

G.W. McLaurin, Appellant

34 v.

Oklahoma State Regents for

Higher Education, Board

of Regents of University of

Oklahoma, et al.

Heman Marion Sweatt, Petitioner

44 v.

Theophilus Schickel Painter, et al.

On Appeal from the United
States District Court
for the Western District
of Oklahoma

On Writ of Certiorari to
the Supreme Court of
the State of Texas

[April -- , 1950]

Memorandum to the Conference from MR. JUSTICE CLARK.

I hesitate to state my views prior to conference, but in these cases I think my convictions, based in part upon my experience in Texas, might be helpful to the Court.

First. I do not think decision should be made to turn upon the physical equality or inequality of the educational plants and teaching faculties available to Negro and white students. I doubt that such a ground is open to us in Sweatt, even though petitioner asserts that "The Texas Court was in error in holding that the law school established for Negroes at Austin was 'substantially equal' to the law school which the state makes available to non-Negroes at the University of Texas." Brief, Errors Relied Upon 11, p. 5. The Texas Court of Civil Appeals, in its opinion on petitioner's motion for rehearing -- the latest opinion in the case --, stated that petitioner did not invoke its jurisdiction to set aside the finding of fact as to the physical equality of the two schools; it ^{simply} declared that the finding would have been upheld had it been made reviewable on proper assignment of error by pet-

itioner. Although there was no opinion by the Supreme Court of Texas in connection with its refusal of a writ of error, it appears that again there was no assignment of error raising the fact issue of physical equality essential to invoke that Court's review. The assignments of error, insofar as relevant on this point, were worded identically on appeal to the Court of Civil Appeals, on motion for rehearing in that court, and on petition for writ of error in the Supreme Court.

If, then, the issue of physical equality of schools is no longer in the Sweatt case, we cannot consider disposing of that case by redetermining whether the two schools were in fact equal on the present record, or by remanding for the introduction of further evidence as to the more adequate segregated law school now maintained at the Texas State University for Negroes in Houston.

Further, we would accomplish nothing by deciding on this basis in Sweatt when we cannot do so in McLaurin, for in McLaurin the only inequality is segregation itself. There are minor physical inconveniences, to be sure; but these we must regard as embraced within the statement that "equal does not mean identical." See the cases collected in 17 Geo. Wash. L. Rev. 208 (1949).

Second. I will not recite ~~xxx~~ all the reasons underlying my conviction that segregated education is unequal education. So far as I have been able to study the historical materials, nothing really conclusive is shown for or against segregated education by statements in Congress, the legislatures or the press at the time ~~the~~ the Amendment was adopted. Compare the Brief of the Committee of Law Teachers Against Segregation, pp. 5-18, with Brief of the States' Attorneys General, pp. 27-33. But we know that the facilities are in fact unequal throughout the South, and necessarily will ^{remain unequal} ~~be~~ as long as the whites in the South have the disposition and the political superiority to enforce local segreg-

ation. And, further, we need no modern ~~psychologist~~ psychologist to tell us that "enforced separation of the two races [does] stamp the colored race with a badge of inferiority," contrary to Plessy v. Ferguson. My question, then, is ~~is~~ "how" to reverse, not "whether", or "why."

H Third. There is fear that a flat overruling of the Plessy case would cause subversion or even defiance of our mandates in many communities. Intimidation, threats and riots are envisioned. A long and terrible step backward is forecast if we go too far forward with legal doctrines at this time. Taney's attempt, in Dred Scott, to resolve political and social issues of this magnitude is not comforting.

I believe that those fears are relevant in resolving Constitutional issues of this type and of this magnitude. I would share those fears should we begin holding, today or tomorrow, that swimming pools may not be segregated; or should we decide that the fourth grade in schoolhouses in Mississippi must be open to Negro and white alike.

But I feel confident that those fears are groundless should we rule that there can be no segregation in the college or graduate schools. There will be no ~~defiance~~ defiance by the school administrators. Negroes now attend the University of Texas Medical School, the Oklahoma Law School, the Arkansas Medical and Law Schools. In some of these schools the white students are reliably reported to have taken the initiative in widening their own fellowship in classes, at ^{lunch} ~~lunch~~, and in study groups, to include Negroes. ^{Nowhere} ~~Nowhere~~ are the forces of progress in the South more apparent than in our colleges and graduate schools. For over ten years many of our colleges in Texas have been permitting or sponsoring Negro speakers before white student groups; white students have been going in dep-

utations to Negro communities, organizations, and ~~church~~ churches; the denominational and interdenominational groups at the colleges have been participating in interracial conferences, banquets, and summer camps, and have engaged in interracial folk dancing on the campuses. The only protests have come from the parents and others of an older generation; non-participating students have been for the most part indifferent; the others are simply amused. To my knowledge there have been no reports of any irregularity among the students. / Nor do I think there will be any disturbance in connection with the admission of Negroes generally to state supported institutions of higher education in the South. While there may be for a time an occasional ~~pr~~ prank or threat directed toward negro students by immature undergraduates, such activity will soon come to be disapproved by the entire college community. In all probability the states will continue to maintain a Negro school, and at the outset only the more ambitious Negro students will enroll at the ~~latter~~ ^{white} institution.

~~Fourth.~~ ^{Fourth.} I am in accord with the suggestion that we limit our opinion to graduate schools. I do not suggest, however, that we write an opinion reaffirming Plessy as to all but graduate schools. I would not sign an opinion which approved Plessy.

In terms of social equality, I recognize that segregated grammar schools / may ~~instill~~ instill racism in young minds at a time and in a manner more destructive of society's fabric than segregated ~~colleges~~ colleges and graduate schools ever will. But our concern in these cases is not with social equality, but with educational equality. Broadly, of course, "education" means infinitely more than acquiring a specific skill -- in engineering, medicine, language, law. To "know anything you must know all", in Holmes' words. But I submit that we must treat "education" in its normal, more narrow connotation and concern ourselves here with but one

question: is the segregated Negro's opportunity to acquire ^{specific} skills ~~equal~~ "equal" to that afforded the white?

If that is the issue, we are justified in writing in the focus of graduate schools and colleges -- or graduate schools, alone. It is entirely possible that Negroes in segregated grammar schools, learning arithmetic and spelling would receive skills in those elementary subjects equivalent to those of white students, providing that the quality of texts, physical facilities and instructors is "equal."

It is ~~obvious~~ obvious that the same cannot be said of graduate schools. Negroes within a profession should not be compelled to defer until their formal education has ended the association with whites against whom they must compete and whose professional views they often must understand in order adequately to accomplish their professional tasks. The atmosphere of age and tradition at an established graduate school itself profoundly stimulates its students in achieving professional competence. And that atmosphere draws professors of stature -- men who make an older University so different from a neophyte Negro academy. Further, the opportunities for discussion available in a larger school are literally invaluable -- there surely can be no substitute for the exploration and combat of ideas in a particular subject matter among maturing minds of varied backgrounds and opinions. In this latter, this fundamental inequality, the Sweatt and McLaurin cases are one.

I join, then, with the proposal that we reverse this case upon the ground that segregated graduate education denies Negroes the equal protection of the laws. I repeat that I would not approve Plessy in any manner. We have before us just two cases. Both concern graduate schools. Perhaps the fundamental legal reason

for limiting discussion to graduate schools is that we should avoid decision of Constitutional questions in advance of the strict necessity for that decision.

How will I vote when the swimming pool and grammar school cases arise? I do not know; that is irrelevant. Should they arise tomorrow I would vote to deny certiorari or dismiss the appeal, so that we would not be compelled to decide the issues.

I leave to one side the segregated school system in the District of Columbia, which arises under the Fifth Amendment; and the extremely remote possibility that a state court will conclude that Plessy should be overruled in its entirety.

I join with those ~~xx~~ who would hold that whatever the present validity of Plessy v. Ferguson, there is no square ruling in this Court that separate graduate education is equal education within the meaning of the Fourteenth Amendment; and that for the reasons outlined above, the petitioner Sweatt should be admitted to the University of Texas Law School, and the discrimination against McLaurin at Oklahoma ~~should~~ ended.