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COMMENTS

CONSTITUTIONALITY OF THE PROPOSED REGIONAL PLAN FOR PROFESSIONAL EDUCATION OF THE SOUTHERN NEGRO

When the Emancipation Proclamation and the Thirteenth Amendment ended human slavery in the South, the problem of the readjustment of both whites and Negroes to a new relationship between the races arose full-blown. The problem, primarily a social one, was by its very nature incapable of immediate solution. The Fourteenth and Fifteenth Amendments, purporting to give the Negro equal legal status with the whites, were adopted. But equality in theory and equality in fact are different things, and generally speaking, in the South the inferior position of the Negro has been recognized and accepted by both races alike. However, the struggle for true equality has never ceased. World War II has caused a general increase in agitation among minorities the world over, and more and more the Negro has turned to the courts to achieve the equality which he has failed to attain by other means.¹ When the struggle has reached the courts, it has centered about the Due Process and Equal Protection clauses of the Fourteenth Amendment. Currently the problem is receiving widespread attention in three specific situations: (1) the right of the Negro to vote in Democratic primaries,² (2) the validity in conveyances of land of covenants restricting alienation to Negroes,³ and (3) the education of the Negro, particularly on the professional and graduate level.⁴

It is the purpose of this comment to consider the constitutional ques-

1. That this approach brings results, witness the fact that the suit brought by a Negro seeking to require the University of Texas to admit him to its law school was a major factor in causing the State of Texas to appropriate \$3,000,000 for a Negro university—an amount equal to one half the appropriation for all Negro Education in the state during the last third of a century. Bullock, *The Availability of Education in the Texas Separate Schools*, 16 J. OF NEGRO ED. 425, 432 (1947). Petitioner in this case applied for admission to the University of Texas in February, 1946. He filed suit for a writ of mandamus to compel his admission in May, 1946. The trial court issued an interlocutory order allowing Texas six months in which to establish a law school for Negroes substantially equal to that for whites. At the end of the period the trial court held that such a school had been provided and denied the writ. Upon agreement of counsel in open court the cause was remanded by the Court of Civil Appeals of Texas, and a second order denying the writ, based upon specific findings by the court, was made by the trial court in June, 1947. This order was affirmed on appeal. *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948).

2. *Rice v. Elmore*, 165 F. 2d 387 (C. C. A. 4th 1947).

3. Four cases on this point were argued before the Supreme Court, January 15 and 16, 1948: *Shelley v. Kraemer*, No. 72; *McGhee v. Sipes*, No. 87; *Hurd v. Hodge*, No. 290; *Urciolo v. Hodge*, No. 291. 16 U. S. L. WEEK 3260 (Feb. 24, 1948).

4. *Sipuel v. Board of Regents*, 68 Sup. Ct. 299 (1948).

tions involved in current plans for establishing in the South regional schools where Negroes may obtain a professional education. Politically and socially the problem of Negro education is dynamic and dynamitic,⁵ and no attempt will be made here to discuss or argue the points involved from a sociological point of view. Rather the purpose here is to consider the question from its narrow legal aspect; social considerations will be noticed only insofar as may be necessary to the discussion of the legal problems.

THE PLAN FOR REGIONAL EDUCATION OF THE NEGRO

The governors of the various Southern States are now formulating a most important project. Plans are being made to establish regional universities where the Negro⁶ may obtain a professional education which has hitherto generally been denied to him.⁷ The proponents of the plan feel that it will afford a real educational opportunity for the Negro, and at the same time preserve racial segregation without imposing an intolerable financial burden upon the individual states.

Equal protection of the laws unquestionably requires equality of opportunity to the extent that substantially equal schools⁸ be afforded.⁹ Since many Southern states which have professional schools for whites do not have

5. The dynamite in the situation is abundantly evident from the Southern reaction to *TO SECURE THESE RIGHTS: REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947)*. For a study of the dynamics of the problem see *JOHNSON ET AL., INTO THE MAIN STREAM: A SURVEY OF BEST PRACTICES IN RACE RELATIONS IN THE SOUTH (1947)*.

6. The regional education plan contemplates the establishment of both white and Negro schools for specialized and professional training. *Nashville Banner*, Mar. 5, 1948, p. 1, col. 7. Acting President C. E. Brehm of the University of Tennessee has suggested that the medical school of his university be made a regional institution. *Nashville Tennessean*, March 31, 1948, p. 13, col. 3. Nowhere in the compact is there any reference to a program for Negroes only; in fact there is no reference whatever to race anywhere in the compact. Appendix, *infra*. Since the existence of white regional schools would have no direct effect upon the legal problems presented in setting up the Negro schools (that is, so long as the present white state universities are maintained), this study is confined to the regional plan for Negroes.

7. Seventeen states require segregation in their public schools. See note 12, *infra*. In 1940 in these states one public Negro law school and one Negro school of library science existed. There were no public schools in these states where Negroes could obtain training at the professional level in medicine, dentistry, engineering or pharmacy. 2 *NATIONAL SURVEY OF HIGHER EDUCATION FOR NEGROES* 15 (1942) [cited, *Brief for Appellant*, p. 62, *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948)]. For a more recent study of Negro opportunities in 15 Southern states and the District of Columbia, see 16 *J. OF NEGRO ED.* 311-438 (1947). On Negro Education generally, see *MANGUM, THE LEGAL STATUS OF THE NEGRO* 78-137 (1940).

8. As to what amounts to substantial equality, see *Claybrook v. Owensboro*, 16 Fed. 297 (D. Ky. 1883) (proportionate number of teachers and length of terms must be substantially the same); *Dameron v. Bayless*, 14 Ariz. 180, 126 Pac. 273 (1912) (Negro may be required to walk a greater distance to his school than he would have to walk to a white school); *Reynolds v. Board of Education*, 66 Kan. 672, 72 Pac. 274 (1903) (not necessary that buildings be same size); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936) (courses of study must be substantially the same); *Jones v. Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923) (physical facilities must be roughly proportionate to the number of children attending). Examples of what is unfair are stated in *United States v. Buntin*, 10 Fed. 730 (C. C. S. D. Ohio 1882) (Negro may not be required to travel an unreasonable or oppressive distance); *Williams v. Board of Education*, 79 Kan. 202, 99

such schools for Negroes,¹⁰ it will be necessary either to admit Negroes to the existing white institutions or to establish new ones for the Negroes.¹¹ Certainly today the general sentiment in the South is that segregation is necessary to preserve social order and to maintain satisfactory educational progress.¹² If this sentiment is to be controlling, adequate schools for Negroes must

Pac. 216 (1908) (unfair to require Negro children to traverse dangerous area to reach school); *Jones v. Board of Education*, *supra*, (unfair to provide only part-time facilities for Negro children). See Note, 103 A. L. R. 713 (1936).

9. *Sipuel v. Board of Regents*, 68 Sup. Ct. 299 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *cf. Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886) (the equal protection of the laws is "a pledge of equal laws").

10. See note 7, *supra*.

11. Gov. Jim Nance McCord of Tennessee, one of the foremost sponsors of the regional education plan, speaking before the Conference of Southern Governors in Asheville, N. C., October 20, 1947, pointed out three possible alternatives for the South: (1) close the white professional schools; (2) admit Negroes to the white schools; (3) establish for Negroes separate schools of equal educational rank. *Nashville Banner*, Oct. 20, 1947, p. 10, col. 4.

12. Seventeen states require segregation of the races in schools. In some instances the requirement is a constitutional one; in others it is statutory, and in many states it is both. ALA. CONST. ART. XIV, § 256, ALA. CODE, tit. 52, § 93 (1940); ARK. DIG. STAT. § 11535 (c) (Pope, 1937); DEL. CONST. ART. X, § 2, DEL. REV. CODE, c. 71, § 2631 (1935); FLA. CONST. ART. XII, § 12, FLA. STAT. ANN. § 228.09 (1943); GA. CONST. ART. VIII, § 1, GA. CODE ANN., tit. 32, § 937 (Supp. 1947); KY. CONST. § 187, KY. REV. STAT. ANN. § 158.020 (Baldwin, 1943); LA. CONST. ART. XII, § 1; MD. CODE GEN. LAWS art. 77, § 192 (Flack, 1939); MISS. CONST. ART. VIII, § 207, MISS. CODE ANN. § 6276 (1942); MO. CONST. ART. XI, § 3, MO. REV. STAT. ANN. § 10349 (1943); N. C. CONST. ART. IX, § 2, N. C. GEN. STAT. § 115-2 (1943); OKLA. CONST. ART. I, § 5, OKLA. STAT., tit. 70, § 451 (1941); S. C. CONST. ART. XI, § 7, S. C. CODE § 5377 (1942); TENN. CONST. ART. XI, § 12, TENN. CODE ANN. § 2377 (Williams, 1934); TEX. CONST. ART. VII, § 7, TEX. REV. CIV. STAT., tit. 49, art. 2900 (Vernon, 1942); VA. CONST. ART. IX, § 140, VA. CODE ANN., tit. 11, c. 33, § 680 (1942); W. VA. CONST. ART. XII, § 8, W. VA. CODE ANN. § 1775 (1943).

For a very complete chart analyzing constitutional and statutory provisions for separate schools in the South, see Johnson & Lucas, *The Present Legal Status of the Negro Separate School*, 16 J. OF NEGRO ED. 280, 286-288 (1947). The position of the Negro student in all states is discussed in MANGUM, *THE LEGAL STATUS OF THE NEGRO* 78-86 (1940).

A good statement of the views of the moderate Southerner is that made by four Southern members of the President's Commission on Higher Education (Arthur H. Compton, Chancellor, Washington University, St. Louis; Douglas S. Freeman, Editor, *Richmond Times-Dispatch*; Lewis W. Jones, President, University of Arkansas; and Goodrich C. White, President, Emory University). The majority report of this Committee had recommended that segregation in schools be ended. The four members of the 28-man committee said by way of dissent:

"The undersigned wish to record their dissent from the Commission's pronouncements on 'segregation,' especially as these pronouncements are related to education in the South. We recognize that many conditions affect adversely the lives of our Negro citizens, and that gross inequality of opportunity, economic and educational, is a fact. We are concerned that as rapidly as possible conditions should be improved, inequalities removed, and greater opportunity provided for all our people. But we believe that efforts toward these ends must, in the South, be made within the established patterns of social relationships, which require separate institutions for whites and Negroes. We believe that pronouncements such as these of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro. We recognize the high purpose and the theoretical idealism of the Commission's recommendations. But a doctrinaire position which ignores the facts of history and the realities of the present is not one that will contribute constructively to the solution of difficult problems of human relationships." PRESIDENT'S COMMISSION ON HIGHER EDUCATION, *HIGHER EDUCATION FOR AMERICAN DEMOCRACY*, Vol. II, p. 29 (1947).

be established. The fact that there may be only a very few Negro students who would avail themselves of the opportunity of attending these schools in no way affects the right of those few to have the opportunity.¹³ Makeshift, second-rate schools will not do. If the state university offers whites a full three-year course in law, the state must provide an equal course for Negroes.¹⁴ It would take as many capable faculty members to give an entire course to a class of ten as it would to a class of 100. The financial burden thus imposed would seriously impair the state's finances or result in a general lowering of educational efficiency through decreased appropriations to existing schools.¹⁵ The way out, as suggested by the plan, is the pooling of resources on a regional scale.

The machinery by which this regional cooperation would be carried out is a compact among the states concerned.¹⁶ A 15-state compact is contemplated. Governor Millard Caldwell of Florida is head of an executive committee which will undertake a study aimed to produce a detailed program. Both the Carnegie Foundation and the General Education Board have been asked to help finance the study, and appropriations from state contingent funds have been made to allow it to begin.¹⁷

Interstate compacts are not unusual, though they have not heretofore been employed for educational purposes.¹⁸ The Constitution requires that such compacts have the consent of Congress.¹⁹ The management and administra-

13. In *McCabe v. Atchinson, Topeka & S. F. Ry. Co.*, 235 U. S. 151, 161-162 (1914), the Court, in discussing the argument that limited demand justified lack of opportunity, declared that such a doctrine made 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 traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws. . . ."

14. *Sipuel v. Board of Regents*, 68 Sup. Ct. 299 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936).

15. For statistics on the cost of supplying truly equal and separate facilities for the Southern Negro, see Wirth, *The Price of Prejudice*, 36 SURVEY GRAPHIC 19, 20 (Jan. 1947).

16. The text of this compact is set out in full, *infra* p. 421, as an appendix to this comment.

17. *Nashville Banner*, Mar. 5, 1948, p. 1, col. 7.

18. See Dodd, *Interstate Compacts*, 70 U. S. L. REV. 557, 574-78 (1936); Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L. J. 685, 696 (1925); Murphy, *The Interstate Compact to Conserve Oil and Gas: An Experiment in Cooperative State Production Control*, 17 MISS. L. J. 314 (1946); Note, *Regional Education: A New Use of the Interstate Compact?* 34 VA. L. REV. 64 (1948).

19. U. S. CONST. ART. I, § 10, cl. 3. This provision was inserted into the Constitution to safeguard the new Union from destructive political combinations among the states. Frankfurter and Landis, *supra* note 18, at 693. It has been suggested that Congressional consent is not necessary where the compact does not affect the states in their relations with the Federal Government. See *Virginia v. Tennessee*, 148 U. S. 503, 518 (1893); Carman, *Should the States be Permitted to Make Compacts without the Consent of Congress?* 23 CORN. L. Q. 280 (1938); Dutton, *Compacts and Trade Barriers*, 16 IND. L. J. 204 (1940); Murphy, *supra* note 18, at 317. If any compacts do not require the assent of Congress it would seem that an agreement concerning education would surely

tion of the interstate projects vary with the provisions of the compacts and the nature of the subject matter.²⁰ The regional education compact provides that the regional schools will be regulated by a joint Board of Control representing all of the participating states, and supported by tax contributions from all of these states.²¹ Such a scheme necessarily raises problems of administration and control which will require considerable thought and careful execution if the regional university is to represent a real advance in educational opportunities of Negroes or whites.²² And, quite apart from the technical difficulties of its administration, the plan raises two fundamental constitutional questions which need to be clarified before the regional universities for Negroes may be developed to their maximum potentiality. These two questions are: (1) Is segregation in public educational facilities constitutional? (2) Will regional schools for Negroes satisfy the equal protection clause if the individual states retain their state universities for whites only?

THE CONSTITUTIONALITY OF SEGREGATION IN EDUCATION²³

That segregation, if accompanied by equality of separate facilities, is not a violation of the equal protection of the laws was decided by the Supreme Court in *Plessy v. Ferguson*²⁴ in 1896. That case involved a Louisiana statute which required that all railways carrying passengers in the state should maintain equal and separate facilities for whites and colored people, and made it a misdemeanor for a member of one race to insist upon going into the coaches set aside for the other. The statute was attacked as violative of both the Thirteenth and Fourteenth Amendments. The Court found little basis for argument as to the Thirteenth Amendment, and confined its main discussion to the equal protection clause.

"The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social,

fall within that class, since education is traditionally a matter of state, as distinguished from federal, concern.

20. Dodd, *supra*, note 18; Frankfurter and Landis, *supra* note 18.

21. Appendix, *infra*, ¶¶ 5, 9.

22. Editor C. A. Scott, of the Atlanta Daily World, speaking of this point, declared that the regional school would be "a sort of monstrosity that would be everybody's business and in the end nobody's business." Quoted in Note, *Regional Education: A New Use of the Interstate Compact?* 34 VA. L. REV. 64, 75, n. 66 (1948). The Port of New York Authority is an example of a somewhat similar plan which has worked quite successfully. A good example of the difficulties attendant upon interstate cooperation in a different type of situation is found in Murphy, *supra* note 18, at 323, n. 24.

23. This question has recently been considered in Note, *Segregation in Public Schools—A Violation of "Equal Protection of the Laws,"* 56 YALE L. J. 1059 (1947). The writer of this note develops the thesis that compulsory segregation necessarily implies social inferiority, and that it is, therefore, a denial of equal protection. The argument is primarily a social one, rather than an analysis of the legal principles involved. See also, Johnson & Lucas, *The Present Legal Status of the Negro Separate School*, 16 J. OF NEGRO ED. 280 (1947).

24. 163 U. S. 537 (1896).

as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."²⁵

The Court further declared that separation in railway coaches is no more "obnoxious to the Fourteenth Amendment . . . than requiring separate schools for colored children . . . , the constitutionality of which does not seem to have been questioned. . . ." ²⁶ The opinion concluded with a statement that equality does not necessarily mean identity, and that the Constitution cannot abolish social inequality.²⁷

Thus, although the *Plessy* case had nothing to do with educational segregation, it assumes the validity of segregation in schools and uses this assumption as one basis for extending the doctrine of separate but equal facilities into another field. In turn, cases which do face the issue of segregation in public schools²⁸ cite the holding in the *Plessy* case as authority for extending the doctrine from the field of transportation into that of education. Thus a peculiar sort of judicial doubleplay has resulted. Taken together, the reasoning of the courts which follow this pattern has been: (1) we assume that segregation in schools is constitutional because it has not been questioned—therefore it follows by analogy that segregation in railroad coaches is permissible; (2) since segregation in railroad coaches is permissible, it reasonably follows that segregations in schools is not improper. This circuitous reasoning detracts from the authority, and the court could rule that segregation in public schools is discrimination without overruling the holding in the *Plessy* case.²⁹

25. *Id.* at 544.

26. *Id.* at 551.

27. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality; it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Id.* at 551-552.

28. *E.g.*, *Dameron v. Bayless*, 14 Ariz. 180, 126 Pac. 273 (1912); *Graham v. Board of Education*, 153 Kan. 840, 114 P. 2d 313 (1941); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936); *State ex rel. Michael v. Witham*, 179 Tenn. 250, 165 S. W. 2d 378 (1942); *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948).

29. The writer in Note, 56 *YALE L. J.* 1059 (1947), reaches the ingenious conclusion that the rationale of the *Plessy* case becomes authority for the doctrine that segregation *per se* is a denial of equal protection. This conclusion is said to follow from the substitution of a proper premise for the erroneous one upon which the court based its decision. *Id.* at 1066.

Other than the *Plessy* holding there is only one sphere of activity in which the Supreme Court has directly upheld the validity of segregation by state or federal action—the wartime separation of Japanese-Americans.³⁰ On the other hand the court has struck down state statutes which imposed residential segregation by means of legislation prohibiting Negroes from owning or occupying property in particular areas.³¹ The denial of equal protection is clearer in these cases however. Such a statute denying to whites the right to own or occupy property in any given area would also be discriminatory, since it would deny to one citizen a right granted to another. The discrimination in such a case would arise not from any claim that an inferior status resulted from segregation (the argument commonly advanced against segregated schools)³² but that it is unfair and illegal to grant to one citizen the right to acquire private property in a given area while denying that right to another citizen solely on the basis of his race. Private covenants establishing segregated or restricted areas have been upheld by the Court on the ground that the Fourteenth Amendment does not reach to individual action in which the state does not participate.³³ This holding is now being attacked upon the ground that court enforcement of such covenants amounts to state action.³⁴

Although the Supreme Court has never squarely faced the question of the constitutionality of segregation in public schools, it has, as already indicated, tacitly accepted such a doctrine. In *Gong Lum v. Rice*³⁵ the Court pointed out that separate schools had long been maintained by Congress in the District of Columbia, and accepted this as an indication that segregation was proper. In *Cumming v. Board of Education*³⁶ the Court allowed a school board to use funds to operate a white high school, although no high school for Negroes existed. The Court has even sustained the validity of a prosecution by a state of an incorporated private school for violation of a segregation

30. *Ex Parte Endo*, 323 U. S. 283 (1944); *Korematsu v. United States*, 323 U. S. 214 (1944); *Hirabayashi v. United States*, 320 U. S. 81 (1943); see *The Alien Land Laws: A Reappraisal*, 56 YALE L. J. 1017 (1947).

31. *Harmon v. Tyler*, 273 U. S. 668 (1927); *Buchanan v. Warley*, 245 U. S. 60 (1917). The ground of the *Buchanan* decision was due process rather than equal protection. See Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81 (1917); Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721 (1934).

32. Note, 56 YALE L. J. 1059 (1947) contains citations to a number of treatises and articles which argue this point. "The only premise on which racial separation can be based is that the inferiority and the undesirability of the race set apart make its segregation mandatory in the interest of the well-being of society as a whole. Hence the very act of segregation is a rejection of our constitutional axiom of racial equality." Brief for Appellant, p. 35, *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948).

33. *Corrigan v. Buckley*, 271 U. S. 323 (1926); *Wyatt v. Adair*, 215 Ala. 363, 110 So. 801 (1926); *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1919); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330 (1922); Martin, *supra* note 31, at 731; see Notes, 9 A. L. R. 120 (1920), 38 A. L. R. 1185 (1925), 42 A. L. R. 1273 (1926).

34. See note 3, *supra*.

35. 275 U. S. 78 (1927).

36. 175 U. S. 528 (1899).

statute.³⁷ And in *Missouri ex rel. Gaines v. Canada*³⁸ the Court remarked by way of dictum that the validity of separate but equal facilities had been "sustained by our decisions."³⁹ In addition to these cases there are numerous state decisions squarely upholding the constitutionality of separate but equal schools.⁴⁰

It would seem that the great number of decisions which either squarely uphold or incidentally accept the proposition that segregation in education is not discrimination would erase any doubt as to the result were the precise question to be presented to the Court. But even stronger precedent has fallen in recent years.⁴¹ The ghost of stare decisis wanders uneasily among the gravestones of overruled Supreme Court cases.⁴² The tendency of the Court is ever toward a recognition of factual results, rather than theoretical legal relations, as the test of the constitutionality of a particular practice or statute.⁴³ For example, in *Rice v. Elmore*⁴⁴ a federal court found that the Democratic party primary, conducted solely by the party's own rules and totally unregulated by any state statute, is state action as comprehended by the Fourteenth Amendment. The court saw that, as a matter of fact, proscription of Negroes by the Democratic party effectively denied the Negro any opportunity to participate in the selection of state officials; having ascertained this fact the court formulated a rationale which would allow it to remedy this denial of a constitutional right. True, this was not a Supreme Court decision, but it follows the pattern set in election cases by the Supreme Court,⁴⁵ and

37. *Bea College v. Kentucky*, 211 U. S. 45 (1908). The decision in this case was arrived at upon the theory that the state had the right to alter, amend, or repeal a corporate charter. The case does not stand for the proposition that a state can require a private individual to segregate races.

38. 305 U. S. 337, (1938).

39. *Id.* at 344.

40. *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); *People ex rel. King v. Gallagher*, 93 N. Y. 438 (1883); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871). Also see cases note 28, *supra*.

41. *E.g.*, *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842), which established a doctrine uniformly followed for nearly a hundred years, was overruled by the celebrated case of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938).

42. In the period between 1937 and 1944 no less than fourteen Supreme Court decisions were expressly overruled by the Court. See *Smith v. Allwright*, 321 U. S. 649, 665, n. 10, for a list of these cases. Mr. Justice Roberts, dissenting in *Smith v. Allwright*, *supra*, said: "the instant decision, overruling that announced about nine years ago [*Grovey v. Townsend*, 295 U. S. 45 (1935)], tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. . . ." *Id.* at 669-670.

43. "The federal courts have shown a mounting reluctance to swallow prejudice preserved in precedent." *The Alien Land Laws: A Reappraisal*, 56 YALE L. J. 1017 (1947).

44. 165 F. 2d 387 (C. C. A. 4th 1947).

45. This pattern has consisted of a series of decisions which have inexorably struck down successive schemes to prevent Negroes from voting in the Democratic primaries. In *Newberry v. United States*, 256 U. S. 232 (1921), the Court held that the term "election" as used in the Constitution referred only to final elections, and that the constitutional guarantees would not reach to primaries. This doctrine was repudiated in *United*

an analogy may be found in the decision which upheld a statute forbidding labor unions to refuse to accept qualified Negroes as members.⁴⁶ The same tendency to look at facts rather than theory is evidenced in cases where the Court has found that due process of law has been denied to Negroes who were indicted and convicted by juries composed exclusively of whites; the Court has been less impressed by the absence of any rule excluding Negroes than it has by the fact that for periods of years no Negro actually has served on the juries.⁴⁷

In 1877 the Court ruled that a Louisiana statute which forbade segregation on ships and boats operating within the state was unconstitutional as an attempt by the state to regulate interstate commerce.⁴⁸ In 1946 the court used the same reasoning to strike down a statute of Virginia which required such segregation.⁴⁹ The rule of law in the two cases is the same; the factual result reached is exactly opposite. It may or may not be significant that it was the later case which resulted in the legal destruction of the color line in a limited sphere of activity. This result may be a mere accident of chronology, but when the *Morgan* case is considered with the more recent *Bob-Lo* case,⁵⁰ the temper of the Court is clearly shown. In this latter case the Court upheld the constitutionality of a Michigan statute which applied anti-segregation rules to an excursion boat operating between Detroit and a Canadian island. The Court pointed out that as a practical matter the boat operated between Detroit and an island which, though politically a part of Canada, was actually a resort

States v. Classic, 313 U. S. 299 (1941), a case which did not involve Negroes. Statutes prohibiting Negroes from voting in Democratic primaries were declared unconstitutional in *Nixon v. Herndon*, 273 U. S. 536 (1927), and *Nixon v. Condon*, 286 U. S. 73 (1932). *Grovey v. Townsend*, 295 U. S. 45 (1935), held that Negroes could be barred from the primary by party action. This was overruled by *Smith v. Allwright*, 321 U. S. 649 (1944). The decision in this last case was based upon the fact that some Texas statutes did relate to the Democratic primary, and this was found to constitute state action as comprehended by the Fifteenth Amendment. The *Elmore* case finds state action to exist in the absolute absence of any statutory mention of primaries.

See Cushman, *The Texas "White Primary" Case—Smith v. Allwright*, 30 CORN. L. Q. 66 (1944); also 20 IND. L. J. 179 (1945). For a discussion of the situation before the *Allwright* case, see Weeks, *The White Primary*, 8 MISS. L. J. 135 (1935).

46. *Railway Mail Association v. Corsi*, 326 U. S. 88 (1945); cf. *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944) (in absence of a statute requiring it to accept Negro members, a "white" union must, if it is the duly certified representative of a class of workers, protect the rights of non-member Negroes who are affected by the acts of the union).

47. It is a denial of equal protection to exclude Negroes from a jury which has indicted or tried a Negro. *Hill v. Texas*, 316 U. S. 400 (1942); *Smith v. Texas*, 311 U. S. 128 (1940); *Carter v. Texas*, 177 U. S. 442 (1900); *Strauder v. West Virginia*, 100 U. S. 303 (1880). Exclusion in fact over a long period will be sufficient to quash an indictment or reverse a conviction, even though there is no law calling for exclusion. "We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County . . . established the discrimination which the Constitution forbids." *Norris v. Alabama*, 294 U. S. 587, 596 (1935). "When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion . . . of negroes . . . , indictments and verdicts . . . cannot stand." *Patton v. Mississippi*, 68 Sup. Ct. 184, 187 (1947).

48. *Hall v. DeCuir*, 95 U. S. 485 (1877).

49. *Morgan v. Virginia*, 328 U. S. 373 (1946).

50. *Bob-Lo Excursion Co. v. People*, 68 Sup. Ct. 358 (1948).

area for Detroit. Canada apparently exercised no active dominion over the island. The question is suggested: Would the Court still uphold the statute if Canada were suddenly to assume active supervision over the island, and pass a segregation statute? The Court answers this question by saying that such a possibility is too remote to be taken into account. This disregard of the two jurisdictions involved is contrary to the reasoning which supported the *Morgan* decision. But the two cases are perfectly consistent as to the factual results obtained: in both instances it was held that segregation of races would not be allowed. True, the *Morgan* and *Bob-Lo* cases are not authority for the proposition that segregation is unconstitutional; both cases arose under the commerce clause. They do, however, reflect a significant attitude on the part of the present Supreme Court.

What will the Court hold when the issue of racial segregation in education is squarely presented to it? Undoubtedly the Court is aware that a ruling that such segregation is unconstitutional would produce a major upheaval in the South. The Court's conduct in cases before it in recent years makes it clear that the Court will not rule on the problem until it is squarely presented.⁵¹ The *Sipuel* case⁵² was intended to present the issue, but the Court treated it as an exact replica of the *Gaines* case⁵³ and disposed of the question in one paragraph. In the later hearing of the *Sipuel* case the Court remarked that the constitutionality of segregation had not been presented in either case.⁵⁴ In *Morgan v. Virginia*⁵⁵ it was not necessary to mention the point, but Mr. Justice Burton, dissenting, did remark that "The issue is . . . [not] the constitutionality of racial segregation as such."⁵⁶ Similar statements were made in the *Cumming*⁵⁷ and *Berea College*⁵⁸ cases. It is not a simple matter to get the issue before the Court. In the *Sipuel* case the Court ruled that the petitioner had been denied equal protection because clearly there was no equality where a white law school existed but no similar school was available to Negroes. The Oklahoma state court to which the case was remanded ordered the Board of Regents of the University of Oklahoma to establish a separate school for

51. The precise issue was met by a federal district court in *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S. D. Cal. 1946). The court ruled that the arbitrary assignment of Mexican children to separate schools was a violation of the equal protection clause. The Circuit Court of Appeals for the Ninth Circuit affirmed the order of the district court, but the affirmance was based solely on the ground that segregation was contrary to California statutes, and that the federal courts have jurisdiction to prevent unequal application of state statutes. Thus the basic constitutional issue was avoided. *Westminster School Dist. v. Mendez*, 161 F. 2d 774 (C. C. A. 9th 1947).

52. *Sipuel v. Board of Regents*, 68 Sup. Ct. 299 (1948).

53. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938).

54. *Fisher v. Hurst*, 68 Sup. Ct. 389 (1948).

55. 328 U. S. 373 (1946).

56. *Id.* at 389.

57. "But we need not consider that question in this case. No such issue was made in the pleadings." *Cumming v. Board of Education*, 175 U. S. 528, 543 (1899).

58. "No such question is here presented and it need not now be discussed." *Berea College v. Kentucky*, 211 U. S. 45, 69 (1908) (dissenting opinion).

Negroes. A petition for mandamus to require the University of Oklahoma to admit the petitioner to its law school was denied on the ground that the Oklahoma court must first determine whether the order of the Supreme Court has been obeyed.⁵⁹ If the case goes back up through the state courts on the ground that the new Negro school is not in fact equal to the white school, then the United States Court may still hold that equal protection has been denied to the petitioner, without considering the segregation issue.

The case of *Sweatt v. Painter*⁶⁰ may present the question to the Court before the *Sipuel* case does so. In the *Sweatt* case the petitioner, a Negro, is seeking admission to the law school of the University of Texas on the ground that a separate school for Negroes cannot possibly meet the requirements of equal protection.⁶¹ Texas has appropriated \$3,000,000 to establish the Negro school, and in the interim period has arranged for the regular law faculty of the University of Texas to give the standard courses to Negro students.⁶² Library facilities in excess of those required by the American Bar Association and equal to those required by the Association of American Law Schools were made available.⁶³ Nevertheless, the petitioner refused to apply for admission to this Negro school, on the ground that he has a constitutional right to attend the established law school of the state university. The Court of Civil Appeals of Texas has held that the Negro school is substantially equal to the white school, and in doing so remarked that "Implicit in these quotations [from petitioner's brief] is the assertion that race segregation in public schools, at least in the higher and professional fields, inherently is discriminatory within the meaning of the fourteenth amendment and cannot be made otherwise."⁶⁴ The court also states "that the validity of state laws which require segregation of races in state supported schools, as being, on the ground of segregation alone, a denial of due process,⁶⁵ is not now an open question."⁶⁶ The court

59. *Fisher v. Hurst*, 68 Sup. Ct. 398 (1948).

60. No. 9684, Tex. Civ. App. (1948).

61. "Appellant does not seek to have appellees establish a separate school for Negroes with facilities equal to those at the University of Texas because appellant contends, as indicated *infra*, that 'equality is determined not by physical identity of things or facilities furnished, but by the identity or substantial similarity of their values—in short, by the community judgment attached to them.' There can be no question that a segregated law school for Negroes has a very low value in the eyes of every community since the purpose is to segregate a group which Texans have been led to believe is inferior." Brief for Appellant, pp. 42-43, *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948).

62. A somewhat similar arrangement has been made at the University of Arkansas. There a single Negro student has been admitted into the law school, but he studies and has classes apart from the white students. *Nashville Tennessean*, Jan. 31, 1948, p. 2, col. 1-2.

63. *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948) (p. 2 of appendix by court).

64. *Id.* at p. 3 of opinion.

65. The court discusses the problem throughout as a question of due process; the brief for appellant was phrased entirely in terms of equal protection.

66. *Sweatt v. Painter*, *supra*, note 60, at p. 1 of opinion.

then quotes at length from *Plessy v. Ferguson*, thus completing the reasoning pattern described above.⁶⁷

Whatever the decision of the Supreme Court may be, it must be made before the plan for regional universities for Negroes can be of maximum service to the South. The National Association for the Advancement of Colored People opposes the program in the belief that once it is well established it will lend weight to the arguments that segregation is not a denial of equal protection.⁶⁸ If a ruling that segregation is unconstitutional should be made, it would of course lead to some type of complete reconstitution of Southern schools. If the Court rules that equal but separate facilities satisfy the requirements of equal protection then the regional program would not be opposed as a factor which would tend to cause such a decision.

THE REGIONAL SCHOOL AND EQUAL PROTECTION

Assuming that the Court will uphold the constitutionality of segregation, or that it will not have to rule directly upon that question in the near future, does the plan for regional universities meet the requirements of equal protection so far as the Negro is concerned? The answer to this question depends upon (1) whether it is discriminatory to require one citizen to go to a regional school to obtain training which is available to another citizen in a public institution within the geographical borders of the state, and (2) whether the interstate compact idea can be so utilized as to give the regional schools a character which partakes of the nature of individual state institutions.

As to the first point, it is possible that the distance factor alone would be sufficient to cause the Court to hold that it is unreasonable and therefore discriminatory to require a Negro to travel from Texas to Tennessee in order to get medical training while a white citizen can obtain like training in Texas. State courts have held that it is not discrimination to require a Negro child to travel a greater distance to his school than he would have to travel to a school for whites.⁶⁹ However, in *United States v. Buntin*⁷⁰ a federal court stated that a Negro could not be required to travel an unreasonable and oppressive distance, or be placed at a material disadvantage because of the greater distance to his school. The cases agree that some variation in distances to be traveled must be expected; the problem is as to when the variation becomes unreasonable.⁷¹ Greater variation would reasonably be allowed in the

67. See text to note 29, *supra*.

68. This attitude was evidenced at the hearings before the Senate Judiciary Committee on the proposed compact for regional education. Nashville Tennessean, Mar. 14, 1948, p. 7, col. 7-8.

69. *Dameron v. Bayless*, 14 Ariz. 180, 126 Pac. 273 (1912); *Roberts v. Boston*, 5 Cush. 198 (Mass. 1849) (decided under a state statute similar to Fourteenth Amendment).

70. 10 Fed. 730 (C. C. S. D. Ohio 1882).

71. The relative distances in the *Buntin* case were 3 miles to white school, 5 miles to Negro school, and the court left it to the jury to determine whether this was reasonable;

case of college students than in situations involving young children, and, under modern conditions of travel and communication, any location within the Southern region might be considered reasonable for persons who are ready for graduate and professional training. In addition, the cases on the subject have dealt with pupils who lived at home and had to traverse the distance daily. A different situation is presented where the students live at the college or university. In the latter case the distance to be traveled is not so significant. Exposure to the elements, dangerous traffic conditions, and expenditure of time are not factors where the individual lives on the campus.

Another consideration which minimizes the objection of relative distance as a distinctive feature of the regional school is that similar variations would necessarily exist even if each state provided individual Negro schools within its borders. The relative number of applicants reasonably requires more white schools than Negro schools within the state, and this indirectly means more convenient white schools. Therefore, if it would be sufficient to establish fewer Negro schools within the individual states, the regional character of the school should add little objection on the score of relative distances to be travelled by the students.

As has already been stated, substantial equality of facilities is a fundamental requirement,⁷² but it may not be sufficient. The possibilities vary with the course of study. For example, it would seem to make little difference to a medical student whether he studied in one state or another, so long as the facilities were adequate; but a law student may derive considerable advantage from studying in the state where he intends to practice. Instructors tend to illustrate their points with local laws, and to pay special attention to local cases and statutes. Opportunity to observe local courts in action, and contacts with the bench and bar where one plans to practice may be of great value. To deny this opportunity to one student, while granting it to another may be a violation of the equal protection requirement.

As to the second point—whether a regional school can be made to partake of the nature of an individual state institution—serious obstacles are encountered. What the equal protection clause demands in this respect is clearly stated in the *Gaines* case, and reiterated in the more recent *Sipuel* case. In Missouri at the time of the *Gaines* case there was no state law school for Negroes, although such a school for whites was an established part of the state university. Under a Missouri statute⁷³ the Board of Curators of the state university were

Roberts v. Boston, 5 Cush. 198 (Mass. 1849) (not unreasonable to require Negro to walk one fifth of a mile farther to her school; *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765 (1890) (not unfair to require Negroes to travel 3½ miles as compared to 2 miles to white schools); *Wright v. Board of Education*, 129 Kan. 852, 284 Pac. 363 (1930) (not unreasonable to require Negro child to go 20 blocks to her school when a white school was in her immediate neighborhood); see Note 103 A. L. R. 713, 714 (1936).

72. See p. 404, *supra*.

73. Mo. REV. STAT. § 9622 (1929).

authorized to arrange for Negro citizens of Missouri to attend schools in adjacent states which would offer them legal training, their home state bearing the cost of tuition. Petitioner, a Negro, sought to compel the University of Missouri to admit him to its law school on the ground that it was a denial of the equal protection of the laws to compel him to go outside the state when facilities within the state existed for whites. The United States Supreme Court sustained this contention, saying:

"The basic consideration is . . . as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination. . . .

"Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system."⁷⁴

In the *Sipuel* case the Court phrased the requirement thusly: "The petitioner is entitled to secure legal education afforded by a state institution."⁷⁵

The critical requirements of the two decisions appear to be that if facilities are offered to whites in state institutions as at present, equal facilities must be offered to Negroes in an institution which (1) is located where the laws of the state operate, that is, within its jurisdiction, and (2) is a state institution. True, the Court suggests that these requirements can only be met by an institution which is located within the borders of the state, but the particular wording is not essential to the holding in the case, and there is no indication that the Court has considered the possibility of a regional school being established. What the Court actually held in the *Gaines* case was that it was not sufficient for the State to pay tuition in an out-of-state institution over which the State had no control, and to which the State had no duty to contribute. The *Sipuel* case held that equal facilities must be furnished in a state institution.

Can a regional school possibly satisfy these two requirements? First, as to the "state institution" requirement, it is obvious that if the language of the court is interpreted to mean an individual state institution, then no re-

74. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 349-350 (1938).

75. *Sipuel v. Board of Regents*, 68 Sup. Ct. 299 (1948).

gional school could possibly be sufficient. The proposed plans would, however, set up what amounts to a joint state institution. Each state has an equal voice in the control of the school.⁷⁶ The amount of money to be contributed by each state is not governed by the number of students from such state (as is true under the out-of-state tuition plan) but is fixed upon the basis of relative state populations.⁷⁷ Qualified students are admitted as a matter of right,⁷⁸ rather than as a matter of privilege granted by a sister state. The individual states hold a position as tenants in common of the beneficial use of the schools' facilities.⁷⁹ All these factors certainly offer some reasonable basis for classifying a regional school as a public institution of each of the participating states.⁸⁰ The language of the *Gaines* case speaks of the several obligations of the states, but it would not necessarily follow from the fact that the obligation is several, that the fulfillment may not be accomplished by joint action.

May such a school be regarded as "within the jurisdiction" of the various states? It has been held that jurisdiction may extend beyond the territorial limits of sovereignty,⁸¹ and it would seem that it is definitely within the power of the states to establish an area wherein all would have concurrent jurisdiction.⁸² Commonly such concurrent jurisdiction is granted over the surface of rivers which are part of a common boundary. The reason for the concurrent power is usually that the difficulty in ascertaining the middle of the channel at a given moment leads to major problems of law enforcement on the rivers, and it has been said that such jurisdiction does not apply to objects of a permanent nature, such as islands, bridges, etc., because their position with respect to the true boundary can easily be ascertained, and the reason for concurrent jurisdic-

76. Appendix, *infra*, ¶ 5.

77. *Id.* at ¶ 9.

78. This right is a qualified one, rather than absolute. That is, a person may meet the minimum requirements for admission, but if facilities are not available to accommodate all who apply, relative rank may be used to determine who shall be admitted. This situation is commonly met in the medical schools.

79. "Title to all such educational institutions . . . and to all properties and facilities used in connection therewith shall be vested in said Board as the agency of and for the use and benefit of the said states and the citizens thereof. . . ." Appendix, *infra*, ¶ 6.

80. Under the terms of the compact it is not necessary that all the states be parties in the establishment of a particular school. Any two or more may set up such a school provided the Board approves. *Id.* at ¶ 8.

81. *Wedding v. Meyler*, 192 U. S. 573 (1904) (statutory jurisdiction of State of Indiana over entire surface of Ohio river opposite State of Kentucky). *But cf.* *Morgan v. Virginia*, 328 U. S. 373, 386 (1946) (segregation on interstate carrier) (" . . . no state law can reach beyond its own border. . . ."); and *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 10 S. W. 595, 597 (1889) (Missouri jurisdiction over torts on Mississippi river near Illinois shore) ("The jurisdiction of a state is co-extensive with its sovereignty.")

82. *Wedding v. Meyler*, *supra* note 81; *In re Mattson*, 69 Fed. 535, 540 (C. C. D. Ore. 1895) (concurrent jurisdiction of Oregon and Washington over Columbia river); *Gilbert v. Moline Water Power & Mfg. Co.*, 19 Iowa 319 (1866) (Iowa Court has no jurisdiction to abate nuisance on Illinois side of Mississippi river); *State v. Nielsen*, 51 Ore. 588, 95 Pac. 720 (1908) (concurrent jurisdiction of Oregon and Washington over Columbia river).

tion fails.⁸³ However, this rationale would not apply to an area over which concurrent jurisdiction was established for an entirely different reason. Possibly the closest analogy to the proposed compact is that which established the Port of New York Authority.⁸⁴ The states of New Jersey and New York established the Port Authority for the purpose of improving the operation of the facilities of the New York port area, and control of the area was placed in the hands of a joint board of managers. When this action was attacked as establishing an unauthorized political subdivision, the New York court said:

"It is obvious that the outlining of a district for the purpose of applying therein certain rules and regulations under which the citizens of the whole state and of an adjoining state will reap an unqualified and direct benefit is not the creation of a political subdivision. No power to tax is granted, no governmental authority is bestowed. . . . The sole power granted to the joint board of managers . . . is to do only what any private corporation may do, . . . not for private gain, but for the welfare and progress of the community."⁸⁵

This same reasoning would logically apply to the education compact. However, such a point goes to the constitutionality of the compact *per se*, and not to its sufficiency under the equal protection clause. It may well be that, even if the Court holds that the regional school is a "state" institution, it may also hold that such a school is not within the jurisdiction of the state in the sense in which "jurisdiction" was used in the *Gaines* case. The laws of each of the states would operate upon the regional institution, but in an indirect manner. A state legislature can pass laws which may immediately affect its individual state schools; no such power exists where the regional schools are concerned. Legislative control over such schools must be exercised in concert with action by the other states concerned, and upon recommendation of the Board of Control.⁸⁶ This may well be the point on which the decision of the Court on the question of equal protection will turn.

It is possible that the Court would consider an argument that the regional school meets the requirements of equal protection because it is supported by taxation levied in the same way and within the same territorial limits as exist for the white schools; that the schools are established by acts of the state legislature in the same way that the white state schools are established; and that the protection of state laws administered by the Board of Control for Southern Regional Education is equivalent to the protection of such laws administered by the state Board of Education.

The purpose of the foregoing paragraphs is not to argue that the regional

83. *Gilbert v. Moline Water Power & Mfg. Co.*, 19 Iowa 319, 322 (1866).

84. For the history of this compact see Frankfurter and Landis, *supra* note 18 at 746; Note, 34 V.A. L. REV. 64, 70 (1948).

85. *City of New York v. Willcox*, 115 Misc. 351, 189 N. Y. Supp. 724, 727 (Sup. Ct. 1921).

86. Appendix, *infra*, ¶¶ 5, 6.

schools do meet the requirements of the *Gaines* and *Sipuel* cases. It is rather to show that the Court could reach such a conclusion if it feels that the projected plan in fact offers substantially equal schools. As has already been stated, the Court has tended to consider factual results rather than technical and sometimes meaningless legal considerations in reaching its decisions. If this tendency manifests itself when the Court passes upon the regional school in the light of the equal protection requirement, it may well be that the Court will hold that the requirement is satisfied. It is noteworthy that the project is not an attempt on the part of the Southern states to deny to the Negro an educational opportunity. The spirit of this plan is radically different from the various schemes devised to deny the Negro the right to participate in his own government.⁸⁷ It represents a real advance over existing opportunities for the Negro. If it had been established before the *Sipuel* case occasioned renewed publicity on the problem, it might well have been hailed from all sides as a statesmanlike project instead of being attacked in some quarters as an attempt to perpetuate discrimination.⁸⁸ The Court, then, may let nice questions of theoretical equality yield to the concrete facts of substantially equal opportunity as established by the regional plan.

POSSIBLE ALTERNATIVE SOLUTIONS

If the Court holds that the regional schools will not meet the requirements of the equal protection clause so long as white state universities exist, this need not mean the end of the program. One solution would be to place all professional schools in the South on a regional basis as provided in the compact. This would remove all question as to the equality of opportunity provided by the states, save for the possible question arising from the variations in the distances which a particular student would have to travel to reach his segregated school.⁸⁹

Even if the present white state schools retain their individual state character, and if the regional school for Negroes is held not to be equal in opportunity, the regional school may still prosper. If enforced segregation were declared unconstitutional, or if the states voluntarily opened their uni-

87. See note 45 *supra*.

88. The regional plan is not a sudden device to attempt to "get around" the *Sipuel* case. It was suggested as early as 1934 by the then Governor-Elect of South Carolina, Olin D. Johnson, at a conference of Southern Governors and President Franklin D. Roosevelt at Warm Springs, Ga. Letter from Senator Olin D. Johnson to VANDERBILT LAW REVIEW, March 23, 1948. The sudden revival of the plan was not prompted by the *Sipuel* case, but rather by the dire financial straits of Meharry Medical College, Nashville, Tennessee. Nashville Tennessean, March 31, 1948, p. 13, col. 1-2. The importance of Meharry to Negro medicine is discussed in Pringle & Pringle, *The Color Line in Medicine*, 220 SAT. EVE. POST, No. 30, pp. 15, 70 (Jan. 24, 1948). Gov. McCord of Tennessee took the active lead in arranging for the Southern states to take over Meharry, and this college is the only one specifically mentioned in the compact. Appendix, *infra*, ¶ 2.

89. See text to notes 69-70, *supra*.

versities to both races, these universities could not accept all Negroes who were qualified. It is common knowledge that only a small percentage of qualified applicants can be admitted into the various medical schools of the nation. These schools naturally select the applicants with the best scholastic records. Past discrimination against the Negro in his undergraduate opportunity is certain to handicap him in his contest with the white applicants for the limited space available in the state universities. The excess number, duly qualified but relatively too low on the list to gain admission to the state university, would still be able to get their training in the regional school, *provided that the Negroes were not still confronted with whites who would tend to squeeze them out of the regional schools also.*⁹⁰ If segregated regional schools existed, this danger would not be present. And, besides those who failed to gain admission to the state schools there would be many of those who could have been admitted who would prefer to attend the regional school where they could be a part of the school activities, both professional and social. Only a theorist wholly divorced from reality would deny that the Negro student who enrolls in a previously segregated Southern "white" school will find himself set apart socially. That such a situation might gradually disappear would be small comfort to the individual who was faced with it in its most extreme form.⁹¹ Thus, so long as the regional segregated school is not declared to be unconstitutional *per se*, it may flourish as equal opportunity in fact, to go along with the equality in theory which the Supreme Court may establish by holding that Negroes must be admitted to an individual state institution or to the existing white universities. Opposition to such a course might arise from the Negro organizations which have led the fights through the courts, but this opposition need not defeat the development of the regional schools to a position of prestige and importance in the area. Such a development would save the legal right of the Negro, provide him with educational opportunity, and minimize the friction which will inevitably follow any substantial disruption of the established racial pattern in the South. Should such a system develop it might also solve many of the problems of federal aid to state education, since the right of the Negro to schooling within the state would be recognized by all

90. In the Northern medical schools which have no segregation rule, the percentage of Negro students is almost negligible. Eighty-five colored students are currently enrolled in twenty Northern and Western schools as against 25,000 whites. Eighteen Negroes have graduated from Philadelphia's five medical schools in the last 27 years. Fewer than 50 Negroes graduated from the medical schools in New York City from 1920 to 1942. Pringle & Pringle, *supra* note 88, at 16.

91. In the *Sweatt* case the trial court refused to admit evidence that Donald Murray, the Negro man who was admitted to the law school of the University of Maryland as a result of the case of *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936), was not ostracized or segregated by his fellow students. This ruling was upheld on appeal. *Sweatt v. Painter*, No. 9684, Tex. Civ. App. (1948). Some twenty persons are now studying law in the University of Maryland as a result of the *Murray* case. Levin, *The Legal Basis for Segregated Schools in Maryland*, 16 J. OF NEGRO ED. 491 (1947).

concerned, and there would be nothing except a social bar to the realization of full equality. The opposition of the Negro to laws which deny him the opportunity for equality is understandable and in fairness cannot be condemned. The insistence upon the destruction of social differentiations by means of legislation or judicial interpretation may be open to vigorous objection on the part of those whose sense of fairness and history is mature.

CLYDE L. BALL

Appendix

[1] WHEREAS, The States who are parties hereto have during the past several years conducted careful investigation looking toward the establishment and maintenance of jointly owned and operated regional educational institutions in the Southern States in the professional, technological, scientific, literary and other fields, so as to provide greater educational advantages and facilities for the citizens of the several States who reside within such region; and

[2] WHEREAS, Meharry Medical College of Nashville, Tennessee, has proposed that its lands, buildings, equipment, and the net income from its endowment be turned over to the Southern States, or to an agency acting in their behalf, to be operated as a regional institution for medical, dental and nursing education upon terms and conditions to be hereafter agreed upon between the Southern States and Meharry Medical College, which proposal, because of the present financial condition of the institution, has been approved by the said States who are parties hereto; and

[3] WHEREAS, The said States desire to enter into a compact with each other providing for the planning and establishment of regional educational facilities;

[4] NOW, THEREFORE, in consideration of the mutual agreements, covenants and obligations assumed by the respective States who are parties hereto (hereinafter referred to as "States"), the said several States do hereby form a geographical district or region consisting of the areas lying within the boundaries of the contracting States which, for the purpose of this compact, shall constitute an area for regional education supported by public funds derived from taxation by the constituent States for the establishment, acquisition, operation and maintenance of regional educational schools and institutions for the benefit of citizens of the respective States residing within the region so established as may be determined from time to time in accordance with the terms and provisions of this compact.

[5] The States do further hereby establish and create a joint agency which shall be known as the Board of Control for Southern Regional Education

(hereinafter referred to as the "Board"), the members of which Board shall consist of the Governor of each State, ex officio, and two additional citizens of each State to be appointed by the Governor thereof, at least one of whom shall be selected from the field of education. The Governor shall continue as a member of the Board during his tenure of office as Governor of the State but the members of the Board appointed by the Governor shall hold office for a period of five years except that in the original appointment one Board member so appointed by the Governor shall be designated at the time of his appointment to serve an initial term of three years, but thereafter his successor shall serve the full term of five years. Vacancies on the Board caused by death, resignation, refusal or inability to serve, shall be filled by appointment by the Governor for the unexpired portion of the term. The officers of the Board shall be a Chairman, a Vice Chairman, a Secretary, a Treasurer, and such additional officers as may be created by the Board from time to time. The Board shall meet annually and officers shall be elected to hold office until the next annual meeting. The Board shall have the right to formulate and establish by-laws not inconsistent with the provisions of this compact to govern its own actions in the performance of the duties delegated to it including the right to create and appoint an Executive Committee and a Finance Committee with such powers and authority as the Board may delegate to them from time to time.

[6] It shall be the duty of the Board to submit plans and recommendations to the States from time to time for their approval and adoption by appropriate legislative action for the development, establishment, acquisition, operation and maintenance of educational schools and institutions within the geographical limits of the regional area of the States, of such character and type and for such educational purposes, professional, technological, scientific, literary, or otherwise, as they may deem and determine to be proper, necessary or advisable. Title to all such educational institutions when so established by appropriate legislative actions of the States and to all properties and facilities used in connection therewith shall be vested in said Board as the agency of and for the use and benefit of the said States and the citizens thereof, and all such educational institutions shall be operated, maintained and financed in the manner herein set out, subject to any provisions or limitations which may be contained in the legislative acts of the States authorizing the creation, establishment and operation of such educational institutions.

[7] The Board shall have such additional and general power and authority as may be vested in it by the States from time to time by legislative enactments of the said States.

[8] Any two or more States who are parties of this compact shall have the right to enter into supplemental agreements providing for the establishment,

financing and operation of regional educational institutions for the benefit of citizens residing within an area which constitutes a portion of the general region herein created, such institutions to be financed exclusively by such States and to be controlled exclusively by the members of the Board representing such States provided such agreement is submitted to and approved by the Board prior to the establishment of such institutions.

[9] Each State agrees that, when authorized by the Legislature, it will from time to time make available and pay over to said Board such funds as may be required for the establishment, acquisition, operation and maintenance of such regional educational institutions as may be authorized by the States under the terms of this compact, the contribution of each State at all times to be in the proportion that its population bears to the total combined population of the States who are parties hereto as shown from time to time by the most recent official published report of the Bureau of Census of the United States of America; or upon such other basis as may be agreed upon.

[10] This compact shall not take effect or be binding upon any State unless and until it shall be approved by proper legislative action of as many as six or more of the States whose governors have subscribed hereto within a period of eighteen months from the date hereof. When and if six or more States shall have given legislative approval to this compact within said eighteen months period, it shall be and become binding upon such six or more States 60 days after the date of legislative approval by the sixth State and the governors of such six or more States shall forthwith name the members of the Board from their States as hereinabove set out, and the Board shall then meet on call of the governor of any State approving this compact, at which time the Board shall elect officers, adopt by-laws, appoint committees and otherwise fully organize. Other States whose names are subscribed hereto shall thereafter become parties hereto upon approval of this compact by legislative action within two years from the date hereof, upon such conditions as may be agreed upon at the time.

[11] After becoming effective this compact shall thereafter continue without limitation of time provided, however, that it may be terminated at any time by unanimous action of the States and provided further that any State may withdraw from this compact if such withdrawal is approved by its legislature, such withdrawal to become effective two years after written notice thereof to the Board accompanied by a certified copy of the requisite legislative action, but such withdrawal shall not relieve the withdrawing State from its obligations hereunder accruing up to the effective date of such withdrawal. Any State so withdrawing shall ipso facto cease to have any claim to or ownership of any of the property held or vested in the Board or to any of the funds of the Board held under the terms of this compact.

[12] If any State shall at any time become in default in the performance of any of its obligations assumed herein or with respect to any obligation imposed upon said State as authorized by and in compliance with the terms and provisions of this compact, all rights, privileges and benefits of such defaulting State, its members on the Board and its citizens shall ipso facto be and become suspended from and after the date of such default. Unless such default shall be remedied and made good within a period of one year immediately following the date of such default this compact may be terminated with respect to such defaulting State by an affirmative vote of three-fourths of the members of the Board (exclusive of the members representing the State in default), from and after which time such State shall cease to be a party to this compact and shall have no further claim to or ownership of any of the property held by or vested in the Board or to any of the funds of the Board held under the terms of this compact, but such termination shall in no manner release such defaulting State from any accrued obligation or otherwise effect this compact or the rights, duties, privileges or obligations of the remaining States thereunder.

[13] IN WITNESS WHEREOF this compact has been approved and signed by the Governors of the several States, subject to the approval of their respective legislatures in the manner hereinabove set out, as of the 8th day of February, 1948.

[SIGNATURES OF STATE GOVERNORS OMITTED]