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can be obtained in equity only. In cases in which the jurisdiction of law and equity is concurrent, the Florida law is unsettled. The Florida Court, in suits not falling within the above categories, will apparently use the statute as a guide in determining the upper limit of mere delay that will constitute laches.

In view of the apparent uncertainty, the Legislature might well consider the advisability of providing a more concrete guide for determining when statutes of limitation are to be applied to suits in equity. Much useless litigation can be avoided thereby if prospective complainants know that there is no chance of recovery in equity if there is none at law. Until this problem is settled, many optimistic complainants will be certain that their cases possess such equities that the chancellor will not apply a limitations statute to bar their suits.

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IMPLICATIONS OF RECENT CASES ON EDUCATION OF MINORITY RACIAL GROUPS

Racial segregation, as such, has never been declared violative of the United States Constitution.[1] Racial discrimination by a state in the exercise of its power, however, has repeatedly been held void.[2] The systematic exclusion of colored citizens from jury service,[3] the refusal of voting privileges in primary[4] or general elections,[5] and the exclusion from the ownership or occupancy of property,[6] for example,

[1]For a well-developed article see Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946).

[2]*Ibid.*

[3]Cassell v. Texas, 70 Sup. Ct. 629 (1950) (Jury Commissioner's selection of jurymen from those citizens that he knew were qualified, together with his limited personal knowledge of potentially qualified negro jurors, would inevitably imply designed exclusion of eligible Negroes); Hill v. Texas, 316 U. S. 400 (1942); Smith v. Texas, 311 U. S. 128 (1940); Pierre v. Louisiana, 306 U. S. 354 (1939); Carter v. Texas, 177 U. S. 442 (1900); Strauder v. West Virginia, 100 U. S. 303 (1879).

[4]Nixon v. Condon, 286 U. S. 73 (1932); Nixon v. Herndon, 273 U. S. 536 (1927).

[5]Lane v. Wilson, 307 U. S. 268 (1939); Gunn v. United States, 238 U. S. 347 (1915).

[6]Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917); 1 U. OF FLA. L. REV. 453 (1948).

all violate the Federal Constitution. Racial segregation on public carriers[7] or in public schools[8] is not a denial of equal protection of the laws under the Fourteenth Amendment, although in regard to transportation a recent decision interpreting a provision of the Interstate Commerce Commission Act[9] apparently prevents segregation of the races in dining cars of railroads engaged in interstate commerce.[10]

I. History of Racial Segregation in Educational Institutions

Since the ratification of the Fourteenth Amendment in 1870, Negro education in Southern states has become a problem of increasing importance.[11] While public education has always been within the peculiar province of state governments,[12] state action is necessarily limited by the fact that the Constitution of the United States grants to all citizens certain minimum protections against state action.[13]

Prior to 1870, segregation of races in the public schools was valid and did not necessarily imply racial inferiority.[14] Many subsequent opinions reiterated this principle even after the adoption of the Fourteenth Amendment. In one of the earliest opinions discussing the problem, a federal court stated:[15]

> "Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights."

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[7]McCabe v. Atchison, T. & S. F. Ry., 235 U.S. 151 (1914).

[8]*See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

[9]54 Stat. 902 (1940); 49 U.S.C. §3(1) (1946).

[10]Henderson v. United States, 70 Sup. Ct. 843 (1950); *accord,* Mitchell v. United States, 313 U.S. 80 (1941).

[11]See Simpkins, The South Old and New 276-277 (1947); Studies in Southern History and Politics 281-287 (1914).

[12]Cumming v. Board of Education, 175 U.S. 528 (1899); Ward v. Flood, 48 Cal. 36 (1874).

[13]Adamson v. California, 332 U.S. 46 (1947); Slaughter-House Cases, 16 Wall. 36 (U.S. 1873).

[14]Roberts v. Boston, 5 Cush. 198 (Mass. 1849).

[15]Bertonneau v. Board of Directors of City Schools, 3 Fed. Cas. 294, 296 No. 1,361 (C.C.D. La. 1878); Wong Him v. Callahan, 119 Fed. 381 (C.C.N.D. Cal. 1902); Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1906).

The Supreme Court of the United States did not consider the issue of segregation until 1927, with the case of *Gong Lum v. Rice*.[16] The Court, following a dictum advanced in 1896 in *Plessy v. Ferguson*,[17] upheld the legality of segregation of races in public schools,[18] provided equal facilities were furnished.

Quite generally, equal facilities have been determined by measuring tangible physical factors[19] such as number of pupils per teacher and number of square feet of floor space per pupil.[20] Inconvenience to individual members of the Negro race because of the location of their school is insufficient to support charges of inequality under the Constitution.[21] If, however, the location is more dangerous or more inconvenient to all Negro pupils attending than is the comparable danger or inconvenience to the white pupils as a group, the consti-

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[16]275 U.S. 78 (1927) (A United States citizen of Chinese extraction was not denied equal protection of the laws when he was assigned to a separate school, since equal facilities were afforded in both institutions).

[17]163 U.S. 537, 544 (1896). In condoning the separation of the races under the police power of a state, the Court cited as the most common instance of that legal separation the establishment of white and colored schools. It pointed out that such separation had long been maintained under Congressional legislation in the District of Columbia. The following cases were cited as upholding such segregation: Bertonneau v. Board of Directors of City Schools, 3 Fed. Cas. 294, No. 1,361 (C.C.D. La. 1878); Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874); Cory v. Carter, 48 Ind. 327 (1874); Dawson v. Lee, 83 Ky. 49 (1884); State v. McCann, 21 Ohio St. 198 (1871); People v. Gallagher, 93 N.Y. 438 (1883). See Hall v. DeCuir, 95 U.S. 485 (1877), for an early Supreme Court approval of state segregation decisions.

[18]A state statute requiring racial segregation in private schools was upheld in Berea College v. Kentucky, 211 U.S. 45 (1908). The case turned on the state's power over corporations; and by inference the Court indicated that such a statute would be unconstitutional if applied to persons or associations other than corporations.

[19]Corbin v. County School Bd. of Ed., 177 F.2d 924 (4th Cir. 1949); Carter v. School Bd., 87 F. Supp. 745 (E.D. Va. 1949); Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903)(a more imposing school building for whites than for colored was not unequal); Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905) (with one white school and one adequate colored school, an additional building for white students was not discriminatory); State *ex. rel.* Lewis v. Board of Education, 7 Ohio Dec. 129 (1876).

[20]Carter v. County School Bd., 87 F. Supp. 745 (E.D. Va. 1949).

[21]Dameron v. Dayless, 14 Ariz. 180, 126 Pac. 273 (1912); Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1890); Roberts v. Boston, 5 Cush. 198 (Mass. 1849); People v. Gallagher, 93 N.Y. 438 (1883); State *ex rel.* Lewis v. Board of Education, 7 Ohio Dec. 129 (1876).

tutional requirement of equal protection is violated.[22] This statement, however, must be limited to those instances in which the treatment afforded might be said to be discriminatory beyond all reason.[23] Mere variance between Negro and white schools in size, convenience of location, or methods of instruction is not discrimination that violates the Fourteenth Amendment.[24] The attempt to vary the amount spent on educational facilities for each race with the proportionate amount of taxes paid is invalid under the Federal Constitution.[25]

Although tacitly acknowledging the right of states to maintain segregated systems of public schools providing equal facilities, the Supreme Court in recent cases has begun to examine more closely the requisites necessary for such equality. It has held that a state must provide substantially equal opportunities for higher education for both white and Negro students within the state.[26] Equal facilities,

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[22]Williams v. Board of Education, 79 Kan. 202, 99 Pac. 216 (1908). The school was so located that railroad traffic frequently forced the children to wait long periods of time for trains to pass when en route to and from school and also interfered with the studies during school hours. The waiting period, coupled with the long distance from the homes of many of the students, exposed the Negro children to the elements for much longer periods of time than the white children. The court held that this treatment was unequal under the Fourteenth Amendment.

[23]Jones v. Board of Education, 90 Okla. 233, 217 Pac. 400 (1923). The value of the colored school buildings was 1/9th of the total valuation of all school buildings, although the colored school population was 1/3rd of the total school population. Further, the school term was 9 months for white children while only 7 for colored. The Court held that these discrepancies resulted in discrimination. Rice v. Arnold, 45 So.2d 195 (Fla. 1950), in which a municipality operating a golf course was held not to discriminate against members of the Negro race when separate days were allotted to both races in proportion to the number of golfers of each race using the course as ascertained from previous records, was reversed by the U.S. Supreme Court and remanded to the Florida Court with instructions to reconsider the case in the light of the *Sweatt* and *McLaurin* cases, 19 U.S. LAW WEEK 3106 (1950).

[24]Carter v. School Board, 87 F. Supp. 745 (E.D. Va. 1949).

[25]Claybrook v. Owensboro, 16 Fed. 297 (D. Ky. 1883). In the jury cases cited in note 3 *supra* the Supreme Court has held that under the Federal Constitution there can be no intentional omission from grand or petit juries. This does not necessarily mean, however, that there must be a proportionate number of each race upon any particular jury, OP. FLA. ATT'Y GEN. 050-229 (June 16, 1950).

[26]Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (provision for paying a Negro's transportation to and tuition in a school outside the state held not to provide equal facilities if white students were offered these facilities within the state); Wrighten v. University of South Carolina, 72 F. Supp. 948 (1947); University of Maryland v. Murray, 169 Md. 478, 182 Atl. 590 (1936).

moreover, must be supplied for Negro applicants at the same time that they are provided for white citizens,[27] and, in the absence of equivalent provisions for Negro education, the Negro applicant must be admitted to the existing schools.[28]

This was the state of the law on June 5, 1950, when *Sweatt v. Painter*[29] and *McLaurin v. Oklahoma State Regents for Higher Education*[30] were decided by the United States Supreme Court. These cases are certain to effect major changes in educational facilities afforded minority racial groups. While not arising on parallel factual situations, the cases deal with two aspects of the problem of racial segregation in education: the measure of equality in non-segregated schools and the measure of equality in segregated institutions. The extent of the changes that will necessarily be required in practice is not altogether clear as yet, but the cases are subject to possible limitations. It is the purpose of this note to attempt an objective analysis of the *Sweatt* and *McLaurin* cases.

II. The Measure of Equality in Segregated Schools

In *Sweatt v. Painter*[31] the petitioner, a Negro, sought admission to the University of Texas Law School. The law of Texas prohibited coeducation of members of the Caucasian and Negroid races, and consequently petitioner's application for admission was rejected by university officials. Sweatt sought a writ of mandamus to compel his admission, contending that no facilities were provided within the state for his legal education, although they were provided for members of the white race. Texas established an interim school for Negroes within six months and prior to the Supreme Court's decision a full-time law school. The former school was rather obviously inferior to the University of Texas Law School, but the latter was well on the road to complete accreditation[32] and had 23 students, 5 regular law instructors, a 16,500-volume library serviced by a full-time staff, a practice court, and a legal aid association. The Texas Supreme Court

[27]Fisher v. Hurst, 333 U.S. 147 (1948), 1 U. of Fla. L. Rev. 296 (1948).

[28]Sipuel v. University of Oklahoma, 332 U.S. 631 (1948).

[29]70 Sup. Ct. 848 (1950).

[30]70 Sup. Ct. 851 (1950).

[31]See note 29 *supra*.

[32]The full-time school at Houston, Texas, was provisionally approved on Sept. 8, 1949, by the American Bar Association. Since 1935 all law schools have been provisionally approved before full approval is given by the Bar Association, 74 Rep. Am'r. Bar Ass'n 155 (1949).

denied the writ of mandamus on the ground that equal facilities for the study of law were provided for the members of both races.

The Supreme Court of the United States reversed the Texas court and held that the facilities afforded the petitioner in neither the interim nor the full-time law school were equal to those afforded the members of the white race. The Court pointed out that the permanent school was not of sufficient size to offer a variety of courses or the opportunity to specialize; that the reputation of the school, faculty, and alumni was practically non-existent; that the insufficient numbers did not allow the students to gain essential practical experience;[33] and that a substantial group of future lawyers and clients, namely, the white segment, was excluded from the Negro school.[34] For these reasons the Court concluded that the law school for Negroes was not in reality equal to the University of Texas Law School.

The stress placed upon such factors as the exclusion of large segments of the population from the Negro school[35] and its lack of prestige and reputation logically brings this question into view: Can any two schools, irrespective of segregation, ever attain the equality that consideration of these intangible factors demands? The answer is patent; no two schools can ever be exactly the same, considering all factors, both tangible and intangible. The emphasis placed by the Court upon the percentage of the citizens of Texas who could not be admitted to the segregated school logically precludes effective use of the "separate but equal" doctrine generally conceded to be the law for a great number of years. If the reasoning of the present Court is followed in subsequent cases, segregation of educational facilities does not seem possible beyond the general college level; and furthermore, if the background of students in general college work is of sufficient importance to later professional training, the Court may require in undergraduate studies the same precise equality. This eventuality would render worthless the time-honored tests of substantial equality, such as the number of square feet per student

[33]Miller, *Clinical Training of Law Students*, 2 J. LEGAL EDUC. 298 (1950).

[34]In Carter v. School Bd. of Arlington County, 87 F. Supp. 745 (E.D. Va. 1949), however, the exclusion of Negroes from the white school, and the establishment of a separate school for Negroes, resulted in a relatively small student body in the latter. This factor in turn rendered impracticable a cadet corps, a football or baseball team, or other activities dependent on numbers; yet no discrimination was found.

[35]See Hornstein, *A Lawyer Looks at the Law School*, 1 J. LEGAL EDUC. 517 (1949).

and the number of students per teacher.

The *Sweatt* case, however, since it concerns the training of students for the legal profession, may be subject to at least three clear distinctions on the facts. First, a lawyer's success depends, to some extent at least, upon the feeling in his community that he is skilled in his chosen profession and that the school he attends is one that affords adequate instruction. Second, since much of a lawyer's work necessarily involves interrelationships among members of the state bar, it is of relatively more importance to a lawyer than to a general college graduate that he be allowed to associate with prospective members of his profession during his training. A third possible distinction is that professional techniques developed in school are of infinite value to the neophyte lawyer. In view of the importance of these and similar factors in most graduate and professional training, segregation during such training may well be constitutionally impossible. Whether this doctrine will be extended below the graduate school level is of course still problematical, but the doubt does not rest on strictly logical grounds.

The Supreme Court, in deciding *Sweatt v. Painter,* had two possible courses: to reconsider *Plessy v. Ferguson* and decide whether segregation in and of itself is unconstitutional under the Fourteenth Amendment, or to reconsider the substantially-equal test and determine its true significance.[36] The Court chose the latter, and found in effect that precise equality is essential. While this requisite comes very close to preventing the establishment of truly equal, separate professional schools, it does not, of course, preclude the states from trying.[37]

[36]See *Segregation and the Equal Protection Clause. Brief for Committee of Law Teachers against Segregation in Legal Education,* 34 MINN. L. REV. 289 (1950).

[37]As an example of this inevitable attempt by the states to seek equality in segregated professional schools the case of Hawkins v. Board of Control of Florida, 47 So.2d 608 (1950), recently decided by the Florida Supreme Court, merits some discussion. The facts in the *Hawkins* case were similar to those in the *Sweatt* case. Hawkins, a Negro, after making application, was denied admission to the University of Florida Law School because of the state constitutional and statutory provisions which barred the education of the white and colored races together. Hawkins sought a writ of mandamus to compel his admission into the University of Florida Law School. No public educational facilities were provided within the State of Florida for the legal training of Negroes. The Board of Control, in its return, alleged that substantially equal facilities would be afforded to the petitioner at a new Negro law school to be established at Florida Agricultural and Mechanical College for Negroes. The answer further

III. TREATMENT OF NEGROES IN NON-SEGREGATED SCHOOLS

McLaurin v. Oklahoma State Regents for Higher Education,[38] also decided on June 5, 1950, presents a new point of constitutional law, namely, whether the treatment of Negroes after admission to non-segregated schools must be equal in the true sense of the word.[39] This question is important in view of the extreme practical difficulty of providing equality in separate schools for each of the races, as indicated by the *Sweatt* case.

In the *McLaurin* case the petitioner, who was seeking a doctor's degree in education, was enrolled in the Graduate School of the University of Oklahoma. The state legislature gave university officials the authority to promulgate rules to enforce the state statutory requirement of segregation of races in educational institutions.[40] Accordingly, petitioner was provided a desk within a certain railed area in each classroom and special tables in both the library and cafeteria upon which were signs reading, "Reserved for Colored." The railings and signs denoting the special desks were subsequently removed, but petitioner was still required to sit in the specified places. The Supreme Court held that this treatment denied McLaurin on the

alleged that in the event the new school was not in operation at the time the petitioner desired training he would be allowed to register in the Negro school and attend the white school temporarily. Hawkins moved for a peremptory writ notwithstanding this answer, and the Court quite properly regarded this motion as the procedural equivalent of a demurrer, that is, as an admission of the truth of the allegations of the Board of Control. Accordingly, although the Florida Supreme Court has specifically retained jurisdiction of the cause, it has not on these pleadings found any denial of due process under the Fourteenth Amendment.

While the specific problem of this one case has been temporarily resolved, the basic question of whether the facilities of the two schools will be equal remains unanswered. In view of the strictness of the yardstick of equality now being used by the United States Supreme Court, the admission of Negroes into the University of Florida Law School is probably the final answer.

In addition to *Hawkins v. Board of Control* the Florida Supreme Court reached the same result in four other cases decided on the same day, using as the rationale the reasoning in the *Hawkins* case, namely: Finley v. Board of Control, 47 So.2d 620 (Fla. 1950) (graduate work in agriculture); Boyd v. Board of Control, 47 So.2d 619 (Fla. 1950) (pharmacy); Maxey v. Board of Control, 47 So.2d 618 (Fla. 1950) (chemical engineering); Lewis v. Board of Control, 47 So.2d 617 (Fla. 1950) (law).

[38]70 Sup. Ct. 851 (1950).

[39]See State v. Board of Trustees, 126 Ohio St. 290, 185 N.E. 196 (1933).

[40]OKLA. STAT. ANN. tit. 90, §§455-457 (1950).

basis of color the equal protection of the laws guaranteed to all citizens by the Fourteenth Amendment.

The Court stressed the fact that the statutorily imposed regulations handicapped the petitioner by depriving him of the right to exchange effectively his ideas with those of the rest of the student body. The argument presented by the respondents that, irrespective of state restrictions, the same result would nevertheless be reached by the voluntary action of the student body was disposed of as follows:[41]

> "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. . . . The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

In other words, the Court now considers that an opportunity to commingle, in so far as it affects public education, is a legal right.[42] Consequently, social restrictions within a public school, if any there be, must come from sources other than governmental bodies whenever intermingling of the students appears to the Court to be a factor affecting education.

Although presenting different legal questions, the facts in the *McLaurin* case are somewhat similar to those in the *Sweatt* case. In both, petitioners were pursuing education beyond what might be conveniently termed general education: Sweatt was seeking a law degree; McLaurin, a doctor's degree in education. Likewise, both cases are concerned with types of education in which close relationships among the students, as well as the exchange of ideas and views, are essential to a well-rounded course of instruction. For this reason, distinctions similar to those made in the discussion of the *Sweatt* case may also be made here. Essentially the Court, for the first time, is measuring the value of group atmosphere in determining equality.

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[41]McLaurin v. Oklahoma State Regents for Higher Education, 70 Sup. Ct. 851, 853 (1950).

[42]Jones v. Newlon, 81 Colo. 25, 253 Pac. 386 (1927); Patterson v. Board

IV. Conclusion

The *Sweatt* and *McLaurin* cases are certain to affect major changes in education, particularly in colleges located in the South. The two cases are, in reality, facets of the same basic problem, namely, the testing under the Fourteenth Amendment for equality of segregated educational facilities. The decisions say in effect that, in professional schools in which factors of atmosphere are of some importance to the complete, well-rounded training of students, precise equality will be required for both white and colored citizens. This requirement supersedes the "substantially equal" doctrine as the test of equality.

The rationale of the Court does not limit the application of this test to professional schools as such, and no such limitation should be assumed. The most that can be said by way of limitation is that the Court may regard these intangible factors as items of lesser importance in public schools below college level, and that separate schools will be considered equal if the physical facilities for both white and colored students are comparable. In any given case the measurement of intangible factors will undoubtedly depend upon their importance to the overall education of the student. Certainly the relevance of intangible factors is not limited to professional schools; they are just as much a part of education in general college work as in law, albeit to a lesser degree.

As an abstract principle of testing and measuring equal facilities, the *Sweatt* and *McLaurin* cases are undoubtedly sound. Whether from a policy point of view—which in reality is the basis for the decisions—the corrective influences could best be accomplished by following the "substantially equal" test is subject to possible doubt.[43] Because of the social repercussions that would undoubtedly follow from any general holding that no segregation in public schools is permissible, the Court wisely limited its decisions to the immediate cases and issues before it.

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of Education, 11 N.J. Misc. 179, 164 Atl. 892 (Sup. Ct. 1933); *cf.* State v. Board of Trustees, 126 Ohio 290, 185 N.E. 196 (1933).

[43]Since individuals cannot be compelled to associate with each other against their wishes, the true effect of these decisions may well be to deprive colored students of the participation in college life that they now enjoy in their own universities. Because of this difficulty, regional education, for example, might be far more effective from a practical standpoint.