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).

scholarship plan contravenes the equal protection clause of the Fourteenth Amendment.[3] *State of Missouri ex rel. Gaines v. Canada.*[4]

The problem of racial discrimination under the Fourteenth Amendment has not been accorded uniform treatment by the Supreme Court. Attempts on the part of southern states to deprive Negroes of the right to participate in primaries,[5] to sit on grand or petit juries,[6] to own or occupy property in certain zones,[7] have been judicially thwarted on the ground that color alone as a basis of classification violates the equal protection clause. On the other hand the Court has sustained the constitutionality of miscegenation statutes,[8] segregation in public carriers,[9] and separation of school facilities.[10] In the case of the carriers and the schools separation is not inequality if

[3] The action of the curators, who as representatives of the State in the management of the State University excluded the Negro, was regarded as state action. *Ex parte* Virginia, 100 U.S. 339, 346 (1879); Neal v. Delaware, 103 U.S. 370, 397 (1880).

[4] 59 S. Ct. 232 (1938).

[5] Nixon v. Herndon, 273 U.S. 536 (1927) (Texas statute barring Negroes from participation in Democratic primary election); Nixon v. Condon, 286 U.S. 73 (1932) (state authorization of political parties through their state executive committee to determine who shall be qualified to participate in the primary, held to come within rule of Herndon case). But see Grovey v. Townsend, 294 U.S. 699 (1935). See note, 39 Yale L. J. 423 (1930). In Guinn v. United States, 238 U.S. 347 (1915), Oklahoma "Grandfather Clause" aimed to deprive Negroes of suffrage, was held to violate the Fifteenth Amendment. *Cf.* Lane v. Wilson *et al.*, 98 F. (2d) 980 (C.C.A. 10th 1938), noted 6 Univ. Chi. L. Rev. 296 (1939).

[6] Strauder v. West Virginia, 100 U.S. 303 (1879); *Ex parte* Virginia, 100 U.S. 339 (1880); Norris v. Alabama, 294 U.S. 587 (1935) ("Scottsboro cases"); Hollins v. Oklahoma, 295 U.S. 394 (1935).

[7] Buchanan v. Warley, 245 U.S. 60 (1917); Tyler v. Harmon, 158 La. 439, 104 So. 200 (1925); Harmon v. Tyler, 273 U.S. 668 (1927). And see State v. Darnell, 166 N.C. 300, 81 S.E. 338 (1914); State v. Gurry, 121 Md. 534, 88 Atl. 546 (1913). See Martin, Segregation of Residences of Negroes, 32 Mich. L. Rev. 722 (1934).

The Fourteenth Amendment does not protect against private discriminations and restrictions against Negroes. Civil Rights Cases, 109 U.S. 3 (1883). Enforcement by state courts of covenants in deed prohibiting sale or lease to Negroes is held not to be state action under the Fourteenth Amendment. Corrigan v. Buckley, 271 U.S. 323 (1926).

[8] Green v. State, 58 Ala. 190 (1877); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); State v. Gibson, 36 Ind. 389 (1871). Adultery between blacks and whites can constitutionally be more severely punished than the same crime between persons of the same race. Pace v. Alabama, 106 U.S. 583 (1882).

[9] Plessy v. Ferguson, 163 U.S. 537 (1896); Hall v. De Cuir, 95 U.S. 485 (1877); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914); *cf.* Louisville, New Orleans & Texas Ry. Co. v. Mississippi, 133 U.S. 587 (1890).

[10] Berea College v. Kentucky, 211 U.S. 45 (1908) (Kentucky statute prohibiting the teaching of Negroes and whites in same school, upheld as valid limitation upon incorporated institutions but not as to private individuals); Gong Lum v. Rice, 275 U.S. 78 (1927) (segregation in public schools upheld); and see Cumming v. Board of Education, 175 U.S. 528 (1899). Innumerable state decisions uphold the constitutionality of maintaining separate tax supported schools: State *ex rel.* Garnes v. McCann, 21 Ohio 198 (1871); Ward v. Flood, 48 Cal. 36 (1874); Cory v. Carter, 48 Ind. 327 (1874); Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891). Most northern states refuse to take advantage of the rule that permits segregation

"substantially equal advantages" are afforded both groups.[11] It would seem therefore that while political and economic discrimination against the Negro is obnoxious to the judicial sense of equality, the drawing of the color line on the social plane, in deference to the "southern problem," is sanctioned.[12]

With the principle of race segregation in the schools upheld,[13] the southern and border states have maintained separate school systems from elementary to collegiate levels. But "the small proportion of colored aspirants to professional and graduate degrees has made independent higher institutions for Negroes impracticable."[14] In order to furnish substantially equal facilities, however, several states have dealt with the problem by providing scholarships to professional schools outside of the state.[15] The number and amount of these scholarships vary.[16] Prior to the instant case only one state decision passed on the constitutional validity of one such out-of-state scholarship plan. In holding that such a provision did not afford equal protection under the Fourteenth Amendment to a Negro desiring to enter the state law school, the Maryland court[17] went primarily on the ground that the amount of the particular

in schools: Jones v. Newlon, 81 Colo. 25, 253 Pac. 386 (1927); People *ex rel.* Workman v. Board of Education, 18 Mich. 400 (1869); and see People *ex rel.* Bibb v. Mayor and Common Council of Alton, 209 Ill. 461, 70 N.E. 640 (1904).

[11] "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." Bertonneau v. Board of Directors, 1 Fed. Cas. No. 1, 361 at 296 (C.C. La. 1878). But where separate schools are not maintained, colored persons must be allowed to attend schools provided for whites: Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54 (1890); Davenport v. Cloverport, 72 Fed. 689 (D.C. Ky. 1896); and see McFarland v. Goins, 96 Miss. 67, 50 So. 493 (1909), in which a statute providing for an agricultural high school for white pupils where none had been provided for Negroes was declared unconstitutional. The different races may not be separately taxed for their schools. Claybrook v. City of Owensboro, 16 Fed. 297 (D.C. Ky. 1883).

[12] It is pretended that there is no conflict between the cases upholding segregation in schools and trains and the cases invalidating legislation which denied the right to use, control, or dispose of property. See Carey v. City of Atlanta, 143 Ga. 192, 201, 84 S.E. 456, 459 (1915). But see Martin, *op. cit. supra* note 7, at 730.

[13] Apparently there must be legislative authority before the segregation will be sustained. See cases cited in note 11, *supra*.

[14] Note, 45 Yale L.J. 1296, 1298 (1936). The limited demand was declared not to excuse the discrimination in the instant case, 59 S. Ct. 232, 237 (1938), quoting McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161 (1914) where the court considered a cognate question: The limited demand as a justification "makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons . . . . cannot be refused. It is the individual who is entitled to the equal protection of the laws. . . . "

[15] Mo. Rev. Stat. 1929, c. 57, art. 19, § 9622; Va. Code. Supp. 1938, c. 45, § 1003l(b); Okla. Stat. 1938, c. 34, art. 1A; W.Va. Code 1937, c. 18, art. 13, § 1894(2).

[16] For a survey of the statutes and their respective appropriations see 45 Yale L.J. 1296 (1936).

[17] University of Maryland v. Murray, 169 Md. 478, 182 Atl. 590 (1936).

scholarship was inadequate, and left open the question whether "with aid in any amount [it would be] sufficient to send the Negroes outside the state for the education."[18]

It would seem, however, that "aid in any amount" could never complete the duty of the state to provide equal facilities. It has been urged that there is no assurance that the Negro will be permitted to matriculate at a comparable northern institution as readily as the white student will be admitted to the local school.[19] And although admitted, he is deprived of such special advantages in attending the local institution as the opportunity for the particular study of the state law, observation of the local courts, and, in view of the prestige of the local law among the citizens of his state, the acquaintance of prospective clients.[20] He may have social and economic reasons for studying at home, but is denied the privilege available to the white student of studying in proximity to his home and family.

Weighing the relative advantages of studying within or without the state, the state court in the instant case found the disparity negligible and, passing directly on the question left open in the Maryland case, sustained the validity of the Missouri scholarship provision as an adequate appropriation.[21] The question before the Supreme Court then was whether the out-of-state scholarship device was consonant as a matter of principle with the equal protection guaranteed by the Fourteenth Amendment. In holding that the practical matters are besides the point, the Court was clear that the "basic consideration is not 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. The admissibility of laws separating the râces in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups *within* the State."[22] The invalidation of the Missouri law on this broad declaration sweeps with it the out-of-state scholarship provisions of the other states regardless of the adequacy of the amount.[23]

In equalizing the facilities three choices are open to the state: Abolition of professional schools for the whites, which would disadvantage the latter to no gain for the colored. Admission of the Negroes to the existing institutions, which would

[18] *Id.* at 487. [19] See note 16 *supra*. [20] See 59 S. Ct. 232, 236 (1938).

[21] The State supreme court pointed out that the universities of the adjacent states admit nonresident Negroes as students in their law department, that these schools were of high standing where one desiring to practice law in Missouri "can get as sound, comprehensive, valuable legal education" as in the University of Missouri, and that the mileage and cost of transportation of a student travelling from Missouri to the state universities of Kansas, Nebraska, and Illinois were substantially equal to that travelled and borne by students within the state. State *ex rel.* Gaines v. Canada, 113 S.W. (2d) 783, 789 (Mo. 1937).

[22] 59 S. Ct. 232, 236 (1938) (italics added). But the fact that the location of a Negro school within the state may inconvenience the individual has been declared insufficient to support charges of inequality. Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891). And see Gong Lum v. Rice, 275 U.S. 78 (1927).

[23] The effect of the instant decision is to compel the states to admit Negroes to the state universities on a parity with whites until equal separate facilities are established. It is likely however that the states may retain the scholarship provisions as optional with Negro students desiring to study out of the state until such time.

foment the prejudice which the system of segregation is designed to obviate.[24] Construction of separate higher institutions, which would entail expense alleged to be disproportionate to the limited number of Negro students on these levels. Of the three courses the first has been dismissed as an improper solution.[25] Rather than comply with the second,[26] it is likely that the states will seek to extend segregation to the professional schools.

In view of the traditional delicacy with which the Court has handled the problem of southern race relations, the instant decision represents a bold and laudable affirmation of Negro rights. The possibility of judicial action, however, is limited[27] and the far-reaching consequences claimed for the decision[28] are not to be expected. The principle of segregation is preserved. Aside from the limitation that equal facilities must be provided by and within the state, no hint is given that the court will further whittle the doctrine. In theory segregation is not inequality but the experience of educators is that segregation makes for inequality.[29] Skepticism therefore may be expressed whether the facilities furnished will as a practical matter equal the opportunities for acquiring a professional education on a liberal out-of-state scholarship plan.

Contracts—Acceptance—Course of Conduct as Such in Bilateral Contracts— [Federal].—The plaintiff was under contract to construct certain buildings in 140 days. Work was to begin by Nov. 28, 1932, with provisions for a daily penalty for delay. On Nov. 23, 1932, the defendant's agent submitted to the plaintiff a "quotation" embodying the terms upon which the steel company would supply material needed in the buildings. A revised quotation was given the plaintiff on Jan. 7, 1933. Both of these instruments provided that written approval of the "Home Office" of the steel company was needed before a binding agreement was effected. The steel company, on Jan. 21, 1933, sent the plaintiff certain drawings stamped with the notation that they did not constitute approval of the contract. On Jan. 28, 1933, the credit department

[24] See dissenting opinion of Justice McReynolds, 59 S. Ct. 232, 238 (1938).

[25] Cumming v. Board of Education, 175 U.S. 528 (1899). On the question of remedy in case the State neither permits Negroes to enter white schools set apart for whites, nor provides them separate facilities see Black v. Lenderman, 156 Ark. 476, 246 S.W. 876 (1923) where it was intimated that the proper remedy was mandamus to compel erection of separate schools. Such remedy was declared unavailable in the absence of a statute authorizing separate facilities in University of Maryland v. Murray, 169 Md. 478, 487, 182 Atl. 590, 594 (1936). *Cf.* Jones v. Board of Education, 90 Okla. 233, 217 Pac. 400 (1923).

[26] The respondent in the instant case contended that it was "contrary to the constitution, laws and public policy of the State to admit a Negro as a student in the University of Missouri." 59 S. Ct. 232, 233 (1938). See Ala. Const. art. 14, § 256; Ga. Const. art. 8, § 1; Mo. Const. 11 § 3; S.C. Const. art. 11, § 7; Tenn. Const. art. 11, § 12; Tex. Const. art. 7, § 7; W.Va. Const. art. 12, § 12.

[27] "The prejudice, if it exists, is not created by law, and probably cannot be changed by law." Ward v. Flood, 48 Cal. 36, 56 (1874).

[28] See 32 Time 20 (Dec. 26, 1938); 147 Nation 693 (Dec. 24, 1938).

[29] See Symposium, The Courts and the Negro Separate School, 4 J. of Negro Educ. 289–464 (1935); Thompson, Education of the Negro in the United States, 42 School and Society 625 (1935); Harris and Spero, The Negro Problem, 11 Enc. Soc. Sci. (1933); and note, Segregation in Educational Institutions, 82 U. Pa. L. Rev. 157 (1933).