seems to prevail.[28] The result of the land cases is more doubtful;[29] but it is believed that even in this situation the same doctrines will be ultimately applied, since the defendant may always question the jurisdiction of the original court by appeal to the Supreme Court if necessary.

The court also leaves undecided the question of whether the doctrine of *res judicata* will be applied where the jurisdictional question was not actually contested. The decided cases present a maze of conflicting holdings. Some invoke the classical approach,[30] while others reach opposite results by the use of special grounds of estoppel of record,[31] and presumptions of conclusiveness of judgments by courts of general jurisdiction.[32] If the jurisdiction is not contested, additional theoretical difficulties are encountered, for a recognition of the original decree as valid would allow the parties to determine the jurisdiction of the court by their collusive conduct, contrary to statutory and constitutional enactments;[33] where contested, there is, in addition, a judicial determination of the jurisdictional question. Dean Gavit presents an ingenious solution by treating a judgment outside the jurisdiction of the court as a binding arbitration, thus leaving undisturbed the jurisdictional concept of a void judicial judgment.[34] In view of the trend toward simplified procedure[35] and a wider application of the doctrine that all available defenses must be presented at the first opportunity,[36] it would not be surprising to find the Supreme Court applying the doctrine of *res judicata* to all questions which might have been raised in the original action, including jurisdictional objections. Of course, in case of default any attempt to prevent collateral attack would violate the due process clause.[37]

Constitutional Law—Elections—Registration Statutes—Negro Suffrage—[Federal].—The plaintiff, a Negro, sued to recover damages from the defendants, election officials and county judge, for having, because of his race and color, prevented his

[28] Davis v. Davis, 59 S. Ct. 3 (1938); noted in 6 Univ. Chi. L. Rev. 290 (1939); Chamblin v. Chamblin, 362 Ill. 588, 1 N.E. (2d) 73 (1936). *Cf.* Andrews v. Andrews, 188 U.S. 14 (1902). See also Harper, The Validity of Void Divorces, 79 U. of Pa. L. Rev. 158 (1930).

[29] Forsyth v. Hammond, 166 U.S. 506 (1896); Carpenter v. Strange, 141 U.S. 87 (1891); Dowell v. Applegate, 152 U.S. 327 (1894); Fall v. Eastin, 215 U.S. 1 (1909); Norris v. Loyd, 183 Iowa 1056, 168 N.W. 557 (1918); Farmers Nat'l Bank v. Daggett, 2 S.W. (2d) 834 (Comm'n of App. Tex. 1928).

[30] Thompson v. Whitman, 18 Wall. (U.S.) 457 (1873). See note 20 *supra.*

[31] Smolinsky v. Federal Reserve Life Ins. Co., 126 Kan. 506, 268 Pac. 830 (1928); Rice v. Metropolitan Life Ins. Co., 152 Ark. 498, 238 S.W. 772 (1922). *Cf.* Thompson v. Whitman, 18 Wall. (U.S.) 457 (1873). See also Farrier, *op. cit. supra* note 9, at 556.

[32] See note 13 *supra.*

[33] Gavit, *op. cit. supra* note 6, at 389.

[34] *Id.*, at 390.

[35] See note 12 *supra.*

[36] *Res judicata* has been extended to bar a subsequent action in a separate cause of action which "might have been adjudicated" under the procedural provisions for the joinder of actions, the "fusion" of the action and the assertion of a cross-claim. See Gavit, The Code Cause of Action, Joinder and Counter-Claims, 30 Col. L. Rev. 802 (1930).

[37] Pennoyer v. Neff, 95 U.S. 714 (1877); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907).

registration and thereby his voting at the general election[1] of November, 1934. The plaintiff alleged that the defendants were acting pursuant to a conspiracy and under color of the Oklahoma registration statute,[2] which, he contends, violates the Fourteenth and Fifteenth Amendments, and the laws enacted pursuant thereto,[3] and the Constitution of Oklahoma, by reason of its attempt to resuscitate the unconstitutional Oklahoma "grandfather clause."[4] This registration law, enacted in 1916 after the "grandfather clause" was declared unconstitutional, provides for automatic registration without application of all who voted in the general election of November, 1914,[5] when the "grandfather clause" was still determinative of the right to vote. All other electors, qualified before May, 1916, must make personal application during a single ten-day period in 1916 or be forever disfranchised. The plaintiff, qualified in 1910, did not vote in November, 1914, nor register in 1916. Therefore, on later application in 1934, the defendant-registrar refused to register the plaintiff. On appeal from a judgment on a directed verdict for the defendants, *held*, affirmed. There is nothing on the face of the statute, the court said, to indicate discrimination. Further, the plaintiff's failure to pursue his statutory remedy in the state courts precludes relief in the federal courts.[6] *Lane v. Wilson et al.*[7]

Neither the Constitution nor the Amendments confer the right to vote, even at federal elections, on a citizen of the United States.[8] But the Fifteenth Amendment does confer a right on all citizens to be free from discrimination "on account of race, color, etc."[9] and as to federal elections, the right to vote, though determined by state law, is derived from the Constitution and laws of the United States.[10] Although the Fifteenth Amendment gives Congress power to enforce its provisions by appropriate legislation, the Supreme Court has restricted this power according to the principles established under the Fourteenth Amendment. Thus, Congress may not legislate against action by private individuals, but only against state action.[11] Hence, under federal statutes,[12] state election officials who, conforming to a state statute violative

[1] Since Representatives to Congress were to be elected the election becomes to that extent a federal election.

[2] Okla. Stat. 1931, § 5651 *et seq.*

[3] Rev. Stat. 1878, § 1979, 8 U.S.C.A. § 43 (1927); Rev. Stat. 1878, § 2004, 8 U.S.C.A. § 31 (1927).

[4] Okla. Const. art. 3, § 4a, declared unconstitutional in Guinn v. United States, 238 U.S. 347 (1915), overruling Atwater v. Hassett *et al.*, 27 Okla. 292, 111 Pac. 802 (1910).

[5] Okla. L. 1916, c. 24, § 4; Okla. Stat. 1931, § 5654.

[6] Citing Trudeau v. Barnes, 65 F. (2d) 563 (C.C.A. 5th 1933), *cert. denied* 290 U.S. 659 (1933).

[7] 98 F. (2d) 980 (C.C.A. 10th 1938), *cert. granted* 59 S. Ct. 249 (1938).

[8] Minor v. Happersett, 21 Wall. (U.S.) 162, 171 (1874); Pope v. Williams, 193 U.S. 621, 632 (1904).

[9] United States v. Reese, 92 U.S. 214, 218 (1875); United States v. Cruikshank *et al.*, 92 U.S. 542, 555 (1875). *Cf.* Neal v. Delaware, 103 U.S. 370, 389 (1880); *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884). See also Matthews, Legislative and Judicial History of the Fifteenth Amendment 97–107 (1909).

[10] *Ex parte* Yarbrough, 110 U.S. 651, 663 (1884); Wiley v. Sinkler, 197 U.S. 58, 63 (1900).

[11] James v. Bowman, 190 U.S. 127 (1903).

[12] See statutes cited note 3 *supra.*

of the Fifteenth Amendment, deprive a qualified Negro of the right to vote, are liable to such citizen for the resulting damages.[13] The officer is still considered to be acting for the state though the supposed authorization for his conduct prove unconstitutional.[14] Unless this were done, the Fifteenth Amendment would be reduced to empty words.

Another serious restriction on the Fifteenth Amendment and the laws pursuant thereto is the court-imposed requirement that the discrimination complained of be *solely* on account of race, color, etc.[15] As a result only the more direct attempts at race discrimination can be successfully challenged as violating the Fifteenth Amendment.[16] Such disfranchising devices as the poll tax, literacy and understanding tests,[17] residence and property requirements, complicated registration procedure, required presentation of registration certificates or tax receipts,[18] and disqualification for petty larceny, wife-beating, etc.—all consciously directed at the Negro's illiteracy, frequent migrations, carelessness, and low economic and social status—have not been stricken down under the Fifteenth Amendment due to their apparent application to some poor and illiterate whites as well.[19] A specific example of this is the instant case. The Oklahoma registration statute, the court held, did not violate the Fifteenth Amendment because on its face it did not discriminate solely between white and Negro voters. "There were probably also some whites who were qualified to vote at the 1914 election who did not vote. They were on the same footing as to registration as were the qualified Negroes."[20] But lack of discrimination on the face of the statute is nŏt sufficient to sustain it. In the "grandfather clause" cases the court laid down the rule that the Amendment has been violated even when the racial discrimination only

[13] Wiley v. Sinkler, 179 U.S. 58 (1900); Myers v. Anderson, 238 U.S. 368 (1915); Nixon v. Herndon, 273 U.S. 536 (1927). Note that the doctrine of Hans v. Louisiana, 134 U.S. 1 (1890), is avoided because suit is against the officer individually.

[14] *Ex parte* Virginia, 100 U.S. 339, 346 (1879); C.B. and Q. R.R. Co. v. Chicago, 166 U.S. 226, 234 (1897). *Cf.* Virginia v. Rives, 100 U.S. 313 ,321, 334 (1879); Poindexter v. Greenhow, 114 U.S. 270, 285 (1884).

[15] United States v. Reese *et al.*, 92 U.S. 214 (1875); United States v. Cruikshank *et al.*, 92 U.S. 542, 556 (1875); Williams v. Mississippi, 170 U.S. 213 (1898); James v. Bowman, 190 U.S. 127, 139 (1903).

[16] Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915).

[17] Note Okla. Stat. 1931, § 5657. "Each qualified elector in this State may be required to make oath that he is a qualified elector in such precinct, and shall answer *under oath any questions touching his qualifications as an elector* and give under oath the information required to be contained in a registration certificate. . . . "

[18] Note Okla. Stat. 1931, § 5662. "The precinct election board when any elector shall offer to vote may demand his registration certificate. . . . ." In addition this section gives the election officials power to refuse a vote if the registration certificate and the register do not correspond, or if the one seeking to vote cannot satisfy the board that he is the person described in the certificate.

[19] Williams v. Mississippi, 170 U.S. 213, 222 (1898). For an excellent treatment of this problem see Lewinson, Race, Class, and Party 63–68, 79–97, 101–124 (1932) (Appendix III contains a comprehensive collection of the election laws of twelve Southern States); also Sait, American Parties and Elections c. II, esp. 36–53 (1927); Harris, Registration of Voters in the United States 157, 203, 312 (1929).

[20] Lane v. Wilson, 98 F. (2d) 980, 984 (C.C.A. 10th 1938).

becomes apparent after reading the words in the light of actual facts.[21] Since the Oklahoma statute discriminates between those who voted at the 1914 election and those who did not vote in 1914, when the unconstitutional "grandfather clause" was still in force against the Negroes, it is within the rule, unless the fact that a few whites were also affected is strong enough to bring the act within the classification of "legal" disfranchising devices. By considering the effect of the statute in actual operation its complete discrimination against the Negro and lack of discrimination against whites would have been obvious.[22] Resort to actual administration in preference to speculation as to probable effect is expressly sanctioned in the leading case of *Yick Wo v. Hopkins*.[23]

An equally strong objection to this registration statute can be made under the Fourteenth Amendment. It may be argued that the classification is very unequal. All who voted in the 1914 election are automatically registered while those qualified in 1914, but not voting, are given a *single* ten day period in which to register.[24] While reasonable classification is permissible, arbitrary distinctions without some substantial basis or reason of public policy cannot be imposed, as they deny equal protection.[25] Further, since the right to vote has been held to be of substantive value, for the illegal denial of which damages may be awarded, it may be considered a property right. Thus, a deprivation of this right by arbitrary classification might also be taking property without due process of law.[26]

Unreasonable regulations of the elective franchise are also objectionable on state constitutional grounds, since they deny or abridge the right to vote given by the constitution.[27] The Oklahoma constitution confers the right to vote on citizens having specified qualifications.[28] Even though permission to enact a registration law is granted by the constitution, as in Oklahoma,[29] still that law must be reasonable, uniform, and impartial, and not directly or indirectly intended to abridge the right to vote.[30] A Michigan statute providing only five days to register each year was held

[21] See cases cited in note 16 *supra*.

[22] See 15th Census of United States, v. 3, pt. 2, 603, where table 21 shows the Negro population of the county of the plaintiff's residence to be 6,753. The registration records of Wagoner County, Oklahoma, v. 1 and 2, show two Negroes registered during the period 1916–36 (as cited in Transcript of Record of instant case).

[23] 118 U.S. 356, 373 (1886); also see Mills v. Green, 67 Fed. 818, 830 (C.C. S.C. 1895), reversed on other grounds in 69 Fed. 852 (C.C.A. 4th 1895), and appeal dismissed in 159 U.S. 651 (1895). *Cf*. Williams v. Mississippi, 170 U.S. 213 (1898), distinguished by Matthews, *op. cit. supra* note 9, at 122.

[24] Except for those who can show absence, illness, or unavoidable misfortune, who may register "at any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916. . . ." Okla. Stat. 1931, § 5654.

[25] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Southern Ry. Co. v. Greene, 216 U.S. 400, 417 (1910); Truax v. Corrigan, 257 U.S. 312, 337 (1921).

[26] 2 Willoughby, Constitutional Law 638 (2d ed. 1929).

[27] Capen v. Foster, 12 Pick. (Mass.) 485, 489 (1832); also 2 Cooley, Constitutional Limitations 1370 (8th ed. 1927) cases cited note 2.

[28] Okla. Const. art. 3, § 1 and art. 1, § 6.

[29] Okla. Const. art. 3, § 6.

[30] Morris *et al.* v. Powell, 125 Ind. 281, 290, 25 N.E. 221, 223 (1890); Pope v. Williams, 98 Md. 59, 66, 56 Atl. 543, 545 (1903), aff'd 193 U.S. 621 (1904).

unconstitutional.[31] The Oklahoma act gives but ten days during the voter's life. This state question was properly before the court in the instant case since the constitutionality of this particular statute has never been passed on by the supreme court of Oklahoma.[32]

If the United States Supreme Court should hold the instant act unconstitutional on any of the aforementioned grounds, the question of separability arises. The objectionable sections appear to be so integral a part of the entire registration scheme that it must stand or fall as a unit. Striking out both the sections objected to by the plaintiff[33] would not rectify the statute. Registration of a voter such as Lane still could not be accepted under the only other appropriate section, since that section is limited to "any person who may become qualified . . . after . . . May, 1916."[34] Lane was qualified in 1910. To remove all objection would entail a more extensive revision than the Court customarily attempts. Striking down the entire act leaves only the constitutional provisions[35] as determinative of the right to vote. This raises a neat jurisdictional problem. If there was no registration requirement, was any damage suffered for the refusal to register? Or must the plaintiff show a denial of the right to vote before obtaining damages? In a like situation where the plaintiff asked an injunction to compel his registration the Supreme Court refused to take jurisdiction on the ground that to grant the injunction would make the court a party to an unlawful scheme.[36] These objections should not apply against an action at law, but a court seeking to avoid the delicate Negro question might employ them.[37] Such a decision would be directly in the teeth of the ruling that a plaintiff may not challenge the constitutionality of a registration statute without having sought to register.[38] In analogous situations it has been held that the law will not require a citizen to undergo risk of criminal prosecution[39] to test the constitutionality of a statute.[40]

The circuit court suggested another jurisdictional ground for dismissing the case—the plaintiff's failure to use the statutory remedy of appeal to the state courts. The only support for this view is a recent fifth circuit decision[41] whereas there is strong au-

[31] Att'y General v. Detroit, 78 Mich. 545, 44 N.W. 388 (1889). *Accord*: Monroe v. Collins, 17 Ohio St. 666 (1867); Daggett v. Hudson, 43 Ohio St. 548, 3 N.E. 538 (1885); State v. Corner, 22 Neb. 265, 34 N.W. 499 (1887).

[32] Davis v. Wallace, 257 U.S. 478, 482 (1922).

[33] Okla. Stat. 1931, §§ 5654, 5657.

[34] Okla. Stat. 1931, § 5659.

[35] Okla. Const. art. 3, § 1.

[36] Giles v. Harris, 189 U.S. 475, 487 (1903) (note that Holmes, J., reserves judgment as to the applicability of these objections to an action at law). Also see Matthews *op. cit. supra* note 9, at 125.

[37] Mills v. Green, 69 Fed. 852 (C.C.A. 4th 1895) on appeal 159 U.S. 651 (1895); Jones v. Montague, 194 U.S. 147 (1904). Also note how the Supreme Court evaded race questions under the Fourteenth Amendment. Collins, Fourteenth Amendment and the Negro Race Question, 45 Am. Law. Rev. 830 (1911).

[38] Wiley v. Sinkler, 179 U.S. 58, 66 (1900).

[39] In Oklahoma illegal voting is a felony. Okla. Stat. 1931, § 5842. Also the Const. art. 3, § 6 prohibits voting by one not registered. See Munger *et al.* v. Town of Watonga, 106 Okla. 78, 233 Pac. 211 (1925) (vote of an unregistered voter is void).

[40] *Ex parte* Young 209 U.S. 123, 146–148 (1908).

[41] Trudeau v. Barnes, 65 F. (2d) 563 (C.C.A. 5th 1933).

thority to the effect that the jurisdiction of a federal court over a cause of action arising under federal law cannot be limited by judicial remedies provided by state statutes.[42]

The practical wisdom, however, of avoiding a decision on Negro suffrage can be appreciated. Striking down discriminatory statutes has done little toward giving Negroes a vote.[43] The ballot, not the judiciary, is the effective means of enforcing political rights. Nevertheless, without a vote, the Negro depends for the protection of his rights on the federal judiciary,[44] who are in a very delicate position. They know that to sanction Negro-suffrage may give the Negro the balance of power in many instances and alienate the Southern whites.[45] They also must recognize that the principle of "equal rights regardless of race" is a part of the Constitution, made so at the cost of a civil war. Perhaps the present strong feeling against "race persecution" affords an opportunity for another[46] Supreme Court decision condemning race discrimination in the United States, this time as to suffrage. A firm stand against arbitrary registration laws may hasten the trend of increased expenditures for Negro education and health protection,[47] and may result in time in the acceptance by the South of an intelligent Negro vote, in spite of the ever-present bogey of Negro balance of power.

Constitutional Law—Equal Protection of the Laws—Exclusion of Negro Law Student from State University—[Federal].—A Negro citizen of Missouri, admittedly qualified, was refused admission to the Law School of the University of Missouri solely on the ground of color. The State of Missouri maintains a separate university for Negroes which does not provide legal instruction. A Missouri statute[1] authorized the board of curators to arrange for scholarships to the university of any adjacent state for taking any course of subjects provided at the University of Missouri but not taught at the Negro university.[2] The petitioner refused to avail himself of the scholarship and brought mandamus to compel his admission to the state university law school. The State Supreme Court refused the writ. Reversing the decision, the United States Supreme Court with two judges dissenting, held that the out-of-state

[42] Chicot County v. Sherwood, 148 U.S. 529, 534 (1893).

[43] Lewinson, *op. cit. supra* note 19, at 59.

[44] Black Justice, 140 Nation 497 (May, 1935).

[45] Sait, *op. cit. supra* note 19, at 55; Lewinson, *op. cit. supra* note 19 esp. 46–105, 157, 176–193; Monnet, Latest Phase of Negro Disfranchisement, 26 Harv. L. Rev. 42, 61 (1912).

[46] State of Missouri *ex rel.* Gaines v. Canada, 59 S. Ct. 232 (1938). Noted 6 Univ. Chi. L. Rev. 301 (1939).

[47] Stewart, A Negro Looks at the South, Reader's Digest, 55–57 (Jan., 1939).

[1] Mo. Rev. Stat. 1929, c. 57, art. 19 § 9622.

[2] Although the statute does not expressly exclude Negroes from the State University, the state court interpreted the scholarship provision as expressing the legislative intention to do so.

The respondent in the instant case sought to press the point that the scholarship arrangement was temporary, pending the establishment of a law department. But the Supreme Court held that since the curators were vested with discretion as to when to provide such facilities, "the discrimination may continue for an indefinite period," and "may not be excused by what is called its temporary character." 59 S. Ct. 232, 237 (1938).