SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 614 34

G. W. McLAURIN,

Appellant,

vs.

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

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

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF OKLAHOMA

Civil No. 4039

G. W. McLAURIN,

Plaintiff,

vs.

BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA, GEORGE L. CROSS, LAWRENCE H. SNYDER AND J. E. FELLOWS,

Defendants

STATEMENT IN SUPPORT OF JURISDICTION

The plaintiff-appellant, having presented this day his petition for appeal and assignment of errors, now files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order and judgment in question, and should exercise such jurisdiction in this case.

I

Statute Sustaining Jurisdiction

The Supreme Court of the United States has jurisdiction to review this cause on appeal under the provisions of Title 28 United States Code, section 1253, this being an appeal from an order denying, after notice and hearing, an injunction in a civil action required by an act of Congress

to be heard and determined by a district court of three judges. (Title 28, United States Code, section 2281) The District Court for the Western District of Oklahoma sitting as a specially constituted three-judge court rendered a final judgment in this cause sustaining the validity of an order made by an administrative board acting under statutes of the State of Oklahoma after the validity of that order and statutes had been placed in issue by the plaintiff on the ground of its being repugnant to the Constitution of the United States.

II

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

The Oklahoma Statutes, the validity of which are involved are Sections 455, 456 and 457 of Title 70 of the Oklahoma Statutes (1941) which provide in part as follows: 70 O. S. 1941, Section 455 makes it a misdemeanor, punishable by a fine of not less than $100 nor more than $500 for

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

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

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

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

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

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

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

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

The full text of these statutes is set forth in the Appendix hereto.

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

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

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

> "That the Board of Regents of the University of Oklahoma authorize and direct the President of the University, and the appropriate officials of the University, to grant the application for admission to the Graduate College of G. W. McLaurin in time for Mr. McLaurin to enrol at the beginning of the term, under such rules and regulations as to segregation as the President of the University shall consider to afford to Mr. G. W. McLaurin substantially equal educational

opportunities as are afforded to other persons seeking the same education in the Graduate College, and that the President of the University promulgate such regulations."

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

The Court refused to enjoin the enforcement of either the statutes or the order, dismissed the complaint of the plaintiff, and rendered judgment for the defendants.

III

Dates of Judgment and of Application for Appeal

The date of the judgment of the United States District Court for the Western District of Oklahoma which is now sought to be reviewed was November 22d, 1948. The application for appeal was presented on January 18th, 1949.

IV

Nature of the Case and Rulings in the District Court

On the 5th day of August, 1948, plaintiff filed in the United States District Court for the Western District of Oklahoma a complaint seeking a three-judge court as required by the then existing Section 266 of the Judicial Code for the issuance of a preliminary and permanent injunction against the Oklahoma State Regents for Higher Education, the Board of Regents of the University of Oklahoma and the Administrative Officers of the University of Oklahoma from enforcing Sections 455-457 of the Oklahoma statutes of 1941 under which the plaintiff and other qualified Negro

applicants were excluded from admission to the courses of study offered only at the Graduate School of the University of Oklahoma.

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

On the 6th day of October, 1948, the three-judge court filed a journal entry that "it is ordered and decreed that insofar as Sections 455, 456 and 457, 70 O. S. 1941, are sought to be applied and enforced in this particular case, they are unconstitutional and unenforceable." The Court, however, refrained from issuing and granting any injunctive relief but retained jurisdiction over the subject matter for entering any further orders as might be deemed proper.

On the 7th day of October, 1948, plaintiff filed a motion for further relief alleging that despite the prior ruling of the court, plaintiff had again been denied admission to the Graduate School of the University of Oklahoma and requested that the court enter an order requiring defendants to admit plaintiff to the "graduate school of the University of Oklahoma for the purpose of taking courses leading to a doctor's degree in education, subject only to the

same rules and regulations which apply to other students in said school."

At this hearing there was placed in issue the order of the defendant Board of Regents of the University of Oklahoma ordering that the plaintiff be admitted only on a basis of segregation solely because of his race. The plaintiff challenged the order as unconstitutional and the defendants rested upon the validity of such order as within the power of the Board of Regents of the University of Oklahoma as a state board.

At the hearing on said motion for further relief, the essential facts were agreed upon by counsel for both parties and, in addition, plaintiff testified as to the conditions under which he was admitted to the University of Oklahoma subsequent to the filing of the motion for further relief.

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

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

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

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

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

The journal entry entered by the Court denied the relief prayed for, dismissed the complaint of plaintiff and entered judgment for the defendants.

V

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Summary

The issue presented by this case has never been decided by the United States Supreme Court.

For one year the plaintiff has been endeavoring to secure admission to classes given at the University of Oklahoma leading to a doctor's degree in education. Such education is offered by the state only at the University of Oklahoma. Originally plaintiff was excluded from the University by the defendants in reliance upon the same criminal statutes prohibiting inter-racial education upon which these defendants had relied in excluding a qualified Negro from the law school.[1]

When those statutes had been declared unconstitutional insofar as they operated to exclude plaintiff from the only educational facility offered by the state, the defendants ordered plaintiff to be admitted to the University on a segregated basis. In operation, that order, while purport-

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[1] See *Sipuel* v. *Board of Regents of University of Oklahoma,* 332 U. S. —, decided January 12, 1948.

ing to admit plaintiff, actually excludes him from the class in which the desired courses are given, for he has been placed in a different room from which he participates in class work through an open door.

All other students at the University of Oklahoma are accepted on an equal basis without regard to race, ancestry, creed, color or consideration other than individual merit. Plaintiff is excluded from the regular classroom, the regular library rooms and the main part of the cafeteria. This exclusion and segregation is based wholly in terms of race or color, "simply that and nothing more." [2] Solely because plaintiff is a Negro he has been denied rights enjoyed as a matter of course by other citizens of other races.

It is in this historical and factual context that the issue raised by the denial of plaintiff's motion for an injunction compelling his admission to the graduate school of the University "for the purpose of taking courses leading to a doctor's degree in education, subject only to the same rules and regulations which apply to other students in said school."

Thus, this Court is asked to decide—

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

No previous decision of this court dealing with the exclusion of Negroes from educational facilities [3] or with the

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[2] *Shelley* v. *Kraemer,* 92 L. Ed. 845 Adv. Sheets; *Buchanan* v. *Warley,* 245 U. S. 60.

[3] *Missouri ex rel Gaines* v. *Canada,* 307 U. S. 305, *Sipuel* v. *Board of Regents of University of Oklahoma,* supra.

separation of the races in other aspects of life [4] has ever passed upon the issue here presented.

This question is certainly substantial, undecided by any decisions of this Court, and is of such a character as to affect the basic rights of citizens of all races, not only in Oklahoma but throughout the United States.

VI

Argument

The right here involved is set forth clearly in the prayer for further relief where plaintiff sought an injunction requiring the defendants to admit the plaintiff "to the graduate school of the University of Oklahoma for the purpose of taking courses leading to a doctor's degree in education, subject only to the same rules and regulations which apply to other students in said school."

The right of Negroes not to be excluded from the only state university offering the desired subjects has been clearly established and recognized by this Court. However, the right of a Negro student subsequently admitted to such university not to be excluded from the regular classroom and thereby ostracized solely because of race or color and segregated from fellow students of all other races and colors has not been decided by the Supreme Court.

A

Access to Public Education Is So Vital to Democracy That It Requires the Highest Constitutional Protection

The role of education, in a democracy, might be defined as: The development in all citizens of the fullest intellectual and

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[4] *Plessy* v. *Ferguson,* 163 U. S. 537; *Hall* v. *DeCuir,* 95 U. S. 485; *Morgan* v. *Virginia,* 328 U. S. 373.

moral qualities, and the most effective participation in the duties of the citizens.

Any general agreement with this definition would automatically preclude any system of segregation on the basis of color,—the existence of which would most certainly abort any meaningful " . . . participation in the duties of the citizens."

If an enlightened citizenry is a necessary factor in the equation of democracy, then it follows that education is an integral part of the democratic process. If education be a privilege, it is one of such a peculiar and precious nature that those entrusted with its administration have a compelling duty rather than mere discretionary power to see that no distinctions are made on the basis of race, creed or color.

Segregation in education is doubly damaging. First, it prevents both the Negro and white student from obtaining a full knowledge and understanding of the group from which he is separated, thereby infringing upon the 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 and conduct of an education or for the discharge of the duties of a citizen.

As stated in 47 Am. Jur., Schools, Section 6, p. 299, at common law, the parent's control over his child extended to the acquisition of an education. The parent's common law rights and duties in this regard "have been generally supplemented by constitutional and statutory provisions, and it is now recognized *that education is a function of the government.*" (Italics ours.)

Education is not only a component part of true democratic living, but is the very essence of and medium through which democracy can be effected. The intent of the framers

of the Fourteenth Amendment was indicated in the 43rd Congress in 1874 by these words: ". . . that all classes should have the equal protection of American law and be protected in their inalienable rights, *those rights which grow out of the very nature of society, and the organic law of this country.*" [5] In 1943, an eminent sociologist and economist, Dr. Karl Mannheim, then Professor of Economics at London School of Economics, said:

> "Finally, there is a move towards a true democracy arising from dissatisfaction with the infinitesimal contribution guaranteed by universal suffrage, a democracy which through careful decentralization of functions allots a creative social task to everyone. The same fundamental democratization claims for everyone a share in real education, one which no longer seeks primarily to satisfy the craving for social distinction, but enables us adequately to understand the pattern of life in which we are called upon to live and act." [6]

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

> ". . . the role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or to weaken their liberties." [7]

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[5] Congressional Globe, Forty-Third Congress, May 22, 1874.

[6] Mannheim, Karl, *Diagnosis of Our Time,* Oxford University Press, 1944, p. 177.

[7] Report of the President's Commission on Higher Education, *Higher Education for American Democracy,* Gov't. Printing Office, Washington, 1947, Vol. I, p. 5.

Discrimination on the part of educational institutions constitutes a deeper injury to democracy. The Mayor's Committee on Unity stated in its Report on Inequality in Higher Education:[8]

> ". . . It is generally agreed that the most urgent social problem of the day is to attain such attitudes of understanding and mutual respect among all elements of our population as will enable them to live together in harmony, regardless of diversity of race, creed, color or national origin. We call that the American Way. Actually such a condition is impossible of realization unless the principle of equality of opportunity in the important fields of human endeavor and relationship is recognized not only in theory but in practice, and until people are judged on the basis only of their own individual worth, and not according to what race they belong to or what creeds they profess.
>
> "To attain such a goal, deep-seated prejudices must be overcome. And it is on education, in the broadest sense of the term, that we must primarily rely to correct these prejudices."

In the light of this role played by education, it is particularly pertinent to consider the uncontroverted testimony of the plaintiff that the effect upon him of his exclusion from the classroom is to deny him an opportunity to secure an equal education. Leaving aside for the moment the grave damage to society resulting from the failure of education to demonstrate in practice the principle of equality upon which our society is founded, in this case the plaintiff's individual right, guaranteed by the Constitution, to have an equal opportunity to secure an education has been denied by the segregation practiced by the University of Oklahoma.

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[8] *Report on Inequality of Opportunity in Higher Education,* Mayor's Committee on Unity, New York, 1946, pp. 1, 2.

B

The United States Constitution Prohibits Government Classifications Based On Race or Ancestry

In recent cases the Supreme Court has held on many occasions under a variety of circumstances that racial criteria are irrational, irrelevant, odious to our way of life and specifically proscribed under the Fourteenth Amendment.[9] Whether this proscription against racial classifications be found in the constitutional concept of equal protection [10] or is included within the meaning of due process,[11] the result is the same. The only apparent limitation on this doctrine appears to be that of a national emergency such as the danger of espionage and sabotage in time of war which might control the decision of the Court.

In *Hirabayashi* v. *United States*,[12] the Supreme Court had to determine whether a curfew order adopted by the West Coast military commander pursuant to Congressional authority violated petitioner's constitutional rights in that the curfew applied only to persons of Japanese ancestry.

The Court said:

> "Distinctions between citizens solely because of their ancestry are by their nature odious to a free people. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection." 320 U. S. 101.

Except for the dangers of war and sabotage the racial distinctions there in issue would have been struck down.

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[9] *Shelley* v. *Kraemer*, supra, *Oyama* v. *California*, 332 U. S. 214; *Takahashi* v. *Fish & Game Commission*, — U. S. —.

[10] *Shelley* v. *Kraemer*, supra.

[11] *Hirabayashi* v. *U. S.*, 320 U. S. 81.

[12] 320 U. S. 81.

In *Korematsu* v. *United States,* 323 U. S. 214, petitioner was convicted for remaining in California in violation of the Japanese exclusion order. The Court said that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

In *Oyama* v. *California,* 332 U. S. 633 (1948) the Court had before it the constitutionality of the California Alien Land Law which forbade aliens ineligible for American citizenship from acquiring, owning, occupying, leasing or transferring agricultural land.

Said the Court: "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled. . . . In our view of the case, the State has discriminated against Fred Oyama; the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature."

In *Shelley* v. *Kraemer,* 92 L. Ed. 845, Adv. Sheets, the basic issue was the validity of court enforcement of racial restrictive covenants intended to exclude Negroes from the ownership or occupancy of real property. The Court stated: "Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color." . . . 92 L. Ed. 855, Adv. Sheets.

"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is

clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color." . . . "Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment." (92 L. Ed. 857 Adv. Sheets.)

The Supreme Court has also held that union bargaining representatives operating under authority of Congress are not permitted to discriminate because of race or color.[13] On the other hand state statutes prohibiting racial discrimination by labor unions have been upheld as within the spirit of the Fourteenth Amendment.[14]

It is clear that although states are permitted to make reasonable classifications for governmental purposes, classifications on the basis of race are unconstitutional violations of the Fifth or Fourteenth Amendment depending on whether the racial classification is by the federal or state government.

C. The Order of the Defendant State Board of Regents Requiring the Segregation of the Plaintiff Enforced by the Exclusion of the Plaintiff from the Regular Classroom Solely Because of Race Is Unconstitutional.

It is clear from the history of the treatment of Negroes seeking graduate educational advantages offered by the State of Oklahoma that the problem confronting the court is one of exclusion. That was true in *Sipuel* v. *Board of Regents* (92 L. Ed. 256 Adv. Sheets) and it was true in the earliest stages of this action, when the plaintiff was excluded

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[13] *Steele* v. *Louisville & Nashville RR Co.*, 323 U. S. 192 (1944).

[14] *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945).

entirely from the University of Oklahoma. It is true at the present time, when the plaintiff, admitted to the campus of the University, is still excluded from the classroom in which the courses he is taking are given to other students. Plaintiff and those other students are, presumably, entitled to pursue the same course of instruction, at the same time, take the same examinations and will, presumably, if they are competent, be awarded the same degree by the University. But during this entire period of study the plaintiff will be excluded, physically, from the room in which other students undertake the joint enterprise of securing an education.

The Supreme Court has dealt on many occasions with the efforts of state agencies to exclude racial minorities from some aspect of community life. Recently, in *Shelley* v. *Kraemer, supra,* the Supreme Court found that the state courts could not exclude Negroes from residential areas by enforcement of racial restrictive covenants entered into by white residents. Thirty years earlier the Court had held that such exclusion could not be accomplished by the enactment of municipal ordinances fixing the boundaries of white and Negro residential areas. *Buchanan* v. *Warley, supra.*

If the state may not, through any of its officials enforce the exclusion of a Negro from a neighborhood where he has "qualified" as a resident by purchasing a home from a willing seller, by what logic can the state be justified in excluding from a classroom a Negro who has qualified and been admitted as a student in that class.

The Supreme Court has held that exclusion of Negroes from residential areas by state action could not be justified by resort to the police power of the state in an effort to prevent race conflict (*Buchanan* v. *Warley, supra*) nor by the sanctity of private contracts (*Shelley* v. *Kraemer, supra*).

It is apparent that the power of the president of a state university acting upon an order of an administrative board of the state to require a qualified Negro student, duly admitted to a class in the University, to remain physically excluded at all times from the room in which that class is conducted must be tested against the same constitutional limitations which apply to the power of other state agencies to exclude a Negro from a home he has purchased.

As the Supreme Court stated in the *Shelley* case:

> "Only recently this Court has had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. *Oyama* v. *California,* 332 U. S. 633 (1948)" 92 L. Ed. 856.

The record of this case is barren of any attempt to define the source of the extraordinary power claimed by the State of Oklahoma. Clearly the trial court was not justified in resorting to a vague public policy, not in itself shown to be reasonable, for when no basis is shown for a classification, the courts may not "conjure up" justifications. *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266 (1935).

The two basic considerations used by the Supreme Court in the *Shelley* case (*supra*) to determine whether the Fourteenth Amendment had been violated were first whether the action was state action and second whether the race of the parties was the determining factor in that action. Those two questions having been affirmatively answered the prohibitions of the Fourteenth Amendment automatically attached to the action of the state. Thus, the Court stated:

> "It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occu-

> pancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.' . . . (92 L. Ed. 850, Adv. Sheets.)
>
> "We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens, of different race or color." (92 L. Ed. 855, Adv. Sheets.)

The United States Supreme Court has also given protection to those substantive rights which it has found to be included within the liberty guaranteed by the due process clause of the Fourteenth Amendment. *Myers* v. *Nebraska,* 262 U. S. 390 (1922); *Pierce* v. *Society of Sisters,* 268 U. S. 510, (1925). In each of these cases the Court found that the state, notwithstanding its power to regulate all schools, had interfered with a right belonging to the individuals protected by this clause and which was beyond the power of the state to regulate.

In this case, plaintiff sought to invoke the protection of the federal constitution against unequal treatment and also against the deprivation of his liberty or right to enjoy facilities afforded by the state and open to members of another group.

The rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights—personal to the individual not to racial groups.

The plaintiff has been seeking to enforce his right to

obtain graduate education at the University of Oklahoma on the same basis as all other qualified students and subject only to the same rules and regulations. This right can only be enjoyed by his admission to the only class and classroom where these courses are taught. However, plaintiff is still excluded from the classroom and is only permitted to participate in the class from another room through an open door, thereby being subjected to rules and regulations applicable solely to him because of his race and color. Thus the plaintiff's individual right was qualified on a group racial basis, set aside by the State of Oklahoma and thereby effectively denied to the plaintiff.

D. The Conflict Between Early and Recent Decisions of the Supreme Court Defining the Limits of State Power to Make Classifications Based On Race under the Fourteenth Amendment Should Be Resolved.

In this case the defendants put in no evidence to show any basis for the exclusion of the plaintiff from the regular classroom. They relied solely upon their alleged right to do so because of race and color.

In denying the plaintiff the relief requested this Court held that the Fourteenth Amendment "does not authorize us to obliterate social or racial distinctions which the State has traditionally recognized as a basis for classification for purposes of education and other public ministrations. The Fourteenth Amendment does not abolish distinctions based upon race or color, nor was it intended to enforce social equality between classes and races . . . It is the duty of this Court to honor the public policy of the State in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land." It is thereby clear that the basic error in the decision in this case was the reliance on the theory set forth in the case of

Plessy v. *Ferguson, supra,* rather than the basic pronouncements of the United States Supreme Court in the more recent cases.

In the case of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896) the majority of the Supreme Court, in upholding the validity of a state statute requiring segregation of the races in intrastate transportation, stated:

> "The object of the amendment (Fourteenth) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it 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." (163 U. S. 537, 544)

In the case of *Buchanan* v. *Warley, supra,* the Supreme Court, in declaring invalid an ordinance requiring residential segregation, stated:

> "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.
>
> "The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person.
>
> "It is urged that this proposed segregation will pro-

> mote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 245 U. S. 81.

The rationale of the *Plessy* case as to classification of Negroes has always been in direct conflict not only with the principles set forth in the *Buchanan* case, *supra,* as to residential segregation but has also been in conflict with other decisions of the Supreme Court on the limitations of the Fourteenth Amendment on the right of states to make classifications.[15]

More reecnt decisions of the Supreme Court set out above have made it clear that the basis for the decision in the *Plessy* case that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color" is no longer valid.

In this case the right which the plaintiff asserts is a right in keeping with these latter decisions of the Supreme Court.

The trial court, again following the doctrines of the *Plessy* case, upheld the racial classification because it "rests upon a reasonable basis, having its foundation in the public policy of the state." This ruling is in direct conflict with prior decisions of the Supreme Court.

In the *Buchanan* case the Supreme Court stated ". . . it is equally well established that the police power, broad

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[15] In order that a classification may meet the prohibitions of the equal protection clause, the Supreme Court has required that the state must show: first, that the purpose sought to be achieved by the classification is within the scope of state power, and second, that the classification bears a reasonable relationship to the end sought by the legislation.

Skinner v. *Oklahoma,* 316 U. S. 535 (1942); *South Carolina Highway Dept.* v. *Barnwell,* 303 U. S. 177 (1938); *Great A. & P. Co.* v. *Grosjean,* 301 U. S. 412 (1937); *Liggett* v. *Lee,* 288 U. S. 517 (1933); *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914); *Rosenthal* v. *New York,* 226 U. S. 260 (1912); *Atchison RR* v. *Matthews,* 174 U. S. 96 (1899).

as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitutions; that principle has been so frequently affirmed in this court that we need not stop to cite the cases." (245 U. S. 66, 74)

In the *Shelley* case the Supreme Court stated ". . . Nor may the discriminations imposed by the state courts in these cases be justified as proper exercises of state police power" (92 L. Ed. Adv. Sheets 845, 856).

In the *Plessy* case, there was enunciated the now antiquated and discarded doctrine which has been relied upon by various states to sustain the constitutionality of statutes requiring the segregation of the races in public education. In the light of more recent decisions of the United States Supreme Court, that case can no longer be used as an authority for the type of discrimination here in issue.

The recent cases, standing as they do for the principle that racial classification by government is unconstitutional because "(d)istinctions between citizens solely because of their ancestry are by their nature odious to a free people," have completely repudiated the doctrine of *Plessy* v. *Ferguson* that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color."

The important governmental function of public education is seriously handicapped by the blind adherence to the doctrine set forth in the *Plessy* case. Just as the conflict between the decisions of *Grovey* v. *Townsend,* 295 U. S. 45, and *United States* v. *Classic,* 313 U. S. 299, had to be resolved in *Smith* v. *Allwright,* 321 U. S. 649, the conflict between the *Plessy* case and the latter cases set out above must be resolved.

That the questions here presented are substantial is made

even clearer by the Fifth recommendation of the Report of the President's Committee on Civil Rights.

> "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 together. There is no adequate defense of segregation." [16]

Conclusion

Negroes seeking public education in Oklahoma and other southern States have always been subjected to varying degrees of discrimination—all based on race and color alone. In this case the plaintiff is seeking to enforce the right to an education by the State of Oklahoma on the same basis as other students subject only to rules and regulations applicable to all. On the other hand, the State of Oklahoma has insisted upon determining his right on the basis of a racial classification. First it was complete exclusion from the university—later it was the exclusion from the classroom. Plaintiff is still the victim of the same racial classification. His individual right is lost in the racial group classification pursuant to the alleged State public policy derived from statutes heretofore declared unconstitutional. The evil complained of is the racial classification which the Fourteenth Amendment was intended to abolish. The question herein involved is not only substantial within the mean-

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[16] Report of the President's Committee on Civil Rights, *To Secure These Rights,* Government Printing Office, Washington, D. C., 1947, p. 166.

ing of the jurisdictional statutes but is basic to two of the most vital areas of our democratic process—public education and the individual's right to complete equality before the law.

Respectfully submitted,

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APPENDIX "A"

Oklahoma Statutes Involved

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

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

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

APPENDIX "B"

Order Involved

From the minutes of a special meeting of the Regents of the University of Oklahoma held on Sunday, October 10, 1948.

Regent Emery: "I now offer the following motion and move its adoption: 'That the Board of Regents of the University of Oklahoma authorize and direct the President of the University, and the appropriate officials of the University to grant the application for admission to the Graduate College of G. W. McLaurin in time for Mr. McLaurin to enroll at the beginning of the term, under such rules and regulations as to segregation as the President of the University shall consider to afford to Mr. G. W. McLaurin substantially equal educational opportunities as are afforded to other persons seeking the same education in the Graduate College, and that the President of the University promulgate such regulations'."

A roll call vote was asked for with the following voting Aye:

Regent Emery
Regent Shepler
Regent White
Regent Benedum
Regent Deacon
Regent McBride

Absent:

Regent Noble.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 4039 (Civil)

G. W. McLaurin, *Plaintiff*,

vs.

Oklahoma State Regents for Higher Education, et al., *Defendants*

Journal Entry

Be it remembered that this cause came on regularly for hearing before this duly constituted court on August 23, 1948. The plaintiff appeared in person and by his attorneys Thurgood Marshall and Amos T. Hall. The defendants appeared either in person, or by and through the Honorable Mac Q. Williamson, Attorney General of the State of Oklahoma, Fred Hansen and George T. Montgomery, Assistant Attorneys General. Testimony was introduced, argument was had, and the matter was continued until September 24, 1948, and was thereafter continued until September 29, 1948. Further evidence was taken, argument heard, and the cause finally submitted.

On this, the 6 day of October, 1948, it is ordered and decreed that insofar as Sections 455, 456 and 457, 70 O. S. 1941, are sought to be applied and enforced in this particular case, they are unconstitutional and unenforceable.

The court refrains at this time, however, from issuing or granting any injunctive relief, but jurisdiction over the subject matter is reserved for the purpose of entering any such further orders as may be deemed proper in the circum-

stances to secure to the plaintiff the redress he seeks under the Constitution and laws of the United States.

Done this 6 day of October, 1948.

(S.) ALFRED P. MURRAH,
Judge of the U. S. Court of Appeals.
(S.) EDGAR S. VAUGHT,
U. S. District Judge.
(S.) BOWER BROADDUS,
U. S. District Judge.

Endorsed: Filed October 6, 1948. Theodore M. Filson, Clerk.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 4039 (Civil)

G. W. McLAURIN, *Plaintiff,*

vs.

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION, ET AL., *Defendants*

Findings of Fact and Conclusions of Law

Preliminary Statement

By this suit, we are asked to enjoin the defendants from refusing to admit the plaintiff to the University of Oklahoma, for the purpose of pursuing a postgraduate course in education leading toward a doctor's degree. It is said that although having made timely application for admission, and being morally and scholastically qualified, he has been denied admission solely because, as a member of the Negro race, the laws of Oklahoma forbid his admission under criminal penalty. It is said that in these circumstances, refusal to admit the plaintiff to the University of

Oklahoma, for the purpose of pursuing the course of study he seeks, is a deprivation of his rights to the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Findings of Fact

I

In accordance with the stipulation, the court finds that the University of Oklahoma is an educational institution maintained by the taxpayers of the State, from funds derived from uniform taxation, and that it is the only educational institution supported by public taxation in which the plaintiff can pursue a postgraduate course leading to a doctor's degree in education.

II

That during the enrollment period for the second semester for the 1947-1948 school term, plaintiff applied for admission to the University for the purpose of taking such courses which would entitle him to a doctor's degree in education, and that at the time of his application, he possessed and still possesses all of the scholastic and moral qualifications prescribed by the University of Oklahoma for admission to the courses he seeks to pursue, and that he was denied admission to the University on February 2, 1948, solely because as a member of the Negro race, the applicable laws of Oklahoma (70 O. S. 1941, Sections 455, 456 and 457) make it a criminal offense for any person to operate a school or college or any educational institution where persons of both white and colored races are received as pupils for instruction, or for any instructors to teach in, or any white person to attend, any such school.

Conclusions of Law

I

This suit arises under the Constitution and laws of the United States, and seeks redress for the deprivation of civil rights guaranteed by the Fourteenth Amendment. The court is therefore vested with jurisdiction, regardless of

diversity of citizenship or amount in controversy. Hague *v.* C. I. O., 307 U. S. 496, 514; Douglas *v.* Jeannette, 319 U. S. 157. Since a temporary injunction against the enforcement of the State laws on the grounds of their unconstitutionality is sought, the subject matter is properly cognizable by a three judge court under Section 266 of the Judicial Code, 28 U. S. C. A. 380.

II

We hold, in conformity with the equal protection clause of the Fourteenth Amendment, that the plaintiff is entitled to secure a postgraduate course of study in education leading to a doctor's degree in this State in a State institution, and that he is entitled to secure it as soon as it is afforded to any other applicant. Sipuel *v.* Board of Regents, 332 U. S. 631; Missouri ex rel Gaines *v.* Canada, 305 U. S. 337. That such educational facilities are now being offered to and received by other applicants at the University of Oklahoma, and that although timely and appropriate application has been made therefore, to this time such facilities have been denied this plaintiff.

III

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

IV

Our attention has been called to and we have seen a statement of the Governor of this State in which he commits the State to a certain course of action, designed to afford equal segregated facilities to this plaintiff and members of his Race in compliance with the constitutional requirements. In that connection, we think it appropriate to state that it is not our function to say what the State shall do in order

to comply with its acknowledged responsibilities to its citizens. Rather it is our function to determine whether what has been done and what is being done meets the constitutional mandate.

V

In the performance of this important function, we sit as a court of equity, with power to fashion our decree in accordance with right and justice under the law. Accordingly, we refrain at this time from issuing or granting any injunctive relief, on the assumption that the law having been declared, the State will comply. We retain jurisdiction of this case, however, with full power to issue such further orders and decrees as may be deemed necessary and proper to secure to this plaintiff the equal protection of the laws, which, translated into terms of this lawsuit, means equal educational facilities.

(S.) ALFRED P. MURRAH,
Judge of the U. S. Court of Appeals.
(S.) EDGAR S. VAUGHT,
U. S. District Judge.
(S.) BOWER BROADDUS,
U. S. District Judge.

Endorsed: Filed October 6, 1948. Theodore M. Filson, Clerk.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 4039 (Civil)

G. W. McLaurin, *Plaintiff,*

vs.

Oklahoma State Regents for Higher Education, et al., *Defendants*

Journal Entry

Be it remembered that this cause came on for further consideration on the 25th day of October, 1948. The plaintiff, McLaurin, appeared in person and by his counsel, Thurgood Marshall and Amos T. Hall. The applicant, Mauderie Florence Hancock Wilson, appeared in person and by the same counsel of record. The defendants appeared either in person or by and through the Attorney General of the State of Oklahoma, the Honorable Mac Q. Williamson, and Assistant Attorneys General Fred Hansen and George T. Montgomery. Testimony was heard, and the case was finally submitted on briefs of the parties.

Upon consideration of the evidence, argument and briefs, it is ordered that the relief now sought by the Plaintiff McLaurin should be and the same is hereby denied.

It is further ordered that the relief prayed for by the applicant, Wilson, should be and the same is thereby denied. The complaint as to each of the parties is dismissed and judgment is entered for the defendants.

Alfred P. Murrah.
Edgar S. Vaught.
Bower Broaddus.

Endorsed: Filed Nov. 22, 1948. Theodore M. Filson, Clerk, by Margaret P. Blair, Deputy.

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 4039 (Civil)

G. W. McLaurin, *Plaintiff,*

vs.

Oklahoma State Regents for Higher Education, et al., *Defendants*

Findings of Fact and Conclusions of Law

Preliminary Statement

At a former hearing of this cause, we held the segregation laws of the State of Oklahoma (70 O. S. 1941, Sections, 455, 456 and 457) unconstitutional and inoperative insofar as they deprived the plaintiff of his constitutional right to pursue the course of study he sought at the University of Oklahoma. We were careful, however, to confine our decree to the particular facts before us, while recognizing the power of the State to pursue its own social policies regarding segregation in conformity with the equal protection of the laws. We expressly refrained from granting injunctive relief, on the assumption that the State statutory impediments to equal educational facilities having been declared inoperative, the State would provide such facilities in obedience to the constitutional mandate.

Now this cause comes on for further consideration on complaint of the plaintiff, to the effect that although he has been admitted to the University of Oklahoma, and to the course of study he sought, the segregated conditions under which he was admitted, and is required to pursue his course of study, continue to deprive him of equal educational facilities in conformity with the Fourteenth Amendment.

Findings of Fact

I

The undisputed evidence is that subsequent to our decree in this case, plaintiff was admitted to the University of Oklahoma, and to the same classes as those pursuing the same courses. He is required, however, to sit at a designated desk in or near a wide opening into the classroom. From this position, he is as near to the instructor as the majority of the other students in the classroom, and he can see and hear the instructor and the other students in the main classroom as well as any other student. His objection to these facilities is that to be thus segregated from the other students so interferes with his powers of concentration as to make study difficult, if not impossible, thereby depriving him of the equal educational facilities. He says in effect that only if he is permitted to choose his seat as any other student, can he have equal educational facilities.

II

He is accorded access to and use of the school library as other students, except if he remains in the library to study, he is required to take his books to a designated desk on the mezzanine floor. All other students who use the library may choose any available seat in the reading room in the library, but a majority find it necessary to study elsewhere because of a lack of seating capacity in the library. The plaintiff says that this secluded and segregated arrangement tends to set him apart from other students and hence to deprive him of equal facilities.

III

He is admitted to the school cafeteria, where he is served the same food as other students, but at a different time and at a designated table. He does not object to the food, the dining facilities, or the hour served, but to the segregated conditions under which he is served.

In the language of his counsel, he complains that "his required isolation from all other students, solely because

of the accident of birth * * * creates a mental discomfiture, which makes concentration and study difficult, if not impossible * * *"; that the enforcement of these regulations places upon him "a badge of inferiority which affects his relationship, both to his fellow students, and to his professors."

CONCLUSIONS OF LAW

I

It is said that since the segregation laws have been declared inoperative, the University is without authority to require the plaintiff to attend classes under the segregated conditions. But the authority of the University to impose segregation is of concern to this court only if the exercise of that authority amounts to a deprivation of a federal right. See Screws v. United States, 325 U. S. 91.

The Constitution from which this court derives its jurisdiction does not authorize us to obliterate social or racial distinctions which the State has traditionally recognized as a basis for classification for purposes of education and other public ministrations. The Fourteenth Amendment does not abolish distinctions based upon race or color, nor was it intended to enforce social equality between classes and races. Plessy v. Ferguson, 163 U. S. 537; Cummings v. United States, 175 U. S. 528; Gung Lum v. Rice, 275 U. S. 78; Missouri ex rel Gaines v. Canada, 305 U. S. 37. It is only when such distinctions are made the basis for discrimination and unequal treatment before the law that the Fourteenth Amendment intervenes. Truax v. Raich, 293 U. S. 33, 42. It is the duty of this court to honor the public policy of the State in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land.

III

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. The segregation condemned in Westminister School District v. Mendez, 161 F. 2d 774, was found to be "wholly inconsistent" with the public policy

of the State of California, while in our case the segregation based upon racial distinctions is in accord with the deeply rooted social policy of the State of Oklahoma.

IV

The plaintiff is now being afforded the same educational facilities as other students at the University of Oklahoma. And, while conceivably the same facilities might be afforded under conditions so odious as to amount to a denial of equal protection of the law, we cannot find any justifiably legal basis for the mental discomfiture which the plaintiff says deprives him of equal educational facilities here. We conclude therefore that the classification, based upon racial distinctions, as recognized and enforced by the regulations of the University of Oklahoma, rests upon a reasonable basis, having its foundation in the public policy of the State, and does not therefore operate to deprive this plaintiff of the equal protection of the laws. The relief he now seeks is accordingly denied.

Application of Mrs. Maude Florence Hancock Wilson

Mrs. Maude Florence Hancock Wilson, claiming to be a member of the same class and similarly situated with the plaintiff McLaurin, has renewed her application for entrance to the University of Oklahoma to pursue a course of study in social work, and upon being denied entrance she comes here seeking the same relief sought by McLaurin in his class action.

The facts are that Mrs. Wilson applied for admission to the University of Oklahoma on January 28, 1948, for the purpose of studying for a master's degree in sociology. She was morally and scholastically qualified to pursue this course of study, and it was unavailable at any separate school within the State of Oklahoma. When her application for entrance was denied, solely because the laws of Oklahoma forbade it, she filed suit in the District Court of Cleveland County, Oklahoma, in May 1948, for a writ of mandamus to compel her admission on substantially the same grounds now asserted here. Having been denied relief in the District Court, she has perfected her appeal to the

Supreme Court of Oklahoma, and that appeal is now pending and undecided. She did not renew her application for admission to the University until October 15, 1948, two days after registration was closed to any applicant for any course of study at the University.

Having elected to pursue an equally adequate remedy in the courts of the State for the purpose of securing equal protection of the laws, and is now actively pursuing that remedy, she is not similarly situated with the plaintiff, McLaurin. Moreover, the course of study she now seeks to pursue is not the same as the one originally sought, and not having applied for admission until all other persons would have been similarly denied admission, she is not within the class for which this suit is prosecuted. The relief sought by her is, therefore, denied.

ALFRED P. MURRAH.
EDGAR S. VAUGHT.
BOWER BROADDUS.

Endorsed: Filed Nov. 22, 1948. Theodore M. Filson, Clerk, by Margaret P. Blair, Deputy.