

EQUAL EDUCATIONAL FACILITIES UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

INTRODUCTION

Recent constitutional developments have accentuated the problem of racial segregation in public educational institutions. State segregation statutes first received legal sanction by the Supreme Court in 1896 in the case of *Plessy v. Ferguson*,¹ the court declaring that so long as equal though separate facilities are accorded both Negroes and whites, such statutes do not violate the equal protection clause of the Fourteenth Amendment of the Constitution.² Between the date of the adoption of the Fourteenth Amendment³ and the decision in the *Plessy* case, numerous state courts and some federal courts other than the Supreme Court had held that state laws providing for the education of white and colored children in separate but substantially equal schools were valid.⁴ During that period, however, there were a number of de-

1. 163 U.S. 537 (1896). This case, however, did not involve racial segregation in the public schools but related to a Louisiana statute requiring the separation of Negroes and whites in railroad cars. See *Hall v. DeCuir*, 95 U.S. 485 (1877), in which the United States Supreme Court in a decision rendered nineteen years prior to the *Plessy* case, held that a Louisiana statute, prescribing that those engaged in transportation among the states give equal rights and privileges to all persons travelling within that state without distinction on account of race or color, was, so far as it related to interstate commerce, a state regulation of interstate commerce and hence unconstitutional. Since the unconstitutionality of the statute involved in the *Hall* case was predicated upon the violation of the interstate commerce clause of the United States Constitution, it cannot accurately be considered the first case in which the United States Supreme Court validated state racial segregation statutes, although by way of dicta the court in its concurring opinion appeared to sanction segregation in the public schools.

2. Section 1 of the Fourteenth Amendment to the Federal Constitution reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Fourteenth Amendment to the Constitution of the United States became effective July 21, 1868.

4. *Bertonneau v. Board of Directors of City Schools*, 3 Woods 177 (5th Cir. 1878); *United States v. Buntin*, 10 F. 730 (C.C.S.D. Ohio 1882); *County Court of Union County v. Robinson, Trustee*, 27 Ark. 116 (1871); *Ward v. Flood*, 48 Cal. 36 (1874); *Wysinger v. Crookshank*, 82 Cal. 588, 23 Pac. 54 (1890); in which the court emphasized that although "it is now settled that it is not in violation of the organic law of the state or nation

cisions indicating a contrary viewpoint, although it is significant to note that none of these cases involved statutes directly imposing separate educational facilities for both races.⁵

to require children in whom racial differences exist to attend separate schools, provided the schools are equal in every substantial respect . . . no separation may be had, in the absence of statutory or constitutional authority therefore;" Board of Education of the City of Ottawa, *et al.*, v. Tinnon, 26 Kan. 1 (1881), where it was conceded for the purpose of the case that the legislature has *authority* to confer upon school boards power to establish separate schools for white and colored children, but that the legislature had not exercised any such authority; State *ex rel.* Mitchell v. Grey *et al.*, School Trustees, 93 Ind. 303 (1883); State v. Grubb, 85 Ind. 213 (1882); Cory *et al.* v. Carter, 48 Ind. 327 (1874); Lebew *et al.* v. Brummell, *et al.*, 103 Mo. 546, 15 S.W. 765 (1891); Christman *et al.* v. Mayor, *etc.*, the Town of Brookhaven, 70 Miss. 477, 12 So. 458 (1893); People *ex rel.* Dietz v. Easton, 13 Abb. (N.S.) 159 (N. Y. 1872); People *ex rel.* King v. Gallagher, 11 Abb. N. C. 187, 93 N. Y. 438 (1882); State v. Duffy, 7 Nev. 342 (1872); State of Ohio *ex rel.* Lewis v. Board of Education of Cincinnati, 1 W. L. Bull. 139, 7 Ohio Dec. Reprint 129 (1876); State of Ohio *ex rel.* Garnes v. McCann and others, 21 Ohio St. 198 (1871).

5. Claybrook v. City of Owensboro, 16 Fed. 297 (D.C. Ky. 1883), 23 Fed. 634 (C.C.A. 6th Cir. 1884) (in which it was held that Kentucky statutes directing that school taxes collected from the white people should be used to sustain public schools for white children only and that school taxes collected from the colored citizens should be used to sustain schools for colored children only contravened the equal protection clause of the Fourteenth Amendment on the ground that there was an unequal distribution of the tax levied and collected and a consequent discrimination against the colored respecting school facilities, although the state statutes requiring separate schools for both races were unaffected by the decision); Davenport *et al.* v. Cloverport *et al.*, 72 Fed. 689 (D.C. Ky. 1896); J. C. Pruitt, Eli Pasour and others v. Commissioners of Gaston County, 94 N. C. 709 (1886) (holding that notwithstanding the fact that the statute involved requiring taxes on the property and polls of one color to be applied exclusively to the education of children of that color violated the North Carolina State Constitution, its decision did not extend to state laws providing separate schools for white and colored); Riggsbee v. Town of Durham, 94 N. C. 800 (1886); Chase *et al.* v. Stephenson *et al.*, 71 Ill. 383 (1876) (where, under a statute providing that school directors may adopt and enforce all necessary rules and regulations for the management and government of the schools, the use of a specially built school housing only four colored students was held to be discriminatory, although the question whether discrimination would have existed had there been separate rooms for colored and white and had there been entirely equal facilities for instruction was not raised by the record); People *ex rel.* Longress v. Board of Education, 101 Ill. 308, (1882) (holding that regulations of the board of education requiring colored children to attend a particular school, thus in some instances excluding them from the schools in the district of their residence, directly violated a state statute whereby boards of education were prohibited from excluding *in any manner* any child from public school on account of color); People *ex rel.* Workman v. Board of Education of Detroit, 18 Mich. 400 (1869) (in which the court quite literally interpreted a statute providing that "all residents of any district shall have an equal right to attend any school therein" to mean that colored children should be placed on an equal footing with white children and should be admissible on the same terms to all schools); Kaine *et al.*, School Directors v. Commonwealth *ex rel.* Monoway, 101 Pa. 490 (1882) (holding that under a statute which made it unlawful for any

Since the doctrine of *Plessy v. Ferguson* was enunciated, the constitutionality of segregation *per se* has never been questioned or re-examined by the courts.⁶ The most recent United States Supreme Court decision on the subject⁷ refused to consider the *Plessy* doctrine because of the court's traditional reluctance to extend constitutional interpretations to facts and situations not directly before it.

It is to be considered, therefore, that as the law now stands separate schools may be maintained for white and colored if the educational facilities provided for each are equal or substantially equal, unless such separation is in contravention of specific state law. It is clear, then, that equality of rights does not necessarily imply identity of rights. What constitutes equivalent educational facilities to comply with the "equal but separate" doctrine of the Constitution's equal protection clause is a question subject to numerous ramifications. In practically all cases, although to a much lesser extent in those before 1896, courts have compared the facilities furnished Negro and white public school students in order to determine whether separate but substantially equal educational facilities were actually provided, and thus, in turn, whether the constitutional requirements of the equal protection clause were fulfilled. Recent court decisions have emphasized that

school directors could not deny a colored child admission, solely because school official to make any distinctions whatever on account of race or color, of color, to a school for white children and assign him to a branch of said school in a neighboring building which was utilized only for the instruction of colored students). The latter three cases, in particular, did not hold that racial segregation statutes in the public schools were invalid or unconstitutional inasmuch as racial segregation statutes were not involved; on the contrary the questioned statutes on their face outlawed, in effect, such segregation. Each case raised the question whether certain actions by school authorities violated provisions of antidiscrimination statutes, not whether racial segregation statutes were legal or illegal.

6. The case of Westminster School District of Orange County, *et al. v. Mendez et al.*, 161 F.2d 774 (9th Cir. 1947) is no exception. There the court asserted that the denial to Mexican children of admission into white public schools in the state of California was a violation of a state statute restricting the segregation of Mexican school children. The basic constitutional question of whether segregation in separate but equal schools was violative of the Fourteenth Amendment's equal protection clause was ignored in spite of the fact that in *Mendez et al. v. Westminster School District of Orange County et al.*, 64 F. Supp. 544 (S.D. Cal. 1946), where the case was initially tried, the court stated that "a paramount requisite in the American system of public education is social equality." *But see* the dissenting opinion in *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950).

7. *Sweatt v. Painter et al.*, 70 Sup. Ct. 848 (1950), decided the same day as *McLaurin v. Oklahoma State Regents for Higher Education et al.*, 70 Sup. Ct. 851 (1950).

the constitutional right of the individual student to the privilege of public educational instruction equivalent to that given by the state to another race is a personal and present right.⁸ Most of these same courts have said, however, that equivalence of educational facilities cannot be determined by averaging the respective advantages and disadvantages of the facilities furnished both races.⁹ Such language by the courts can only be taken to imply that the *overall* weighing of the respective educational facilities may not be the controlling factor in an individual student's personal right to an equal education as guaranteed by the Constitution. Thus, in a particular case, the individual may be discriminated against although others of his race are not, because, for example, the latter differ from him in having no desire to take a certain course of instruction offered only to white students.¹⁰

It is manifest that courts must perforce compare the respective educational facilities accorded both races to aid them in resolving the question of whether equal facilities are denied an individual in a particular case. The comparison of educational facilities embraces various and sundry factors which in most instances the courts have failed to label and categorize into well-defined component parts.¹¹ However, these factors will be arbitrarily labeled for convenience. Though they will be singly considered, it does not necessarily follow that the factor under consideration was the dominating influence in the court's decision; on the contrary, almost invariably, more than one of the factors were controlling. The following factors will be considered in

8. *Carter v. School Board of Arlington County et al.*, 182 F.2d 531 (4th Cir. 1950); *Corbin et al. v. County School Board of Pulaski County, Va., et al.*, 177 F.2d 924 (4th Cir. 1949); *Sweatt v. Painter et al.*, 70 Sup. Ct. 848 (1950).

9. *Carter v. School Board of Arlington County et al.*, 182 F.2d 531 (4th Cir. 1950); *Corbin et al. v. County School Board of Pulaski County, Va., et al.*, 177 F.2d 924 (4th Cir. 1949). It is interesting to note, however, that these cases, despite such language, compared the educational facilities.

10. *Pearson et al., Officers and Members of Board of Regents of University of Maryland, Appts. v. Murray*, 169 Md. 478, 182 Atl. 590 (1936).

11. However, *Sweatt v. Painter et al.*, 210 S.W.2d 442 (1948) is illustrative of those few courts which have attempted to break down the various elements into clear-cut categories. The following factors relative to comparison of a white and a Negro law school were discussed in turn by the court; entrance, examination, graduation, similar requirements, faculty, classroom, library, and the physical facilities. See also *Carter v. School Board of Arlington County et al.*, 87 F. Supp. 745 (E.D. Va. 1949); *Carr v. Corning et al.*, 182 F.2d 14 (D.C. Cir. 1950); annotation at 103 A.L.R. 718.

turn: location of school, physical plant, length of school terms, quantity and qualification of faculty members, available courses of study, and "academic vacuum."

I. LOCATION OF SCHOOL

Frequently, the sparsity of colored schools will cause the Negro children in attendance to travel greater distance than children attending white schools. In such cases, the prevailing rule is that equal educational facilities are not provided if the colored pupil must travel an unreasonable or an oppressive distance.¹² The earlier decisions were generally quite conservative in construing what was reasonable or unreasonable, oppressive or unoppressive.¹³ The first case ever to be decided on the question of segregation in the public schools declared that the fact that a colored student was required to travel one-fifth of a mile farther to the separate colored school than she would have had to travel to attend the school for white children was not unreasonable regulation.¹⁴ Neither was it deemed unreasonable for colored children to walk four miles to school, while the farthest some children had to walk to the white schools was two and one-half miles.¹⁵ Some courts have said that though the inequality in distances school children must travel in order to reach school is an inconvenience, it is an inconvenience which necessarily arises from the nature of school systems and hence may not give rise to important objections.¹⁶ In *Dameron v. Bayless*¹⁷ where colored

12. *Roberts v. The City of Boston*, 5 Cush. 198 (Mass. 1849); *United States v. Buntin*, 10 F. 730 (C.C.S.D. Ohio, 1882).

13. *But see*, *People ex rel. Longress v. Board of Education*, 101 Ill. 308 (1882).

14. *Roberts v. The City of Boston*, 5 Cush. 198 (Mass. 1849). Relying heavily on the *Roberts* decision was *Ward v. Flood*, 48 Cal. 36 (1874) in which a Negro student was refused admission to the public school nearest her home solely because of her race.

15. *The State of Ohio ex rel. Hensley Lewis v. The Board of Education of Cincinnati*, 1 W. L. BULL. 139, 7 Ohio Dec. Reprint 129 (1876). See also *State of Ohio, ex rel. William Garnes v. John W. McCann and others*, 21 Ohio St. 198 (1871); *Bertonneau v. Board of Directors of City Schools et al.*, 3 Woods 177 (5th Cir. 1878) where colored children were denied admittance into a public school only three blocks from their home because they were colored; *People ex rel. Dietz against Easton*, 13 Abb. (N.S.) 159 (N. Y. 1872); *Lehew et al. v. Brummel et al.*, 103 Mo. 546, 15 S.W. 765 (1891); *Wright et al. v. Board of Education of City of Topeka et al.*, 284 Pac. 363, 129 Kan. 852 (1930).

16. *Lehew et al. v. Brummel et al.*, 103 Mo. 546, 15 S.W. 765 (1891); *The State of Ohio ex rel. Hensley Lewis v. The Board of Education of Cincinnati*, 1 W. L. Bull. 139, 7 Ohio Dec. Reprint 129 (1876); *People ex rel.*

school children in order to reach their school had to cross four railroad track and go a greater distance to school than white children had to travel to the white school, the court went so far as to hold that:

The matter of nearness or remoteness of schoolhouse to the pupils' residence ordinarily should have no place as a factor in determining the adequacy and sufficiency of school facilities.¹⁸

It is clear, however, that such is not the rule today. It is strikingly apparent that recent cases indicate a more liberal interpretation of what constitutes unreasonableness. What probably would have been considered a reasonable inequality in distance in the earlier cases is now implicitly considered unreasonable and hence discriminatory.¹⁹ Indicative of the modern trend is *Williams v. Board of Education*,²⁰ the court holding that colored school children were denied equal educational facilities when they were excluded from a school close to their homes and compelled to attend a more distant colored school which was located near sixteen railroad tracks over which the colored children had to cross on their daily trek to and from school. Although it is true that in this case the colored children had to cross sixteen railroad tracks whereas in the *Bayless* case they had to cross only four, it is probable that if the *Bayless* case consisted of the *Williams* factual situation, the result in the former case would have remained precisely the same, because of that court's tenuous reasoning that it is difficult for children located in any part of a particular school district to attend school without being subject to the inherent hazards of street car and automobile traffic.

The most recent decision in which the factor of school location

King v. Gallagher, 11 Abb. N. C. 187, 93 N. Y. 438 (1882); Dameron *et al.* v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912).

17. 14 Ariz. 180, 126 Pac. 273 (1912).

18. *Id.* at 183, 126 Pac. 274.

19. The relatively early Illinois case, *People ex rel. Langress v. Board of Education*, 101 Ill. 308 (1882), is no exception since it concerned a statute which invoked an anti-segregation policy in regard to the public schools; see note 5 *supra*. And the recent case of *Carr v. Corning et al.*, 182 F.2d 14 (D.C. Cir. 1950) wherein a vigorous dissenting judge asserted that many colored students had to travel three or four miles to reach the colored high school whereas the high schools for white pupils were within a moderate distance of every student, cannot, strictly speaking, be labeled an exception because the majority holding that equality existed concerned itself *only* with the fact that the claim of unequal facilities rested upon the "assignment of pupils to buildings."

20. 79 Kan. 202, 99 Pac. 216 (1908).

relative to equal educational facilities was discussed²¹ held that unlawful racial discrimination existed in a school district wherein white pupils could attend one of three high schools and colored pupils had to attend the one colored high school, with the consequence that the colored pupils were compelled to leave home earlier in the morning, endure a longer ride on the school buses, and arrive home later than the white pupils, thus forcing the Negro students to forego many healthful activities at school and to spend less time for study, recreation, and play. An earlier New Jersey case ostensibly went further²² when it said that to deny colored children admission to the junior high school nearest their homes because of their race constituted unlawful discrimination; significant was the fact that the junior high school in question was the only school in the entire school system in the city of Trenton where colored children were segregated, notwithstanding the fact that no state statute provided for segregation in public educational institutions. Thus it cannot properly be said that New Jersey holds that it is discriminatory and unconstitutional *per se* for colored students to travel greater distances to school solely on account of their race inasmuch as no statute authorized school segregation.²³ Nevertheless, the case reflects a change in legal attitudes from the earlier cases, but not one as extreme as might appear superficially.

The case of *Pearson v. Murray*²⁴ presented in a different aspect the same problem of school location on the collegiate level instead of the elementary and high school level. Since there was no Negro law school in Maryland, the state provided a limited number of \$200 scholarships to Negroes to defray tuition fees of foreign law schools which would admit colored students. The court stated that the opportunity for attending these other law schools falls short of providing for colored students facilities substantially equal to those furnished whites because of the additional expenses of living away from home, or of commuting to and from home.²⁵

21. *Corbin et al. v. County School Board of Pulaski County, Va., et al.*, 84 F. Supp. 253, 177 F.2d 924 (4th Cir. 1949).

22. *Hedgepath v. Board of Education of City of Trenton*, 131 N.J.L. 153, 35 A.2d 622 (1944).

23. Thus the lack of a school segregation status was the real basis of the decision.

24. 169 Md. 478, 182 Atl. 590 (1936).

25. The same question was probed in *Missouri ex rel. Gaines v. Canada*,

The more modern cases, therefore, have woven a pattern of case law imprinting a definite trend that courts are more difficult to convince that, in any particular factual situation, it is reasonable and nondiscriminatory for a colored student to travel greater distances to attend a colored school when a white school is nearer his residence.²⁶

II. FACTOR OF PHYSICAL PLANT

The factor of comparative physical plants as an element in the courts' determinations whether equal educational facilities exist had never been singled out in a judicial decision until 1883.²⁷ Not even then did the courts often consider this factor in their opinions until quite recently.²⁸ This seems surprising since the physical plant is unmistakably tangible in character. A careful analysis of all the cases on the subject indicates that the courts today are making a thorough and painstaking effort to compare in factual detail the physical plants of colored and white schools to help them resolve the question of whether or not "segregated

Registrar of the University of Missouri, *et al.*, 305 U.S. 337, *rehearing denied*, 305 U.S. 676 (1938), in which the court held that the action of the state of Missouri in furnishing legal education within the state to whites while not furnishing legal education within the state to Negroes was a discrimination repugnant to the Fourteenth Amendment, notwithstanding the fact that the state was to pay tuition charges for outstate legal education of colored students. The court determined that "the basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color." See also *McCready v. Byrd et al.*, 73 A.2d 8 (1950); *Johnson v. Board of Trustees of University of Kentucky et al.*, 83 F. Supp. 707 (E.D. Ky. 1949), asserting that the fact that colored law students at Frankfort, Ky., had to travel to the University of Kentucky at Lexington to use the law school library was a factor in the determination that colored law students were not receiving substantially equal educational advantages as compared to white students.

26. But in State *ex rel. Toliver v. Board of Education of City of St. Louis et al.*, 230 S.W.2d 724 (1950) the fact that Stowe Teachers College for Negroes was located in a Negro community center whereas Harris Teachers College for whites was located in a white residential section was an element tending to prove that equal educational facilities did, in fact, exist.

27. *Claybrook v. City of Owensboro*, 16 F. 297 (D.C. Ky. 1883), 23 F. 634 (C.C.A. 6th Cir. 1884).

28. Only three cases made mention of this factor between 1884 and 1948: *Reynolds v. Board of Education of City of Topeka*, 66 Kan. 672, 72 Pac. 274 (1903); *Lowery v. Board of Graded School Trustees in Town of Kernersville*, 140 N. C. 33, 52 S.E. 267 (1905); *Jones v. Board of Education of City of Muskogee et al.*, 90 Okla. 233, 217 Pac. 400 (1923).

equality" exists in any particular instance.²⁹ Consequently, they are finding much more frequently that unlawful segregation does in fact exist.

While it is true that the comparative education standards of two schools cannot by any means be measured by the cost or value of their respective physical plants alone, where there is a noticeable discrepancy in value and at the same time no indication that the smaller school possesses intangible attributes tending to offset the disparity in value, it is obvious that the two schools are not substantially equal. Thus, where a new and modern elementary school building was being built for white pupils at a cost of \$140,000 and where the colored school was valued at \$6000, although there were almost six times as many white pupils as colored, this disparity in value was a controlling factor in the court's holding that equivalent educational facilities were substantially lacking.³⁰ Again, the fact that the school population of white students was less than twice that of colored while the physical plant for whites possessed a value four times greater than that of the physical plant for colored, was influential in a decision that equal facilities were not furnished colored pupils.³¹ And aiding in the court's determination in *Carter v. School Board*³² that unlawful discrimination existed was the fact that manual training shops and equipment in the white school cost \$131,000, whereas the shop plant for colored pupils, which also housed the home economic department, cost not quite \$40,000; thus, even though there were nine times as many white students as colored students and even though the defendant school board expended only slightly more than three times as much money for the manual training plant for the whites as it did for the colored

29. *Smith et al. v. School Board of King George County, Va., et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Ashley et al. v. School Board of Gloucester County et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Pitts v. Board of Trustees of DeWitt Special School Dist.*, 84 F. Supp. 975 (E.D. Ark. 1949); *Corbin et al. v. County School Board of Pulaski County, Va., et al.*, 84 F. 253 (W.D. Va. 1949), 177 F.2d 924 (4th Cir. 1949); *Butler et al. v. Wileman*, 86 F. Supp. 397 (N.D. Texas 1949); *Sweatt v. Painter et al.*, 210 S.W. 2d 442 (1948). 70 Sup. Ct. 848 (1950); dissent in *Carr v. Corning et al.*, 182 F.2d 14 (D.C. Cir. 1950); *Carter v. School Board of Arlington County et al.*, 182 F.2d (4th Cir. 1950); *State ex rel. Toliver v. Board of Education of City of St. Louis et al.*, 230 S.W.2d 724 (Mo. 1950).

30. *Pitts v. Board of Trustees of DeWitt Special School Dist.*, 84 F. Supp. 975 (E.D. Ark. 1949).

31. *Smith et al. v. School Board of King County, Va., et al.*, 82 F. Supp. 167 (E.D. Va. 1948).

32. 182 F.2d 531 (4th Cir. 1950).

pupils, the differences between the two schools in this respect helped constitute unlawful discrimination against the latter. The mere fact that there are nine times as many white students as colored students does not necessarily mean that unconstitutional discrimination will be found to exist *only* when more than nine times as much money is spent on the physical plants of schools for whites than for colored. This is evident when it is considered, for example, that in the nature of things the cost of constructing a small school building for twenty children will not necessarily be twice that of constructing the same quality school house for ten children. The *Carter* case, accordingly, properly refuses to adhere to a strict mathematical formula which dictates that a proportionate ratio must exist between the number of students of both races on one hand and the cost or value of the physical plants furnished on the other.³³

In considering whether the physical plants of colored and white schools in a given situation are equal, the courts in recent years not only compare in great detail the relative value of the physical plants in monetary terms but also the various physical facilities which constitute the integral parts of the physical plant. That a school for white children had sanitary toilet facilities connected with the city sewers, whereas the colored school was served only by outdoor pit toilets was an element in creating unequal facilities in *Pitts v. Board of Trustees*.³⁴ In *Smith v. School Board*³⁵ inequality of facilities was found from evidence which included: the school for white pupils had running water, modern toilet facilities, a central heating plant, a comparatively modern cafeteria, and a gymnasium, while the school for colored pupils had outside toilets, no central heating plant, no gymnasium, and a greatly inferior cafeteria.³⁶ Music rooms, auditoriums, and school infirmaries were compared in the *Carter* decision and

33. It is obvious that in a situation where colored students outnumber white students and the value of the colored school property is less than the value of the white school property, equal educational opportunities do not exist. *Jones v. Board of Education of City of Muskogee et al.*, 90 Okla. 233, 217 Pac. 400 (1923).

34. 84 F. Supp. 975 (E.D. Ark. 1949).

35. 82 F. Supp. 167 (E.D. Va. 1948).

36 See also *Ashley et al. v. School Board of Gloucester County et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Corbin et al. v. County Schools Board of Pulaski County, Va., et al.*, 84 F. Supp. 253 (W.D. Va. 1949), 177 F.2d 924 (4th Cir. 1949).

found to be unequal.³⁷ Another important physical facility which courts often compare is the school library: in the recent case of *Sweatt v. Painter*³⁸ the United States Supreme Court maintained that the University of Texas Law School Library which contained over 65,000 volumes for the use of 850 students was greatly superior to the newly established Negro law school whose library of 16,500 volumes serviced 23 students, and that such superiority was a factor swaying the court in the direction of holding that equal educational facilities were not furnished Negro law students in Texas.³⁹

It is true that physical facilities alone do not spell greatness in a school system. A school with a relatively poor physical plant may eclipse one with superior physical facilities if the former excels in other factors, such as available curriculum, quantity and quality of faculty, length of school terms, and the location of school. It is just as true that with other factors equivalent, students attending a school with poor physical facilities are not being provided as equal an educational opportunity as those who attend a school with good physical facilities. Thus the factor of physical plant *must* be studied by the courts in determining

37. See also *Carr v. Corning et al.*, 182 F.2d 14 (D.C. Cir. 1950), where in a vigorous dissent to a majority holding that substantially equal educational facilities were provided the dissenting judge claimed, among other things, that inequality was apparent by the fact that the enrollment of colored students in the senior high school exceeded the building capacity by 1,523 whereas the white high school had space for 3,062 more students than were enrolled. See also *Butler et al. v. Wileman*, 86 F. Supp. 397 (N.D. Texas 1949).

38. 70 Sup. Ct. 848 (1950).

39. See *Carter v. School Board of Arlington County et al.*, 182 F.2d 531 (4th Cir. 1950) where the fact that the white library with 8682 books and 90 periodical subscriptions and the colored library, which was not so well adapted for library purposes, with 1,077 books and 21 magazine subscriptions was considered to indicate that unequal educational facilities existed; *Smith et al. v. School Board of King George County, Va., et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Ashley et al. v. School Board of Gloucester County et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Corbin et al. v. County School Board of Pulaski County, Va., et al.*, 84 F. Supp. 253 (W.D. Va. 1949), 177 F.2d 924 (4th Cir. 1949). *But see* the recent Missouri decision in *State ex rel. Toliver v. Board of Education of City of St. Louis et al.*, 230 S.W.2d 724 (Mo. 1950), in which the court asserted that substantially equal privileges with respect to library facilities existed in Harris Teachers College for white students and Stowe Teachers College for colored students even though Harris had 24,000 volumes and Stowe only 14,000 inasmuch as the accreditation agency, the North Central Association of Secondary Schools and Colleges, no longer took the number of volumes into consideration but the kind of books in the library; Stowe library had books on 275 of 752 titles whereas Harris had books on 209 of 752 titles.

whether racial segregation in public educational institutions is unconstitutional in a given case. Although the requirement that substantially equal educational facilities must be accorded Negro pupils does not necessarily imply identical physical plants in regard to school buildings and facilities, there is an undercurrent drifting through the decisions in recent years indicating that there is an inclination to find unconstitutional inequality of educational facilities and opportunities in a particular factual situation where physical plants are not comparable.

III. FACTOR OF LENGTH OF SCHOOL TERMS

Where the length of the school term is shorter in the schools for Negroes than it is for white children, the educational facilities have generally been considered unequal. Such has been the holding of the courts ever since the factor of length of school term was first passed upon in *Claybrook v. Owensboro*.⁴⁰ It was decreed that a certain tax statute⁴¹ infringed upon the Fourteenth Amendment when its consequence was that, among other things, a school session of nine or ten months in each year was provided for approximately eight hundred white pupils and a school session of only about three months was provided for about five hundred colored pupils.

Subsequent cases followed the same line of reasoning. Dicta appeared in *Lowery v. Board of Graded School Trustees*⁴² to the effect that the school term in the schools of both races should be of the same length during the school year. That the white schools had a full nine-month term, while the colored schools had only a seven-month term was a telling factor in the finding in *Jones v. Board of Education*⁴³ that colored schools had been subject to shameful discrimination. In the very recent case of *Pitts v. Board of Trustees*⁴⁴ the fact that white schools had a nine-month term, whereas the colored schools had an eight-month term, was a circumstance leading to the decision that no substantial equality of educational facilities was present.

It is self-evident why courts have not hesitated to pronounce that equivalent educational opportunities are not offered where

40. 16 Fed. 297 (D.C. Ky. 1883).

41. See note 4 *supra*.

42. 140 N.C. 33, 52 S.E. 267 (1905).

43. 90 Okla. 233, 217 Pac. 400 (1923). See note 56 *infra*.

44. 84 F. Supp. 975 (E.D. Ark. 1949).

the length of the school term is not the same. Thus, it is understandable that whenever the school term for colored children is of shorter duration than the school term for white children, there is considerably less likelihood that equal educational facilities will be found to exist.⁴⁵

IV. FACTOR OF QUANTITY AND QUALIFICATION OF FACULTY MEMBERS

Equivalent educational facilities are generally not provided where the qualifications and the proportionate numbers of teachers are not equal in the separate schools established for both races. Obviously the quality of the teachers in any school system mirrors, to a great extent, the quality of that system. In cases where members of the faculty have special training in certain courses and teach only those subjects, the courts which have considered the matter have recognized that such method of departmentalization is, in the higher grades, an advanced and improved method of education superior to the situation which exists where a teacher attempts to teach all or mostly all the courses of instruction. In *Graham v. Board of Education*,⁴⁶ a case in which the petitioner, a colored boy, was promoted from the sixth grade of the colored elementary school and was denied admission into the white junior high school and told to continue in the colored elementary school which included eight grades, the court held that since the white junior high school used the departmental system of education while the colored school which the petitioner was told to attend did not, the petitioner was being illegally deprived of the benefits of an improved method of education. Hence, equal educational facilities were said not to exist, the court stating that "no one instructor can be as proficient in teaching all courses of study as he is in the particular branches in which he has special interest and training."⁴⁷ *Sweatt v.*

45. In *Carr v. Corning et al.*, 182 F.2d 14 (D.C. Cir. 1950), dictum indicates that, even had not the double-shift schedule in the colored junior high school, which allowed an individual student only four and one-half hours of daily work in the school instead of the standard six hour period, been eliminated, the court would hold that there was no discrimination because "so far as the record shows" the same expedients are used when pupils are white as when they are colored. A vehement dissent convincingly discloses, however, that great inequalities between white and colored school existed.

46. 153 Kan. 840, 114 P.2d 313 (1941).

47. *Id.* at 845, 114 P.2d at 317.

*Painter*⁴⁸ implicitly came to the same conclusion. In that case the United States Supreme Court said that in terms of numbers of the faculty the University of Texas Law School for whites was superior to the public-supported law school for Negroes. Such was its determination in spite of the fact that sixteen full-time and three part-time professors taught the 850 students at the white law school while five full-time professors instructed the 23 students at the colored law school. The court apparently felt, though it did not expressly say so, that although there was a proportionally greater number of teachers for the student body of the colored law school than for that of the white school, the fact that the total number of teachers at the white law school was greater indicated that the professors at the latter school had the opportunity to teach their specialties to the better advantage of the white law students.

Generally, the courts have considered that where the number of teachers for white students is proportionally greater than the number of teachers allotted colored students, the consequence is that educational facilities are not equal.⁴⁹ Where eighteen teachers taught eight hundred white children and only three teachers taught five hundred colored children it was held (five years after the adoption of the Fourteenth Admendment) that there was unlawful inequality.⁵⁰ That the average number of students assigned to each teacher or class in the colored schools was more than the average number of pupils assigned to each teacher or class in the white schools was a factor influencing a decision that inequality of educational facilities existed.⁵¹ In the recent Missouri decision of *State ex rel. Toliver v. Board of Education*⁵² holding that Harris Teachers College for whites and Stowe Teachers College for Negroes were substantially equal, the two faculties were considered comparable and equivalent by evidence

48. 70 Sup. Ct. 848 (1950).

49. See the dissenting opinion in *Carr v. Corning et al.*, 182 F.2d 14 (D.C. Cir. 1950).

50. *Claybrook v. City of Owensboro*, 16 Fed. 297 (D.C. Ky. 1883).

51. *Jones v. Board of Education of City of Muskogee et al.*, 90 Okla. 233, 217 Pac. 400 (1923). Another existing factor was that the salaries of the teachers in the white schools were considerably greater than those of the teachers in the colored schools, suggesting that better qualified teachers took the teaching posts at the white schools. For general dicta see *Lowery v. Board of Graded School Trustees in Town of Kernersville*, 140 N.C. 33, 52 S.E. 267 (1905).

52. 230 S.W.2d 724 (Mo. 1950).

which disclosed that there were seventeen pupils for each teacher at Stowe and twenty-two for each teacher at Harris,⁵³ that sixty per cent of the professors at Stowe possessed master degrees while fifty-two per cent of the professors at Harris had master degrees, although only nineteen per cent of the teachers at Stowe had doctorate degrees while thirty per cent of the teachers at Harris had earned their doctorate.⁵⁴

Since the quality of instruction in educational institutions greatly depends upon the quantity and the qualifications of faculty members and since, in turn, the quality of instruction greatly determines the quality of the schools, it is apparent that this factor is a highly important one for the courts to consider in resolving the problem of whether equal educational facilities have been denied in a given case. It must be recognized that to determine the quality of educational instruction is a perplexing problem because of the difficulty of applying any well-defined standard to measure the intangibles of teaching. For that reason courts have heavily relied upon the factors of the quantity and qualifications of faculty members when making their determinations concerning the quality of educational instruction.

V. FACTOR OF AVAILABLE COURSES OF STUDY

Where separate schools for Negroes fail to furnish the same or similar courses of study as do the schools for whites, it generally has been held that equal educational facilities have not been provided both races. Illustrative of this principle is *Carter v. School Board*⁵⁵ holding that unlawful discrimination against high school pupils of the colored race existed at least partly for the reason that courses available to white students but not to colored students were: speech, journalism, solid geometry, commercial arithmetic, bookkeeping, auto mechanics, woodworking,

53. There was a total of sixty-three teachers at Harris and forty-one at Stowe.

54. Where for the reason, among others, that colored students would be subject to the disadvantage of being taught by a migratory faculty whose duties and responsibilities in respect to the proposed graduate school for colored would necessarily be secondary and subordinate to their duties and responsibilities at the white university, it was held that colored students were not accorded educational advantages substantially equal to those available to white students. *Johnson v. Board of Trustees of University of Kentucky et al.*, 83 F. Supp. 707 (E.D. Ky. 1949).

55. 182 F.2d 531 (4th Cir. 1950).

and printing.⁵⁶ Influencing the decision in *Corbin v. County School Board*⁵⁷ that there were glaring inequalities between the public high schools for colored and white students was the fact that in breadth of curriculum there were more than ten courses open to white high school students and denied to Negroes, whereas the only courses available to Negroes and not given to whites were beauty culture and barbering. Although the first decision to discuss the factor of available courses of study was rendered as late as 1923,⁵⁸ other cases enunciating the prevailing rule are relatively numerous.⁵⁹

A slightly varying aspect of the same question concerns itself with the situation which occurs when courses are available each year to every eligible white pupil without demand or request but which becomes available to colored pupils only upon reasonable advance notice to the proper school authorities that they are desired.⁶⁰ The problem was decisively settled in *Sipuel v. Board*

56. Also, none of the following extra-curricular activities or awards were available to colored students though they were available to white students: glee clubs, choruses, cadet corps, publication staffs, Hi-Y organization, debating club, athletic teams, or nominations to the National Honorary Scholastic Society and for the honorary science award. In addition, although white students were provided courses in vocational training, colored students were not afforded an equal advantage by school authorities' sending Negro vocational pupils to a regional school twenty-five miles distant in another county.

57. 177 F.2d 924 (4th Cir. 1949).

58. *Jones v. Board of Education of City of Muskogee et al.*, 90 Okla. 233, 217 Pac. 400 (1923), wherein the fact that the curricula of the white schools, among other things, consisted of courses in blacksmithing, auto repairing, printing, electrical wiring, architectural and mechanical drawing, banking and commercial courses, kindergartens, handicrafts, cartooning, lettering, commercial art, and band, none of which were included in the curricula of the colored schools, considerably influenced the decision that colored schools were discriminated against in violation of the state constitutional provisions for "like accommodations" in the separate schools for each race.

59. *Sweatt v. Painter et al.*, 70 Sup. Ct. 848 (1950); *Smith et al. v. School Board of King George County, Va., et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Ashley et al. v. School Board of Gloucester County et al.*, 82 F. Supp. 167 (E.D. Va. 1948); *Corbin et al. v. County School Board of Pulaski County, Va., et al.*, 177 F.2d 924 (4th Cir. 1949); *Butler et al. v. Wileman*, 86 F. Supp. 397 (N. D. Texas 1949); *Graham v. Board of Education of City of Topeka et al.*, 153 Kan. 840, 114 P.2d 313 (1941). *But see State ex rel. Toliver v. Board of Education of City of St. Louis et al.*, 230 S.W.2d. 724 (Mo. 1950), where substantially equal privileges were held to exist but not in respect to the available courses of study because the white teachers college offered eighteen more courses than the colored.

60. The question was raised in *Missouri ex rel. Gaines v. Canada*, Registrar of the University of Missouri, *et al.*, 305 U.S. 337 (1938); *Bluford v. Canada*, 32 F. Supp. 707 (W.D. Mo. 1940), *appeal dismissed* 119 F.2d 779 (8th Cir 1941); *State ex rel Michael et al. v. Witham et al.*, 179 Tenn.

of *Regents*.⁶¹ A colored girl, qualified in all other respects, was denied admission into the white law school of the University of Oklahoma solely on the ground of color. Langston University, the state university for colored students, had no law school. The state court denied the petitioner her request for mandamus because she failed to give the proper school authorities reasonable advance notice of her intention to enter a publicly supported law school within the state.⁶² The Supreme court reversed and remanded the judgment of the state, saying:

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the state. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as it does for applicants of any other group.⁶³

Therefore, where colored students were required, although white students were not, to request courses in the spring to ascertain what subjects they desired for the next session, *Carter v. School Board of Arlington County*,⁶⁴ relying heavily upon the *Sipuel* decision, held that this difference in procedure could not be sustained since it placed an unequal burden upon Negro students and deprived them of the opportunity of taking a course of instruction unless they had determined to take it months ahead of time.

250, 165 S.W.2d 378 (1942). In a suit filed by the Board of Curators of the University of Missouri for a declaratory judgment determining Negro rights in Missouri and the duties of state educational institutions in this regard, Circuit Judge Sam C. Blair in an oral ruling of June 27, 1950, held that the refusal of the curators of the University of Missouri to permit three Negroes to enroll in divisions of the University for studies not available at Lincoln University for colored violated the equal protection clause of the Fourteenth Amendment of the federal constitution and the guarantee of equal rights and opportunities under the state constitution. St. Louis Post-Dispatch, June 28, 1950, p. 1, col. 1.

61. 332 U.S. 631 (1948).

62. *Sipuel v. Board of Regents of University of Oklahoma et al.*, 199 Okla. 36, 180 P.2d 135 (1947).

63. 332 U.S. 631, 632 (1948). For the subsequent holding in reference to this opinion see *Fisher v. Hrust*, 333 U.S. 147 (1948), where it was held that the Oklahoma district court did not depart from the Supreme Court's mandate by entering an order directing the Oklahoma State Regents for Higher Education either to enroll the plaintiff in the first year class at the School of Law at the University of Oklahoma or to admit no students to that first year class until a separate and substantially equal school of law should be established, but if such separate school should be established then not to enroll the plaintiff in the University of Oklahoma.

64. 182 F.2d 531 (4th Cir. 1950).

No one will deny the fact that a school which offers a greater variety of courses than another school is, in that respect at least, a superior educational institution. Nor do the courts fail to recognize this salient point. In ascertaining, therefore, whether a colored student has been denied equal educational facilities the courts will invariably consider the factor of courses of study available in the respective colored and white schools.⁶⁵

VI. THE "ACADEMIC VACUUM" FACTOR

Though the cases dealing with segregation in public educational institutions are legion, not one decision declaring that there were unequal educational facilities based its decision, either in full or in part, upon the intangible factor of what may be termed the "academic vacuum" until June, 1950, and the decision in *Sweatt v. Painter*.⁶⁶ The Court ordered the Negro Sweatt admitted to the all-white University of Texas Law School instead of the newly created colored school. After finding the University of Texas Law School superior upon a comparison of the physical plants, faculty, and curriculum the court said, speaking through Chief Justice Vinson:

What is more important, the University of Texas Law School possesses to a far greater extent those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of faculty, experience of administration, position and influence of alumni, standing in community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question closed.⁶⁷

This approach to the problem was never previously expressed by the courts. Much more significant was what the court went on to say:

Moreover, a few students and no one who has practiced law would choose to study in an academic vacuum, removed from

65. For cases where there were no separate schools for each race but where provisions for similar courses did not permit the courses to be followed under circumstances of equal advantage see *State ex rel. Cheeks v. Wirt*, 203 Ind. 121, 177 N.E. 441 (1931); *State ex rel. Weaver v. Board of Trustees of Ohio State University et al.*, 126 Ohio St. 290, 185 N.E. 196 (1933); *Patterson v. Board of Education of City of Trenton*, 11 N.J. Misc. R. 179, 164 Atl. 892 (1933), *aff'd* 112 N. J. L. 99, 169 Atl. 690 (1934); *Jones v. Newlon et al.*, 81 Colo. 25, 253 Pac. 386 (1927).

66. 70 Sup. Ct. 848 (1950).

67. *Id.* at 850.

the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body 85 per cent of the population of the state and . . . most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.⁶⁸

This language of the court, revealing a novel avenue of thought never before considered by the courts in school segregation cases, clearly implies that no matter how good the physical plant, faculty, curriculum, and other factors heretofore discussed may be in a particular colored law school, a Negro can not obtain an equal legal education in a segregated law school because he must, by the very nature of segregation, study in what Chief Justice Vinson has called an "academic vacuum." This view is both sound and realistic and unmistakably applies to segregation in state law schools.⁶⁹ The *Sweatt* case raises the quere whether the application of the "academic vacuum" factor extends to public educational institutions generally and whether the Court, al-

68. *Ibid.*

69. However, in *Epps v. Carmichael*, U.S.D.C., M.N.C., October 9, 1950, the opposite conclusion was reached. In refusing to admit qualified Negro applicants to the North Carolina law school for whites, the court overruled the contenton of the plaintiffs that there can be no equality of opportunity if segregation exists. It stated that courts throughout the country have very generally held to the contrary, and that, furthermore, the plaintiffs' contention was satisfactorily contradicted by the testimony of the witnesses for the defendant that the advantages which the plaintiffs would derive from attending the law school for Negroes, as a result of their contacts and acquaintances with members of their race attending the colored law school from all parts of the state, would greatly exceed the disadvantages which might occur to them if they attended the white law school. The court's reasoning was apparently based, in part, upon the evidence that Negro lawyers in North Carolina derived their practice from members of their race and upon the fact that there was no evidence showing that any Negro ever represented a white client in the state.

It is manifest that this court ignored the essence of the "academic vacuum" factor as it applies to law school education. The fact that Negro lawyers do not represent white clients is wholly immaterial inasmuch as a Negro lawyer must, of necessity, deal in his practice with other lawyers, witnesses, judges, jurors, and other officials, the great majority of whom are members of the white race. If this federal district court decision were appealed, there is reasonable certainty that it would be overruled by the Supreme Court on the basis of the "academic vacuum" doctrine enunciated in the *Sweatt* case.

though expressly refusing to re-examine the doctrine of *Plessy v. Ferguson*,⁷⁰ did in effect overrule that doctrine.

The quære was ostensibly answered in the negative eight days after the *Sweatt* decision by the Missouri case of *State ex. rel. Toliver v. Board of Education*.⁷¹ After comparing the respective facilities of Harris Teachers College for whites and Stowe Teachers College for colored, the Missouri Supreme Court held that the petitioner, a colored student, did not stand deprived of any individual constitutional right inasmuch as substantially equal educational facilities existed. The court in denying a rehearing made no mention whatsoever of the *Sweatt* case and of its consideration of the "academic vacuum." Since the *Sweatt* case refused to re-examine the "separate but equal" doctrine of the *Plessy* case because the facts of the case were not broad enough, it narrowed the general issue to be decided to the question of the extent to which the power of a state to practice segregation in professional and graduate educational schools⁷² in a state university is limited by the equal protection clause of the Fourteenth Amendment. That the *Toliver* case did not consider the *Sweatt* case binding by reason of the fact that the former was concerned with undergraduate schools and not professional or graduate schools is a distinct possibility. Nevertheless since the *Sweatt* case was probably overlooked⁷³ by the Supreme Court of Missouri in

70. 163 U.S. 537 (1896).

71. 230 S.W.2d 724 (Mo. 1950).

72. The issue also extended to graduate educational schools because of the case of *McLaurin v. Oklahoma State Regents for Higher Education et al.*, 70 Sup. Ct. 851 (1950), decided by Chief Justice Vinson the same day as the *Sweatt* case. The broad issues of both cases were consolidated. The *McLaurin* case held that where colored and white graduate students were allowed in the same school, a colored student who was assigned a seat in the classroom in a row specified for colored students, was assigned a special table in the library, and was assigned a special table in the cafeteria was deprived of equal educational opportunities. Since the Court stated that the state restrictions impaired and inhibited McLaurin's ability to study for his doctorate in education, the education of the students he teaches "will necessarily suffer to the extent that his training is unequal to that of his classmates." The court appears to be suggesting, therefore, that segregation within a "mixed" school was a denial of equal educational facilities.

73. It is quite likely that the *Sweatt* case and the *McLaurin* case were overlooked by the Supreme Court of Missouri in the *Toliver* decision since the original holding in the *Toliver* case was made on May 8, 1950, and the merits of whether a rehearing should be granted were apparently discussed and the opinion denying a rehearing was apparently written before the *Sweatt* and *McLaurin* cases were decided, although the *Toliver* opinion was

the *Toliver* decision, the question whether the doctrine of the *Sweatt* case extends to public school segregation generally is presumed not to be answered by the *Toliver* decision.

It would appear that a consideration of the controlling factor of "academic vacuum" in resolving the problem of whether equivalent educational facilities exist would be limited to a determination of the question only in respect to law schools. As the *Sweatt* decision realistically points out, lawyers must, because of the very nature of their profession, come into contact with judges, jurors, witnesses, and other lawyers and officials, the vast majority of whom are of the white race. It is essential, therefore, for a successful attorney to understand the points of view and ideas of those people with whom he deals in his practice of the law. To prevent a colored law student from studying with white students in an atmosphere where the interplay of ideas and exchange of views with fellow white students are absent amounts to a denial of equal educational facilities. But would such necessarily be the case in respect to other types of education? Could not a colored student studying engineering, for example, obtain a complete engineering education while studying in an "academic vacuum" since he will probably not have to deal with white people in any professional capacity? Similarly, a colored student studying to become a school teacher would most likely teach colored children in colored schools after obtaining his degree so that studying in an "academic vacuum" would not amount to substantial inequality. Thus, it could be argued that this new factor is limited in its application.

It is true that the "academic vacuum" referred to in the *Sweatt* case is described in terms of a law school education inasmuch as the court stated:

. . . few students and no one who has practiced law would choose to study in an academic vacuum removed from the interplay of ideas and the exchange of views with which the law is concerned.⁷⁴

Certainly, however, it cannot truthfully be said that law is the *only* field of education with which the interplay of ideas and the exchange of views is concerned. On the contrary, the study of all the professions is concerned with the interplay of ideas and

technically handed down eight days after the decisions in the *Sweatt* and *McLaurin* cases.

⁷⁴ 70 Sup. Ct. 850 (1950).

the exchange of views. Indeed, the pursuit of all knowledge is concerned with them. Although this is obviously true of education on the collegiate level, high school and elementary education is nonetheless concerned, though to a lesser degree. If, then, this view is accepted, it logically follows that the controlling factor of the "academic vacuum" applies, not to segregated state law schools alone, but to segregation in public educational institutions generally and that, consequently, the *Sweatt* case, although expressly refusing to re-examine the doctrine of the *Plessy* case, did in effect overrule that doctrine by implying that no constitutional equality can exist where one is compelled by state law to study in an "academic vacuum."⁷⁵

CONCLUSION

The problem of what constitutes equal educational facilities under the equal protection clause of the Fourteenth Amendment remains. The general doctrine that pursuant to state law, segregated schools may be maintained for Negro and white pupils if equal educational facilities are furnished has yet to be expressly overruled. Silhouetting the whole problem are four broad propositions: first, that in determining whether an individual's present and personal right to receive equal educational facilities has been denied, the courts will compare the respective educational facilities provided both races; second, that in making such a determination the courts have, as the years passed, compared the various characteristic factors of educational facilities in ever-increasing detail; third, that in reaching their decisions, courts, particularly in recent years, have almost invariably been influenced by more than one of these factors; and fourth, that, in the course of time, a general trend has clearly emerged indicating that the courts construe more strictly the question of what constitutes equal facilities.

In more specific terms it may be concluded that the tendency of the modern courts, when considering the two factors of the location of the respective schools and their respective physical plants, is to reach the finding that unequal educational facilities

75. See the views expressed in the dissenting opinion of Carr v. Corning *et al.*, 182 F.2d 14 (D.C. Cir. 1950). See also 49 COL. L. REV. 629 (1949); T. I. Emerson, J. P. Frank, A. H. Frey, E. N. Griswold, R. Hale, H. Havigurst, and E. Levi, *Brief for Committee of Law Teachers Against Segregation in Legal Education*, 34 MINN. L. REV. 289 (1950).

exist where under exactly the same factual circumstances, the same courts in an earlier period would have most likely reached an opposite result, or even might not have considered the factor of respective school facilities at all. The courts maintain with consistent emphasis that where the length of school terms and the qualifications and proportionate number of faculty members are not the same, there are unequal educational facilities. Where the available courses of study are not the same, equal facilities do not exist; particularly is this true under recent decisions where Negroes were required to request in advance the taking of certain courses, which, however, were available to whites without request. Finally, it may be concluded that with respect to racial segregation in legal education, the new factor of the "academic vacuum" interdicts such segregation, regardless of how good the other factors may be relative to a particular Negro law school. Thus, by virtue of the *Sweatt* decision, segregation *per se* in state *law* schools, at least, is impliedly unconstitutional.

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