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CONSTITUTION

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

STATE OF MISSOURI EX REL. LLOYD L. GAINES, PETITIONER,

VS.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, AND THE CURATORS OF THE UNIVERSITY OF MISSOURI, RESPONDENTS.

PETITION OF THE RESPONDENTS FOR A REHEARING.

Come now the above-named respondents, S. W. Canada, registrar of the University of Missouri, and the curators of the University of Missouri, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

I.

The court's construction of the equal protection clause applied in this case is not in accord with prior interpretations of the clause by this court, and is erroneous.

In holding that the State of Missouri is bound to furnish Gaines equal facilities for legal education *within its own borders,* and cannot satisfy his constitutional right

to equal protection by furnishing such facilities in an adjacent state university, the court has construed and applied the equal protection clause of the fourteenth amendment in a manner not justified by its language, and not in accordance with the settled construction of the clause as heretofore applied by this Honorable Court.

The court holds that the question whether the provision for the legal education in other states of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, is "the pivot upon which this case turns" (page 6 of printed opinion). The court then says that the relative advantages of legal education within and without the State are matters beside the point; that the validity of laws separating the races rests wholly upon the equality of privileges given to the separated groups "*within the State*" (page 6); that the State's obligation of equal protection "can be performed only where its laws operate, that is, *within its own jurisdiction*"; that "it is *there* that the equality of legal right *must be* maintained" (page 7); and that the State was bound to furnish Gaines equal facilities for legal education "*within its borders*" (page 8). The court concludes that Gaines was entitled to be admitted to the law school of the University of Missouri "in the absence of other and proper provision for his legal training *within the State*" (page 9).

The equal protection clause provides that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws." The court in this case has construed the words "within its jurisdiction" to mean that the State of Missouri must provide legal instruction for Gaines *within its borders*, and may not satisfy his con-

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(All italics in quotations are ours.)

stitutional right to equal protection by contracting or arranging, at the State's expense, for his legal education in a nearby adjacent state university, regardless of the high quality of legal education there available to him.

This is a new interpretation of the equal protection clause, and one which (so far as our research discloses) has never before been applied by this Honorable Court. Heretofore the phrase "within its jurisdiction" has been interpreted merely as limiting the guaranty of equal protection of the laws to *persons who are physically within the territorial jurisdiction of the State.* The phrase has heretofore been construed as defining the *persons* to whom equal protection must be accorded, and has never before been construed as limiting *the territory within which* facilities accomplishing equal protection may be used. Decisions construing the phrase are as follows:

In *Blake* v. *McClung,* 172 U. S. 239, 260-1, the court said:

> "It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' *That prohibition manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.'* "

In *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417, the court said:

> "We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the fourteenth amendment, *a person within the jurisdiction* of the State of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws."

In *Philadelphia Fire Ass'n* v. *New York,* 119 U. S. 110, 116, the court said:

> "The provision of the fourteenth amendment, which went into effect in July, 1868, is, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The first question which arises is, whether this corporation was a *person within the jurisdiction* of the State of New York, with reference to the subject of controversy and within the meaning of the amendment."

In *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369, the court said:

> "The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, *to all persons within the territorial jurisdiction,* without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 400, the court said:

> "The equal protection clause extends to *foreign corporations within the jurisdiction* of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that *natural persons within its jurisdiction* have a right to demand under like circumstances."

To the same effect are the following:

Kentucky Finance Corp. v. *Paramount Auto Exchange Corp.*, 262 U. S. 544, 550.

National Council of United American Mechanics v. *State Council of Virginia*, 203 U. S. 151, 163.

Atchison, Topeka & Santa Fe Railway Co. v. *Vosburg*, 238 U. S. 56, 59.

12 Corpus Juris 1142.

It is respectfully submitted that the meaning thus applied to the phrase "within its jurisdiction" by these decisions is correct, and that the words were not intended, and should not be construed, to *define or limit the place where* the State must supply the facilities fulfilling equal protection.

If in this case the court will give to the phrase "within its jurisdiction" only the meaning heretofore applied, the result will be to hold that Missouri may not deny to petitioner, *who is a "person within its jurisdiction,"* facilities for legal education equal to those provided for its white citizens. This proposition has never been denied by the state court or by the respondents.

But this court has departed from its settled construction, and has now for the first time construed the phrase "within its jurisdiction" as defining, not merely the *person* to whom equal protection must be accorded, but the *place or territory* within which the facilities implementing equal protection must be used.

The construction formerly applied by the court will not require the State to provide facilities for legal education for petitioner *within the State,* and will only require that the facilities provided for him shall be equal to those provided for white citizens.

We respectfully call attention to the fact that no authority is cited for the construction now adopted. We believe no authority exists.

It is also a fact that the construction applied by the court was not presented or even suggested in petitioner's brief—for which reason it was not discussed in respondents' brief. *So the case is decided upon a question not actually presented.* The gravity of the question is apparent. We respectfully submit that a question so fundamental and of such far-reaching effect should be finally decided by this Honorable Court only after full presentation.

II.

The court overlooks the right of Missouri to enter into a contract with another state to supply the facilities for legal education to Gaines.

The court in its decision overlooks the fact that the Missouri statute (Sec. 9622, R. S. Mo., 1929) authorizes the curators of Lincoln University to contract with the university of an adjacent state to supply Gaines the facilities for a legal education equal to those afforded white students at the University of Missouri. The constitution recognizes that states will contract with each other (Art. I, Sec. 10). Such contract need not be in writing, and may be a mere verbal understanding (*Holmes* v. *Jennison,* 14 Pet. 540, 572). The State of Missouri has the right to enter into a contract with another state, the adjacent State of Illinois, for example, to furnish Gaines the facilities for a legal education, and such a contract is valid even without the consent of Congress. In *Virginia* v. *Tennessee,* 148 U. S. 503, 518, the court said:

> "There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of pestilence, without obtaining the consent of Congress, which might not be at the time in session."

To the same effect are *Wharton* v. *Wise,* 153 U. S. 155, 168-170; *Dodge* v. *Briggs,* 27 Fed. 160, 171, and 59 C. J. 36-37.

III.

The court overlooks the relationship of principal and agent which would exist between Missouri and the university of an adjacent state.

The State of Missouri in furnishing the facilities for higher education must necessarily act through some agency. The court in its decision overlooks the fact that

when the curators of Lincoln University carry out the authority in them vested by the Missouri statute (Sec. 9622, R. S. Mo., 1929) and arrange or contract with, let us say, the University of Illinois, for Gaines's attendance at the law school of that institution, and pay said university all it demands for such services, to-wit, the full tuition, the University of Illinois thereby becomes the agent of the State of Missouri to give Gaines the required education. And since Missouri makes this arrangement and pays the full price requested by Illinois therefor, it is *the State of Missouri* that gives Gaines the equal protection, and *not the State of Illinois.* It therefore is erroneous to say, as the opinion states, that "no state can be excused from performance by what another state may do or fail to do." Such a statement would be applicable if Missouri did not enter into the picture (as here), as the principal paying the price to the University of Illinois, which is the agent receiving the fee for services in supplying facilities for legal education.

Contracts of this kind are valid contracts although the performance thereof is to occur outside the territorial boundaries of Missouri (*Virginia* v. *Tennessee,* 148 U. S. 503, 518; *Wharton* v. *Wise,* 153 U. S. 155, 168-170; *Dodge* v. *Briggs,* 27 Fed. 160, 171; 59 Corpus Juris 36-37). And so long as this agency complies with the arrangement which Missouri makes with it for the education of Gaines, there can be no denial to Gaines of the equal protection of the law. The State of Illinois is satisfied with such an arrangement, as indicated by the fact that it receives negro students from other states (R. 87-88); and Gaines cannot raise any objection on its behalf. So long as this arrangement provides Gaines facilities for legal education substantially equal to those provided for

white students, he has not been deprived of any constitutional right and cannot complain.

IV.

The court overlooks its well-established canon of construction of the fourteenth amendment.

With the greatest respect we feel constrained to suggest that in approaching the solution of the problem here involved the court failed to consider and give effect to the well-established canon of construction so clearly and ably stated by the late Justice Holmes speaking for the unanimous court in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110. Justice Holmes there said that—

> "we must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

The construction of the equal protection clause applied by the court in the case at bar fails to comply with the above canon of construction, which this court has for a long time heretofore observed in measuring state laws with the yardstick contained in the Fourteenth Amendment.

V.

The court overlooks the effect of the failure of Gaines to apply to the curators of Lincoln University.

The court in its decision overlooks the settled rule that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted. In *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616-617, this court through Justice Cardozo said:

> "One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. *He should apply and see what happens.*"

In *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, this court through Mr. Justice Brandeis held that the contention of the shipbuilding corporation was—

> "at war with the long-settled rule of judicial administration that *no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.*"

To the same effect are *Petroleum Exploration, Inc.*, v. *Public Service Commission*, 304 U. S. 209, 222-3; *Bourjois, Inc.*, v. *Chapman*, 301 U. S. 183, 188; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Smith* v. *Cahoon*, 283 U. S. 553, 561-2; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468, 471; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 55-6; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562, and *Ex parte Virginia Commissioners*, 112 U. S. 177.

The record shows that Gaines deliberately refused to avail himself of the provisions made by the state for his benefit, by refusing to apply to the Lincoln University curators, the agency of the state charged with the furnishing of higher education to its negro citizens (R. 74, 82, 83, 84, 85-86, 218-219, 222). *He even declined under oath to say whether he would have attended a law school in Lincoln University* if one had been established there on a par with the law school at the University of Missouri. This appears at page 88 of the record, as follows:

> "Q. At page 69 of your deposition, do you recall my asking you if a good law school were established at Lincoln University, one that would be on a par with that at Missouri University, whether you would attend it, *and you refused to answer—didn't you?*
> A. *Yes, sir.*"

This attitude on the part of Gaines must leave this court as well as the State of Missouri in the dark as to the good faith of Gaines's application.

We respectfully submit that the court should have decided this question. The mention in the opinion of what the President of Lincoln University wrote Gaines does not answer the point, because the president had no power to act or bind the board of curators. The Board of Curators of Lincoln University alone had the power under the statutes (Sec. 9618, 9622, R. S. Mo., 1929), to provide legal education at Lincoln University. Under the above authorities it was the duty of Gaines to apply to the Lincoln curators, and his failure to do so leaves him in no position to ask judicial relief.

VI.

The far-reaching effect of the court's decision.

The principle of race separation in educational facilities is firmly established in many of the states. It is founded in long-established and deeply-rooted tradition. It is a condition, not a theory.

While maintaining this tradition seven of these states, exercising their police power, in a good faith attempt to solve this difficult problem in a manner to conserve the general welfare of both races, have provided for race separation in higher education, and have enacted laws designed in good faith to give the negro equal facilities for higher education—by out-of-state instruction. (Of these states only Missouri has established a state university for negroes within its borders.) The laws of these seven states are printed in the appendix to petitioner's brief (pages 25-37). Those laws are in actual operation, to the reasonable satisfaction of all fair-minded persons.

So far as Kentucky, Maryland, Oklahoma, Tennessee, Virginia and West Virginia are concerned (each of which has made provision for out-of-state instruction but has no negro university within its borders), the decision means that these states will be compelled either to admit negroes to sit with white boys and girls in their state universities, or to build separate negro universities within their borders to take care of any demand for higher education of negroes which might arise. Because of long-settled and deeply-rooted traditions, and through a well-founded fear of the consequences of any change, it is reasonably certain that those states cannot and will not abolish race separation. So the only choice open to them is either to abolish their state universities and depend upon private

institutions for the education of white students, or to build negro universities within their borders to be ready to supply, immediately on demand, higher education for negroes in every branch of learning taught in the state university—and this too *even though there may never have been any demand* for education in some, or any, of those branches, and even though it cannot reasonably be foreseen that there ever will be such a demand. The dilemma forced upon these states by the opinion is obviously a serious one.

The effect of the decision so far as Missouri is concerned is twofold:

First. The State must at once establish in Lincoln University each and every course of instruction available at the University of Missouri, whether there has ever been any demand therefor by any Missouri negro or not. This because conceivably such a demand may arise; and if it does arise the State must at once be in a position to satisfy it. The result will be a number of new departments in Lincoln University with *idle teaching staffs and empty classrooms.*

Second. If the State should desire to expand the curriculum in the University of Missouri by the addition of new courses of instruction, for which there has arisen a demand from white students but for which there is absolutely no demand from negroes, then the State must at once establish the same courses of study at Lincoln University—again with *idle teaching staffs and no students.* The natural economic result would be to deter the State from the normal expansion of its higher educational institutions.

The problem presented here is intensely practical, and must be solved with due regard for the *actual needs* of the two races, rather than upon the basis of purely theoretical considerations. As stated in the dissenting opinion:

> "The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Missouri be, upon further consideration, affirmed.

Respectfully submitted,

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
Counsel for Respondents.

Certificate of counsel.

We, the undersigned, counsel for the above-named respondents, do each hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
Counsel for Respondents.