason.[32]

This demonstration of the effects of inequitable segregation in education dramatizes one of the key issues which this Court must decide. Failure to provide Negroes with equal educational facilities has resulted in deprivations to the state and nation as well as to the Negro population. The Constitution establishes a set of principles to guide human conduct to higher levels.[33] If the courts reject the theory of accepting the lowest common denominator of behavior because this standard is so blatantly detrimental to the individual citizen, to the state, and to the nation as a whole—then they will be exercising the power which the Constitution has vested in them for the protection of the basic values of our society.

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[31] *The Black and White of Rejections for Military Service.* Montgomery, Ala., American Teachers Association (1944), p. 5.

[32] *Ibid.*

[33] Higher Education for American Democracy, *A Report of the President's Commission on Higher Education,* Vol. I, 1947, p. 34. Government Printing Office.

2. On the Professional School Level the Inequities Are Even More Glaring.

As gross as is the discrimination in elementary education, the failure to provide equal educational opportunities on the professional levels is proportionately far greater. Failure to admit Negroes into professional schools has created a dearth of professional talent among the Negro population. It has also deprived the Negro population of urgently needed professional services. It has resulted in a denial of equal access to such services to the Negro population *even on a "separate" basis.*

In Oklahoma, the results of the legal as well as the extra-legal policies of educational discrimination have deprived the Negro population of professional services in the fields of medicine, dentistry and law. The extent of this deprivation can best be judged by the following data, in which the figures represent one lawyer, doctor and dentist, respectively, to the following number of white and Negro population:[34]

Profession	*White*	*Negro*
Law	643	6,754
Medicine	976	2,165
Dentistry	2,931	8,887

That this critical situation is not peculiar to Oklahoma alone but *is an inevitable result of the policy of racial segregation and discrimination in education* is demonstrated by an analysis made by Dr. Charles H. Thompson.[35] He states that:

> "In 1940 there were 160,845 white and 3,524 Negro physicians and surgeons in the United States. In

[34] Based on data in *Sixteenth Census of the United States: Population,* Vol. III, Part 4, Reports by States (1940).

[35] Charles H. Thompson, "Some Critical Aspects of the Problem of the Higher and Professional Education for Negroes," *Journal of Negro Education* (Fall 1945), pp. 511-512.

proportion to population these represented one physician to the following number of the white and Negro population, respectively:

Section	*White*	*Negro*
U. S.	735	3,651
North	695	1,800*
South	859	5,300*
West	717	2,000*
Mississippi	4,294	20,000*

"A similar situation existed in the field of dentistry, as far as the 67,470 white and 1,463 Negro dentists were concerned:

Section	*White*	*Negro*
U. S.	1,752	8,800*
North	1,555	3,900*
South	2,790	14,000*
West	1,475	3,900*
Miss.	14,190	37,000*

"In proportion to population there are five times as many doctors and dentists in the country as a whole as there are Negro doctors and dentists; and in the South, six times as many. Even in the North and West where we find more Negro doctors and dentists in the large urban centers, there are two and one-half times as many white dentists and doctors as Negro.

"*Law*—In 1940 there were 176,475 white and 1,052 Negro lawyers in the U. S. distributed in proportion to population as follows:

Section	*White*	*Negro*
U. S.	670	12,230
North	649	4,000*
South	711	30,000*
West	699	4,000*
Miss.	4,234	358,000*

* To the nearest hundred or thousand.

> "There are 18 times as many white lawyers as Negro lawyers in the country as a whole; 45 times as many in the South; and 90 times as many in Mississippi. Even in the North and West there are six times as many white lawyers as Negro. With the exception of engineering, *the greatest disparity* is found in law." (Italics ours.)

The professional skills developed through graduate training are among the most important elements of our society. Their importance is so great as to be almost self-evident. Doctors and dentists guard the health of their people. Lawyers guide their relationships in a complicated society. Engineers create and service the technology that has been bringing more and more good to more and more people. Teachers pass on skills and knowledge from one generation to another. Social service workers minister to the needs of the less fortunate groups in society and reduce the amount of personal hardship, deprivation, and social friction.

Yet the action of the State Supreme Court in this case, quite aside from any legal considerations, lends the sanction of that court to a series of extra-legal actions by which the various states have carried on a policy of discrimination in education. In Oklahoma, the 16 other states and the District of Columbia where separate educational facilities for whites and Negroes are mandatory, the provisions for higher education for Negroes are so inadequate as to deprive the Negro population of vital professional services.

The record of this policy of educational segregation and denial of professional education to Negroes is clear. In the 17 states and the District of Columbia in 1939-1940 the following number of states made provisions for the public professional education of Negro and white students:[36]

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[36] Based on data in *National Survey of Higher Education for Negroes,* Vol. II, p. 15. U. S. Office of Education, 1942.

Profession	*White*	*Negro*
Medicine	15	0
Dentistry	4	0
Law	16	1
Engineering	17	0
Social Service	9	0
Library science	13	1
Pharmacy	14	0

The result has been that the qualified Negro student is unable to obtain the professional education for which he may be fitted by aptitude and training.

Other sections of the country, too, practice discrimination against Negroes in professional schools by means of "quotas" and other devices.[37] But only in the South is *legal*

[37] "Wherever young Americans of 'minority' races and religions are denied, by the open or secret application of a quota system, the opportunity to obtain a medical, law or engineering education, apologists for the system have a standardized justification.

"In their racial-religious composition, the apologists contend, the professions must maintain ratios which correspond to those found in the composition of the whole population. Were the institution of higher learning left wide open to ambition and sheer merit, they argue, the professions would be 'unbalanced' by a disproportionate influx of Catholics, Negroes and Jews.

"Such racial arithmetic hardly accords with our vaunted principles of democratic equality. In effect it establishes categories of citizenship. It discriminates against tens of millions of citizens by denying their sons and daughters a free and equal choice of profession. If a ratio must be imposed on the basis of race, why not on the pigmentation? Forcing a potentially great surgeon to take up some other trade makes sense only on the voodoo level of murky prejudice. It not only deprives the citizen of his legal and human rights but, no less important, it deprives the country of his potentially valuable services."—from "Religious Prejudices in Colleges," by Dan W. Dodson. *The American Mercury* (July 1946), p. 5. See also: "Higher Education for American Democracy", *A Report of the President's Commission on Higher Education,* U. S. Government Printing Office, December, 1947, page 35. "This practice is a violation of a major American principle and is contributing to the growing tension in one of the crucial areas of our democracy."

discrimination practiced and it is thus in the South that the Negro population suffers the greatest deprivation of professional services.

The record is quite clear, and the implications of the above data are obvious. There is another implication, however, which is not as obvious but is of almost equal importance in the long-range development of the Negro people. From the ranks of the educated professionals come the leaders of a minority people. In the course of their daily duties they transmit their skills and knowledge to the people they serve. They create by their daily activities a better, more enlightened citizenship because they transmit knowledge about health, personal care, social relationships and respect for and confidence in the law.

The average Negro in the South looks up to the Negro professional with a respect that sometimes verges on awe. It is frequently the Negro professional who is able to articulate the hopes and aspirations of his people. The respondents, in denying to the petitioner access to equal educational facilities on the professional level within the State, also deny to the Negro population of Oklahoma equal access to professional services and deprive it of one of the most important sources of guidance in citizenship. This denial is not only injurious to petitioner, and to other Negro citizens of the State, but adverse to the interests of *all the citizens of the State* by denying to them the full resources of more than 168,849 Negro citizens.

D. *There is No Rational Justification For Segregation in Professional Education and Discrimination Is a Necessary Consequence of Any Separation of Professional Students On the Basis of Color.*

1. The professional skills developed through graduate training are among the most important elements of our society. Their importance is so great as to be almost self-evident. They are the end results, the products of education, but, at the same time, they do not constitute the full purpose of education.

> "It is a commonplace of the democratic faith that education is indispensable to the maintenance and growth of freedom of thought, faith, enterprise, and association. Thus the social 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."[38]

It clearly follows then, that segregation is an abortive factor in the full realization of the objectives of education. First, it prevents both the Negro and white student from obtaining a full knowledge of the group from which he is separated, thereby infringing upon the natural rights of an enlightened citizen. Second, a feeling of distrust for the minority group is fostered in the community at large, a psychological atmosphere which is not favorable to the acquisition of an education or to the discharge of the duties of a citizen in redirecting "forces, men and events". Lastly, one of the effects of segregation in education with respect

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[38] "Higher Education for American Democracy", *A Report of the President's Commission on Higher Education,* U. S. Government Printing Office, December 1947, p. 5.

to the general community is that it accentuates imagined differences between Negroes and whites.

This false assumption of differences is given an appearance of reality by the formal act of physical separation. Furthermore, as the segregation is against the will of the segregated, it produces a very favorable situation for the increase of bad feeling, and even conflict, rather than the reverse.[39]

It is clear, then, that in seeking a form of education free from any racial restrictions, one wants not only the benefits and skills that that education can yield him, but, primarily, he desires to live and function as an enlightened citizen in a representative democracy.

2. Qualified educators, social scientists, and other experts have expressed their realization of the fact that "separate" is irreconcilable with "equality".[40] There can be no separate equality since the very fact of segregation establishes a feeling of humiliation and deprivation to the group considered to be inferior.[41]

The recently published report of the President's Committee on Civil Rights states:

> "No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."[42]

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[39] Gunnar Myrdal, *An American Dilemma,* New York, 1944, Vol. I, page 625: "But they are isolated from the main body of whites, and mutual ignorance helps reenforce segregative attitudes and other forms of race prejudice".

[40] Gunnar Myrdal, *op cit.,* page 580.

[41] Carey McWilliams, "Race Discrimination and the Law", *Science and Society,* Volume IX, Number 1, 1945.

[42] "To Secure These Rights", *The Report of the President's Committee on Civil Rights,* U. S. Government Printing Office, 1947, p. 82.

The sociological and political significance of the practice of segregation is found not only in the deprivations experienced by the minority group, but by society at large. In one of the most exhaustive studies ever conducted on the subject of segregation, the noted sociologist Gunnar Myrdal has stated:

> "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 discrimination against Negroes and 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."[43]

There are many other authoritative studies which bear out Mr. Myrdal's observations.[44]

In addition to the psychological atmosphere of distrust and the practical inequities which result under a segregated system, the citizens of both the majority and minority groups are deprived of that inter-change of ideas and attitudes which is so necessary to a full education.

3. No one questions the kind of separation which the community imposes in the interest of public safety, convenience or welfare. There is ample justification for differences in the treatment of the old and the young, the healthy

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[43] Gunnar Myrdal, *An American Dilemma,* New York, 1944, Vol. I, page 644.

[44] H. Cantril, *Psychology of Social Movements,* 1941, pages 78-122; Gene Weltfish, "Causes of Group Antagonism", *Journal of Social Issues,* Vol. 1.

and the sick, the criminal and the law-abiding. In each of these cases the act of separation is justified and is motivated by a desire to protect society at large, and to promote the interest of both groups.

There is, however, no rational basis, no factual justification for segregation in education on the grounds of race or color. This type of segregation is often rationalized on the ground that "Negroes have an inferior mental capacity to whites." Yet this premise is completely invalid and no act of segregation based upon it can be upheld as reasonable.[45] Scientific studies have been conducted in which representative samples of both groups, Negro and white, have been placed in nearly identical situations with identical tasks to perform. In a study by an eminent sociologist, it is stated:

> "The general conclusion can be only that the case for psychological race differences has never been proved. . . . The general conclusion of this book is that there is no scientific proof of racial differences in mentality. . . . There is no reason, therefore, to treat two people differently because they differ in their physical type. There is no justification for denying a Negro a job or an education because he is a Negro. No one has been able to demonstrate that ability is correlated with skin color or head shape or any of the anatomical characteristics used to classify races."[46]

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[45] *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, "Los Angeles Negro Children", *Educational Research Bulletin,* Los Angeles, 1923.

[46] Otto Klineberg, *Race Differences* 343 (1935).

Moreover, it has been demonstrated, that in cases where no segregation exists, or where it has ceased to exist, the results have never been disastrous but often favorable. Lloyd W. Warner in his study of New Haven Negroes says:

> "... children in New Haven are not taught color consciousness in the schools and develop it only slowly from outside influences. There is no discrimination in the New Haven public-school system. ... There are colored children in four out of every seven schools in the city, and in none are they segregated by class, seat, or section. Reports indicate, also, that the white teachers make no distinction in their treatment of the two races. ...
>
> "In many early grades, white and black children romp and learn together. Negroes compete without restraint or embarrassment ... and, if proficient, are cheered and honored. They debate, sing, and act in dramatics, generally without discrimination."
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> * * * * * * * * *
>
> "There is no feeling of difference among fellow teachers, white or black. They entertain each other socially and make friends, eat, banquet, talk and play cards together. They are united against discrimination when it shows itself."[47]

Since all available evidence controverts the theory that Negroes have an inferior mental capacity to whites, and moreover, since the two groups work well together and to their mutual advantage, it must be concluded that any claim of inferiority is motivated by a desire to perpetuate segregation *per se*.[48]

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[47] Lloyd W. Warner, *New Haven Negroes,* New Haven, 1940, pp. 277-279.

[48] D. O. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional" (1945), 33 Cal. L. Rev. 5, 27 (note 94: "When a dominant race, whether white or Negro, demands separation, it is fallacious to say ... that the intention and effect is not to impose a 'badge of inferiority' on the other.")

4. It may be that the pattern of segregation which has existed in the South for more than fifty years cannot be abolished instantaneously. But although the term "gradual" may be used adjectively in relation to the overall pattern, it should not be used as a rationalization for inaction in this case. The Report of the President's Commission on Higher Education, published in December, 1947, advocates as its sixth step toward equalizing educational opportunities the immediate abolition of segregation, in the following words:

> *"The time has come to make public education at all levels equally accessible to all, without regard to race, creed, sex or national origin.*
>
> "If education is to make the attainment of a more perfect democracy one of its major goals, it is imperative that it extend its benefits to all on equal terms. It must renounce the practices of discrimination and segregation in educational institutions as contrary to the spirit of democracy."[49]

Only a few months earlier, the Report of the President's Commission on Civil Rights had recommended:

> *"The elimination of segregation, based on race, color, creed, or national origin, from American life.*
>
> "The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facilities for minority peoples. Finally, it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work to-

[49] "Higher Education for American Democracy", *A Report of the President's Commission on Higher Education,* U. S. Government Printing Office, Washington, December, 1947, p. 38.

gether. There is no adequate defense of segregation."[50]

All of the studies referred to herein demonstrate that segregation inevitably results in inequality and injustice. Thus, an objective examination of the facts furnishes the basis for a new ruling by this Court—a new ruling which will be evolutionary rather than revolutionary.

III

The Doctrine of "Separate But Equal" Facilities Should Not Be Applied to This Case.

The examination of the "separate but equal" doctrine reveals that it is at best a bare constitutional hypothesis based upon a fallacious evaluation of the purpose and meaning inherent in any policy or theory of enforced racial separation. This Court should not recognize such a doctrine in the absence of clear and unmistakable evidence that such enforced separation affords the equality guaranteed by the Fourteenth Amendment, which "equality" this Court has, while passing upon the validity of segregation statutes, assumed actually to exist.

The asserted right of the State of Oklahoma to enforce segregation of the races in public schools even to the extent of excluding petitioner from the only law school must be weighed against the national interests as set forth in the Constitution.[51] This Court has re-stated our national policy

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[50] "To Secure These Rights", *The Report of the President's Committee on Civil Rights,* U. S. Government Printing Office, 1947, p. 166.

[51] *Cf.: Morgan* v. *Virginia,* 328 U. S. 373; *Marsh* v. *Alabama,* 326 U. S. 501; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Railway Mail Association* v. *Corsi,* 326 U. S. 88.

to be opposed to racial classifications because such classifications are irrational and unreasonable criteria "odious to a free people whose institutions are founded upon the doctrine of equality".[52]

The flagrant discrimination against the petitioner in this case is directly in the teeth of the Fourteenth Amendment and was made with full knowledge of the decision of this Court in the *Gaines* case. The respondents only defense is a reliance upon certain language in this Court's opinion. Petitioner has already lost more than a year of legal training which she would have received had she not been a Negro. This petitioner's rights can only be protected by affirmative action of this court in recognizing her right to be admitted to the Law School of the University of Oklahoma without qualifying such relief by apparently recognizing the validity of the doctrine of "separate but equal" facilities in this case.

Conclusion

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

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