No. 34 OT 1949
McLAURIN v. OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION, et al.
Appeal from DC for WD of Oklahoma

No. 44 OT 1949
SWEATT v. PAINTER et al
Cert to Supreme Court of Texas

These cases raise, broadly, the question of the validity of segregated schools. Both petitioners are negroes who have been denied relief in connection with their applications to the Oklahoma University graduate school and the University of Texas Law School, respectively.

The obvious difficulties inherent in any decision in these cases have caused the Court to postpone decision re noting jurisdiction in No. 34, the appeal, for nearly a year, and granting cert for nearly six months in No. 44. I will try to summarize what I understand to be the views expressed by the Justices after a brief survey of the facts and the legal and other background.

1. The Facts

No. 34, McLaurin. An Oklahoma statute makes it a misdemeanor, punishable by fine, for any person, association or corporation to maintain any institution in the State where "persons of both white and colored races are received as pupils for instruction." It is criminal, too, for an instructor to teach any such school; and for a white person to attend. Under 28 U.S.C. §2281, McLaurin had a three-judge District Court impanelled, asking an injunction against the enforcement of the State statutes on the ground that they conflicted with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. McLaurin desired to enter the University of Oklahoma to pursue graduate study leading to a doctorate in education, and there was no other tax supported school in Oklahoma available for that purpose. The DC agreed that the statutes were unconstitutional, but did not enter an order, stating that now that the law

was declared it was sure the University would comply. The University did admit McLaurin, but (1) made him sit in a doorway to class rooms, separate from other students, although he was as close to the professors as were the majority of white students; (2) allowed him to use the library, but in a special place on the mezzanine, apart from white students; (3) allowed him to use the cafeteria, but at a different time and place than whites. He petitioned the DC for further relief from these actions, but the DC denied his petition, stating that the "Oklahoma statutes held unenforceable in the previous order of this court have not been stripped of their vitality to express the public policy of the State in respect to matters of social concern." While the DC action is pretty unusual, it surely amounts to a holding that a statute of Oklahoma is valid in some respects against the claim of Constitutional right. As a three-judge Court so holding, there is the right of direct appeal to this Court under 28 U.S.C.§1253.

No. 44, Sweatt. In 1946 the petitioner filed a petition for mandamus in a Texas court alleging that he had been refused admission to the law school of the University of Texas solely because of race or color. The trial court found that he had been denied equal protection, but refused mandamus, giving school authorities six months to establish a course of legal instruction substantially equivalent to that afforded at the University of Texas. Six months later a law school had been authorized, but not built, but the trial court held that this was compliance with its order. On appeal to the Texas Court of Civil Appeals, the judgment was reversed without opinion and remanded for further proceedings. In May of 1947, petitioner filed papers alleging that segregation violated the equal protection clause; and, further, that the law school which had by then been established for negroes was not equal to that at the University of Texas.

The trial court held a long hearing on these allegations. Deans and

instructors of law from many law schools gave expert opinions. The record is fat. Dean McCormick of Texas stated that he thought the two schools were "substantially equivalent", and the trial court took his judgment in preference to others, as did the Supreme Court of Texas in denying relief. The negro law school did, however, have all the natural drawbacks of a school established overnight. The instructors and Dean were the same men who taught at the "white" law school of Texas; and the rooms for instructions were large enough for the number of students expected. But for various reasons -- principally the fact that instructors were necessarily on a part-time basis -- the school did not meet the standards for accrediting necessary for the ABA or the American Association of Law Schools. And there was no Order of the Coif or Law Review, now legal aid clinic or scholarship fund. There was dispute re the library. Students at the negro law school could use the library at the State capitol -- right across the street from their building -- but so could any other resident of the State; there was nothing separate for law students, as at the regular law school. The capitol library had more volumes, but was to some extent less suited for students -- e.g., fewer periodicals, no English Reports past 1931.

Respondent now claims (Pg. 7 of his brief) that the facilities have been considerably improved since the trial of this action. He says that there are now twenty-three students in the law school and that the school itself contains more than 15,000 volumes of law books -- more than twice the minimum standards of the ABA. There is also now a full-time Dean and five full-time professors.

Should petitioner admit these facts, this Court can of course, take them into consideration. But as yet, there have been no admissions from the petitioner.

2. The Amendment and the "Intention" of the Framers

The first section of the Fourteenth Amendment, after defining citizenship, states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; now 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."

McLaurin and Sweatt, while claiming physical inequality of the facilities for their education, also claim that the last clause in Section 1 means that there can be no segregation according to race consistent with the Fourteenth Amendment. They ask this Court to so rule.

The history of the adoption of the Amendment furnished little help on this question. So far as I can determine from the debates in Congress, from the Journal of the Reconstruction Committee, from Benjamin Kendrick's history thereof (published by Columbia University in 1914) and from Flack, Adoption of the Fourteenth Amendment, the question of segregation was not prominently raised. The framers were concerned with larger problems -- alleged murders and beatings of negroes; absence of the franchise; the policy of Reconstruction, including the reception of Southern States back into the Union; and the total lack of education for the negro. (E.G., R. E. Lee, in Kendrick, p. 279.) The Amendment seems to have had its genesis in the mind of Robert Owen of Indiana, who wrote an account of his experience with Thad. Stevens in the Atlantic Monthly in June, 1875. Much of the amendment was redrafted in Committee; and political expendiency played, perhaps, the larger part of the decision as to matters such as negro suffrage, Owen's draft contained a provision for limited negro suffrage ~~although after the Negro was "educated"~~. But most of the Northern states did not grant the negro the right to vote; (cf. Kendrick, p. 291)

and many Congressmen evidently considered it unwise, politically, to give the negro suffrage.

In the Congressional election of 1866, both sides made charges and statements re the meaning of the Amendment. What is interesting is that they were not in agreement, even then, on the meaning of "equal protection." Thus it was a base charge of the Democrats that the Amendment contemplated negroes in jury boxes -- a charge to which an audience was evidently supposed to pale in terror. Flack, p. 149. Again, however, I have not been able to find anything specific re segregation.

It might seem from what has been said in the last two paragraphs that the authors of the Amendment would have been shocked at the notion of nonsegregation -- that the presence of these larger problems for a people so recently returned from slavery means that no-one dreamed of providing that negroes should mix with whites. That is not necessarily the case, however, assuming that the question is relevant. The Amendment uses big ideas -- equal protection, due process -- and it is difficult to determine whether those who wrote the language, those in Congress and in the State legislatures who voted for it, had more than a vague idea of what the language meant. One Republican said that Section 1 of the Amendment granted "justice" to Negroes. There seems to have been little comprehensive attempt to define the meaning of justice.

If there is nothing specific re segregation in the adoptive history of the Amendment, I suppose we must retreat one step, and ask what would have been intended had the problem been considered? As I have tried to indicate above, we have no way of knowing. And further, we have no frame of reference in which to act. Thus the history of an Act of Congress is

examined through Committee reports, debate on the floor, and so on. We can sometimes tell -- fairly well -- what Congress, or at least its Committee, intended. But without some rare situation making the problem paramount in every state, to what are we to ~~turn~~ turn in discovering what was "meant" by an Amendment? To what each State legislature thought? Or to what the "people" thought? And how are we to determine that?

To rebut any presumption that the people would have been shocked at nonsegregation, however, we have the Civil Rights Act of 1875, 18 Stat. 335. As finally passed, the statute required "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accomodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." This was Senator Sumner's bill, in substance. An amendment providing that "separate but equal" facilities would suffice was defeated in the Senate. Senator Sumner and some of his supporters based this statute on the Fourteenth Amendment; they felt, and very strongly, that segregation had been outlawed by the equal protection clause, See Cong. Globe, 42d Cong., 2d Sess., p. 385; and that this was legislation to enforce that guarantee. This interpretation of the Amendment, advanced just eight years after the Senate had passed it, seems of some importance, although it is true that it may have been used simply to put the Civil Rights Act across.

In the House, there was little reliance upon the Fourteenth Amendment as authority for automatic invalidity of segregation, although the fifth

section of the Amendment was the supposed source of power for Congressional action to make the Amendment effective. As originally reported by the House Judiciary Committee, the bill contained a "separate but equal" proviso; 3 Cong. Rec. 1010; but as finally passed this had been dropped. 18 Stat. 335. Segregation in education in particular was the subject of debate in the House. Senator Sumner's bill included the "common schools" as under a duty to provide nonsegregated facilities. But the statute as finally passed does not mention schools. This does not detract, however, from the judgment of those members of the Senate who believed that segregation in schools as well as elsewhere had been invalidated by the Fourteenth Amendment. The elimination of schools seems to have been a decision purely on the basis of policy -- whether it would be wise for the country to provide criminal and civil penalties against segregated schools at that time. In a truly moving speech, Rep. Cain, a South Carolina negro, acquiesced in the removal of all references to schools in the Civil Rights Act, to insure passage of the rest of the bill. 3 Cong. Rec. 981. [Some of the above material is summarized in the amicus brief in No. 44, Sweatt, on behalf of the Committee of Law Teachers Against Segregation in Legal Education.]

Now the Civil Rights Act was declared unconstitutional by this Court in the Civil Rights Cases, 109 U.S. 3 (1883), over the eloquent dissent of Mr. Justice Harlan. But the Court did not base its conclusion on any notion that the Fourteenth Amendment did not abolish segregation. It simply held that this was direct legislation by Congress, and that the enabling clause of the Amendment authorized only action directed against

state laws, not original legislation to enforce substantive rights in the Amendment.

In summary, it would appear that we cannot determine what the intention of the Amendment was re segregation at the time it was adopted; that certain inferences at that time would point to the conclusion that segregation was not prohibited, but that those are very weak indeed; and that the legislative history of the Civil Rights Act points to some extent in the direction of the invalidity of segregation under the 14th Amendment.

3. The Cases since 1870

Both lower courts relied heavily on Plessy v. Ferguson, 163 U.S. 537 (1896). For petitioner and appellant, there is no question that Plessy is the villain of the piece. The question there was as to the constitutionality of a Louisiana statute passed in 1890, providing for separate railway cars for the white and colored races. Plessy was prosecuted for entering a car used by a race "to which he did not belong". (He alleged that he was 7/8 white, but that, the Court held, has a question of state law.) The Court upheld the statute against an attack based upon the Thirteenth and Fourteenth Amendments, and clearly enunciated the doctrine that the Fourteenth Amendment requires equal facilities -- but that those facilities may be "separate." Speaking through Mr. Justice Brown, the Court said that the Amendment "in the nature of things could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either....We consider the underlying fallacy of the plaintiff's

argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. It this be so, it is not by reason of anything found in the act, but solely because the colored race choses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely the same terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." And so on. Justice Bewer did not sit, and Justice Harlan entered a vigorous dissent. "...In the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and ~~no right knows~~ neither knows nor tolerates classes among citizens..." Harlan prophesied that the decision would "in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case."

Now Plessy did not concern education, but obviously the rationale carries over. Only one case in this Court applies "separate but equal" to education, and that to a five-year old child.

It is Gong Lum v. Rice, 275 U.S. 78 (1927). Chief Justice Taft, for a unanimous Court, held that a citizen of the United States of Chinese descent was not denied equal protection by being forced to attend a school for children other than Caucasians. Petitioners attempt to distinguish this case on the ground that it simply decided that classifying

a Chinese child in the colored race is not unreasonable, but that is by no means the import of the opinion. It is true that Taft spent little time on the question -- simply cited cases, including Plessy. But that was only because he considered the problem so well settled.

Some law review articles, and petitioners, claim that only Plessy and Gong Lum uphold the doctrine of separate but equal. That is simply not the fact. There is unquestioned reaffirmance of Plessy in C. & O. Ry. v. Kentucky, 179 U.S. 388 (1900). A Kentucky statute demanding separate (but equal) railroad facilities, construed to apply only to intra-state traffic, was upheld after quotation and paraphrase of Plessy, Justice Harlan again dissenting. And in Chiles v. C. & O. Ry., 218 U. S. 71 (1910), the Court ruled that Congressional inaction permitted a railroad to make separation on the basis of race -- and that such a separation was "reasonable", citing and quoting Plessy with some additional remarks. Once more Harlan dissented.

But other cases relied on by the Courts below are clearly inapposite. Thus Hall v. DeCuir, 95 U.S. 485, held simply that it was a burden on interstate commerce for a state to forbid segregation on a Mississippi River Boat. (And decision on this issue was limited by Bob-Lo Excursion v. Michigan, 333 U.S. 28) There is dictum reaffirming Plessy in a Hughes opinion in 1914, McCabe v. Atchison, etc. Ry. 235 U.S. 151, but the case turned on the lack of injury to the particular plaintiff, and therefore his standing to sue. (White, Lamar, Holmes, and McReynolds concurred only in the result.) In Cummings v. County Board of Education, 175 U.S. 528 (1889), the Court specifically did not pass upon the validity of separate but equal facilities. The Court held that the plaintiffs had

chosen the wrong remedy to enforce their right to equal educational facilities. (Injunction against collection of taxes to support a white high school while there was no colored high school -- equality was not to be achieved by bringing down the level of white education.)

Two other cases have held that, on the particular facts, equal facilities were not provided. In Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938), the Court cited Plessy, but held that the state could not discharge its duty by providing a colored student with funds to secure a legal education in a law school outside the State. In Sipuel v. Board of Regents, 332 U.S. 631, (1948) the Court refused to grant Oklahoma time to erect a law school for colored citizens, stating simply that petitioner was entitled to an education equal to that of other groups, and at the same time as other groups. In an action to enforce the mandate, the Court held that its particular mandate in that particular case had not been violated by an order permitting Oklahoma to establish a separate law school if the State could do so by the time the next term started, or, in the alternative, to discontinue the education of white law students in the freshman year. Fisher v. Hurst, 333 U.S. 147; Justice Rutledge dissented, and Justice Murphy stated that a hearing should be held to see whether the action of Oklahoma amounted to evasion of the mandate. In neither action was the doctrine of Plessy cited or mentioned in this Court.

Other cases, such as Berea College v. Kentucky, 211 U.S. 45, while reiterating Plessy, seem to depend upon the notion that a State can delimit the corporate charter in any manner it chooses.

To summarize: There is the landmark holding, Plessy, in 1896, announcing the "separate but equal" formula; there is reaffirmance of Plessy in other railroad cases in 1900 and 1910; there is strong reaffirmance in Gong Lum, an education case involving a five year old in 1927; and bare citation in 1938. Harlan dissented in the first three cases; Taft wrote for an unanimous court in 1927. Because the question was "settled", however, there has been no thorough reconsideration of the doctrine after 1896.

There are, of course, myriad cases in the lower federal courts and in the state courts repeating the separate but equal rule. I have not read all these cases, but there is what appears to be a competent summary in 46 Michigan L. Rev. 639 (1949), and in 103 A.L.R. 713 (1936). See also 56 Yale L. J. 1059, at 1065 (1947). Gradually the Courts have been tightening the requirements, demanding more showing of real equality, according to these authorities. But, as is pointed out in 17 Geo. Wash. L. Rev. 208 (1949), "equal does not mean identical" under the Plessy rule, and it has been difficult to convince Courts that the mere incidence of classification has ~~meant~~ more than peripheral inequality -- e.g., it has been held that the fact that a colored child has to walk two miles farther because he must attend a colored school, does not make the facilities unequal.

4. Is Segregated Education Equal Education?

If we can divorce ourselves from Plessy and the cases on which it depends, for a moment, and remember that the problem was by no means clear when that case was decided, I submit that we must examine the problem afresh, looking only at the language of the Amendment and the conditions upon which it must now operate.

Can segregated education provide a negro "equal protection of the laws"? The answer to that question must be no, on two grounds.

In the first place, every objective study which has been made of the comparative merits of white and negro education in the South shows that as to money spent per pupil, as to teachers' salaries, as to physical equipment, the standards and facilities in the negro school are microscopic compared to those in the white school. Perhaps the best summary of these findings is contained in the Appendix to petitioner Sweatt's brief, No. 44, which I attach. See also 56 Yale L. J, 1059. I will not attempt a summary here, but it cannot be too strongly emphasized that as a matter of fact, becuase of the hesitancy to be the social pioneer and bring actions, because of fear of reprisals, because of the South's resistance and the law's delay, there are simply not equal educational facilities in the present system of segregation.

The other ground is more basic. Modern psychology tells us that it is impossible to have segregation with equality. The flip logic of Mr. Justice Brown in Plessy, that separation does not connote the inferiority of one race, is simply not the case. An excellent summary of the views of objective observers, with copious citation and quotation of leading psychiatric and psychology authorities, is found in 56 Yale L. J. 1059 at 1061 (1947). It bears repeating here (I omit citations and quotations of authority):

> "Every authority on psychology and sociology is agreed that students subjected to discrimination and segregation are profoundly affected by this experience. Though it has been argued that to force the abolition of educational segregation would create problems of adjustment more injurious to the personalities of children than are presently engendered in

> separate schools, the prevailing view indicates the advisability of unified school associations. Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation. These abnormal results, condoned by the implications of the Plessy case, deny to the Negro and Mexican child 'equal protection of the laws' in every meaningful sense of the words."

Thus we now know what was not so clear when Plessy and cases following it were decided: that it is literally impossible to have equal facilities when there are segregated facilities. If a word is the "skin of a living thought", then the words "equal protection" as used in the Fourteenth Amendment, must be applied to a modern situation in a modern way, not in a way that might have suited another era. Such has been the history of the Fourteenth Amendment in other phases — e.g., expansion of the right to counsel with little attention paid to what the "framers" thought. The world moves and changes; words being only symbols, must move onward with their objects. Whatever the words meant in 1866, and it is by no means clear that they did not mean the abolition of segregation, they must of necessity change with the times; and in this day of relative enlightenment they can mean, I submit, but one thing: that segregated education is simply not equal protection of the laws.

5. Politics

As I understand it, and my information may be faulty, the entire Court, with the exception of Justice Reed, was in substantial agreement with the views that there can be no equality in a segregated school system,

and that segregation was a violation of the equal protection clause. [Justice Reed apparently takes the position that since some states have segregation and others do not, the question is one for the legislative rather than the judicial judgment. This position, while of value to the Court's majority in questions of "substantive" due process, has never, so far as I am aware, been used under the equal protection clause. If it had, of course, none of the South's anti-negro laws could have been struck down by the Court. Reed's reported approach thus ignores the whole history of the Fourteenth Amendment re negroes.]

But the question is whether it would be wise or necessary or both to make such a pronouncement at this time. On this question the Court has had enormous hesitation. All members of the Court were in doubt. The worry, of course, was the reaction of the South — whether a judicial fiat ending all segregation would be respected or defied; and if defied, whether this would not lead to a break-down of other beneficial rulings made by this Court in recent years. In attempting to sweep forward, would the Court take a practical step a long way back?

Perhaps these problems should not enter a Court's mind. Perhaps one should declare "the law" without thought of the consequences. But an awareness of the effect of one's decision is surely necessary before decision is made.

There are alternatives to a straight overruling of Plessy In the Texas case, as one can see from a reading of the facts, above, it would be possible to decide the question on the fact that the law schools were not physically equal — providing one does not consider "improvements" made since the trial. One could avoid reaffirmance of Plessy by saying simply that we do not reach that question since it is clear that even if

Plessy is still the law, these facilities are not equal. But it would be very difficult, if not impossible, to avoid Plessy when it came to the issuance of a mandate. Will Texas be ordered to admit the petitioner into the "white" law school? Or to "improve" the negro law school? (Even without that problem, it can well be urged that leaving Plessy on the books to give States authority for segregation would be not an act of statesmanship.)

It seems close to impossible to avoid Plessy, however, in the Oklahoma case. The only inequality there is the very fact that the appellant is separated from his fellow students.

Another possibility would be an order to give relief to these complainants predicated upon a finding that in these particular cases there can be no equality in separation. This would avoid a blanket overruling of the Plessy rule.

There is another compromise solution, which would interpret the Constitution in the "right" way and would avoid, at least for the interim, most of the possibilities of defiance in the South. It is a solution which, I am told, was first suggested by Justice Frankfurter. It is this: rule that segregation is a violation of the Constitution in graduate schools, and make no mention of other schools. This may seem artificial, but perhaps it isn't. The only cases before us concern graduate schools; and in graduate schools, more than anywhere else, the student needs the free discussion and seminar classes, the give and take which only the large, well-established law or graduate school can provide. The idea of setting up a graduate school for one or two students is absurd — those students simply cannot receive the training in discussion necessary to education that students in the regular university receive. Plessy could be handled by saying that "whatever

the present validity of Plessy v. Ferguson, we will not apply its doctrine to graduate schools", or words to that effect.

This would seem to be a most reasonable compromise, if it is deemed advisable not to overrule Plessy right now. How that solution will fare this Term I do not, obviously, know. But your vote would give it real impetus. Yet if you sympathized with those who feel that the only candid thing to do is to overrule Plessy , there would seem to be few connected with this Court who could object.

GRANT AND REVERSE in No. 44
NOTE PROBABLE JURISDICTION and REVERSE in No. 34

8/31 L. Tolan