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Nos. 34 and 44

In the Supreme Court of the United States

OCTOBER TERM, 1949

G. W. McLAURIN, APPELLANT

v.

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

HEMAN MARION SWEATT, PETITIONER

v.

THEOPHILIS SHICKEL PAINTER ET AL.

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

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These cases, together with No. 25, *Henderson* v. *United States,* have great importance to the Government and the people of the United States. They are significant because they test the vitality and strength of the democratic ideals

to which the United States is dedicated. The cases at bar do not present isolated instances of racial discrimination by private individuals. On the contrary, the asserted discriminations relate to practices systematically engaged in by the States themselves, and come before this Court bearing the endorsement of the laws of these States. The decisions in these cases may thus have large influence in determining whether the foundations of our society shall continue to be undermined by the existence and acceptance of racial discriminations having the sanction of law.

McLaurin and Sweatt are Negroes. For that reason alone they have been subjected under the laws of the States in which they live to various educational restrictions not imposed on white students. McLaurin, a graduate student at the University of Oklahoma preparing for a doctor's degree in education, is required to sit at a special desk set aside for him in the doorway of the classroom; he may use the library, but only if he takes his books to a designated desk on the mezzanine floor; he may eat in the school cafeteria, where he is served the same food as other students, but only at a different time and at a table specially set apart for his use. Sweatt has been excluded from the University of Texas Law School, which is reserved for white students. Instead, he has been offered the privilege of applying for admission to a new law school, for Negroes only, which the State has undertaken to establish.

The Fourteenth Amendment, which became part of the Constitution in 1868, forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." In an impressive series of decisions, extending over a period of more than three-quarters of a century, this Court (with the principal exception of *Plessy* v. *Ferguson,* 163 U. S. 537) has construed the Amendment liberally so as to carry out its purposes, namely, to establish complete equality in the enjoyment of fundamental human rights and to secure those rights against governmental discriminations based on race or color. *Strauder* v. *West Virginia,* 100 U. S. 303, decided in 1880, was the first case in which the Court was called upon to define the scope of the Amendment as applied to distinctions based on race or color. The interpretation of the Fourteenth Amendment made in that case (pp. 306–308) is especially significant, not merely because of its comprehensive nature, but because it was written by a Court whose members lived during the period when the Amendment was enacted:

> This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and

meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It is well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are

enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their

> color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, of right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Strauder v. *West Virginia* was soon followed by a number of other cases in which the Court continued to give broad effect to the constitutional principle that all men stand equal and alike before the law, and that legal distinctions drawn solely on the basis of race or color are incompatible with the guarantee of equal protection of the laws. *E. g., Virginia* v. *Rives,* 100 U. S. 313 (1880); *Ex parte Virginia,* 100 U. S. 339 (1880); *Neal* v. *Delaware,* 103 U. S. 370 (1881); *Bush* v. *Kentucky,* 107 U. S. 110 (1883). And in a line of decisions extending to the present time, the Court has applied this broad doctrine in a great variety of factual contexts. To cite only some of the more familiar cases, and the dates when they were decided, is to show that equality is not an abstract concept but a living principle firmly rooted in our basic law: *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *McCabe* v. *Atchison, T. &*

S. F. Ry. Co., 235 U. S. 151, 161 (1914); *Truax* v. *Raich,* 239 U. S. 33 (1915); *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Nixon* v. *Herndon,* 273 U. S. 536 (1927); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Mitchell* v. *United States,* 313 U. S. 80, 94–97 (1941); *Hill* v. *Texas,* 316 U. S. 400 (1942); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Shelley* v. *Kraemer,* 334 U. S. 1, and *Hurd* v. *Hodge,* 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948).

In *Shelley* v. *Kraemer,* which outlawed judicial enforcement of racial restrictive covenants on real property, the Court again took occasion to reaffirm the broad construction made in *Strauder* v. *West Virginia.* Mr. Chief Justice Vinson wrote for the Court (334 U. S. at 23):

> 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. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.

With specific reference to the field of education, it has been held that, while a State is not obliged to furnish higher education to any of its citizens, if it offers such education to its white residents, the Constitution requires that the same privilege be extended on equal terms to its colored residents. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631. The constitutional requirement is that of *equality,* not merely in one sense of the word but in every sense. Nothing in the Fourteenth Amendment, or in the cases decided under it, supports the notion that facilities need be equal only in a physical sense.

In the cases at bar the facilities of the University of Oklahoma have been made available to McLaurin, but only under conditions in which the spirit of free intellectual inquiry plainly can not long survive. As to Sweatt, the briefs submitted by him and the other *amici curiae* amply demonstrate that the institution which the State has established for the purpose of providing legal education for its colored residents falls far short of being the equal of the Law School of the University of Texas. The argument is made, however, that the State cannot overnight establish for its Negro citizens a law school comparable in all respects to that now available to its white citizens, and that the Constitution is satisfied if the State in good faith undertakes to provide facilities which will eventually be "equal" to those of

the University of Texas. But it does not answer Sweatt's present claim to say that, at some unspecified time in the future, colored persons as a group will be treated equally. The right to equal legal education which Sweatt asserts is a personal one, and the State can discharge its obligation to him only by providing him such education "as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633. The Constitution cannot be construed to require Sweatt to postpone or forego his legal education until the State of Texas establishes an "equal" law school for colored students. If it were so construed, his constitutional right would have neither meaning nor value.

Moreover, the fact of racial segregation is itself a manifestation of inequality and discrimination. The argument to the contrary is derived principally from *Plessy* v. *Ferguson,* 163 U. S. 537, which, almost three decades after the Fourteenth Amendment was adopted, read into it for the first time an implied limitation that enforced racial segregation does not violate the Amendment so long as the separate facilities are "equal." In the brief for the United States in the *Henderson* case, No. 25, we have argued that the "separate but equal" theory of *Plessy* v. *Ferguson* is wrong as a matter of law, history, and policy. The United States in these cases again urges the Court to repudiate the "separate but equal" doctrine as an unwarranted deviation from the principle

of equality under law which the Fourteenth Amendment explicitly incorporated in the fundamental charter of this country.

Under the Constitution every agency of government, federal and state, must treat our people as *Americans,* and not as members of particular groups divided according to race, color, religion, or national ancestry. All citizens stand equal and alike in relation to their government, and no distinctions can be made among them because of race or color or other irrelevant factors. The color of a man's skin has no constitutional significance. If the Constitution is construed to permit the enforced segregation of Negroes, there would be no constitutional barrier against singling out other groups in the community and subjecting them to the same kind of discrimination.[1]

"Separate but equal" is sometimes described as an "ancient" doctrine of constitutional law. But it is derived not from the Constitution but

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[1] In recommending the elimination of segregation, based on race, color, creed, or national origin, from American life, the President's Committee on Civil Rights stated:

"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." (*To Secure These Rights*, p. 166).

from a judicial expression which did not make its appearance in the reports of this Court until 1896, and which is irreconcilable with the body of precedents which preceded and followed it. Here, therefore, as in *Helvering* v. *Hallock,* 309 U. S. 106, 122, the "real problem is whether a principle shall prevail over its later misapplications." The *Hallock* opinion gives the clear answer. To alter slightly the Court's language in that case: "Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of [the Fourteenth Amendment] which, on further examination, appear consonant neither with the purposes of the [Amendment] nor with this Court's own conception of it." (*Ibid.*) [2]

The subordinate position of Negroes in this country has been described as the greatest unsolved task for American democracy. The racial discriminations typified by these cases represent a challenge to the sincerity of our profession of the democratic faith. The President has stated: "If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their

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[2] In *Passenger Cases*, 7 How. 283, 470, Chief Justice Taney agreed "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy. We know the way. We need only the will."[3]

The Court is here asked to place the seal of constitutional approval upon an undisguised species of racial discrimination. If the imprimatur of constitutionality should be put on such a denial of equality, one would expect the foes of democracy to exploit such an action for their own purposes. The ideals embodied in our Bill of Rights would be ridiculed as empty words, devoid of any real substance. The lag between what Americans profess and what we practice would be used to support the charges of hypocrisy and the decadence of democratic society.[4] The words of Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson,* 163 U. S. 537, 562, are as pertinent today as when they were written more than fifty years ago:

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a

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[3] Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 7.

[4] Concrete illustrations of the extent to which the existence of racial discrimination in this country embarrasses the United States in the conduct of foreign affairs are set forth in the Government's brief in the *Henderson* case, pp. 60–63.

> large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations * * * will not mislead any one, nor atone for the wrong this day done.

It is in the context of a world in which freedom and equality must become living realities, if the democratic way of life is to survive, that the issues in these cases should be viewed. In these times, when even the foundations of our free institutions are not altogether secure, it is especially important that it again be unequivocally affirmed that the Constitution of the United States, like the Declaration of Independence and the other great state papers in American history, places no limitation, express or implied, on the principle of the equality of all men before the law. The proposition that all men are created equal is not mere rhetoric. It summarizes a rule of law embodied in the Constitution, the supreme law of the land, and thus is binding on the Federal and State governments and all their officials. See *Truax* v. *Corrigan,* 257 U. S. 312, 332; *Hill* v. *Texas,* 316 U. S. 400, 406; *Hirabayashi* v. *United States,* 320 U. S. 81, 100; Civil Rights Act of May 31, 1870, c. 114, § 16, 16 Stat. 144, 8 U. S. C. 41.

Disregard of constitutional rights does not raise issues merely of "civil liberties." It involves considerations which go to the essence of law enforcement in a democracy. A basic postulate of democratic government is that a valid law must be

enforced and obeyed, even by those who disagree with it or against whose firmly held convictions the law may run counter. Citizens and officials cannot be relieved of their obligation to respect the law, simply because they regard it as unwise or wrong. Nor can personal beliefs or prejudices justify failure to respect the legal rights of others. The right of all Americans to equal treatment under law is specifically guaranteed by the Constitution and laws of the United States. Like other legal rights, it must be recognized and enforced by all persons and by every instrumentality of governments. To countenance disregard of such right is to sanction disrespect for law and thereby weaken the fabric of our society.

Respectfully submitted.

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