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Comments

THE CONSTITUTIONALITY OF THE PROPOSED REGIONAL SCHOOL*

During the second session of the Eightieth Congress just recently adjourned, resolutions were introduced in both the Senate¹ and House of Representatives²

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*This comment is the outgrowth of the writers’ work on the final argument in the annual Case Club Competition at the University of Missouri Law School.
1. S. J. Res. 191.
seeking congressional approval of a compact on regional education entered into between the Southern States at Tallahassee, Florida, on February 8, 1948. The resolutions were referred to the respective Committees on the Judiciary. The House passed its resolution on May 4. The Senate committee reported its resolution on April 13, but no further action was taken.

Although congressional approval was not secured at this session of Congress, the matter is merely held in abeyance and will have to be disposed of in the near future. Not only is the proposal a very controversial political and social issue, but, if approved, it will present significant constitutional questions as well. This comment will review some of the history behind the proposal and the constitutional issues which it involves.

A regional approach to problems has been widely advocated for a generation, and higher education is one of the fields which has been recognized as needing such an approach. The rapid increase in the demand for various types of technical and professional training following World War II has made this need imperative. Such types of education are the most expensive of all, while the demand for any one particular type is limited, especially within each state. By combining, it will be feasible for a group of states to provide public-supported training in many fields which it would otherwise be impossible for each state to enter. This was predicted in the report of the National Resources Committee made in December, 1935, entitled "Regional Factors in National Planning," where the following was said (page 35):

"As students of administration come to be more clearly aware of the minimum tax base, population and size of area required for the best public services, we may find that it is desirable to establish for a group of States a single system of hospitals, institutions of higher learning, and other public services in which the quality of service is partly dependent on having a sufficiently numerous group to warrant classified and specialized services."

The particular proposal for which congressional approval was sought came from the Southern States. Such a plan had long been under consideration by them. It became an urgent problem when Meharry Medical College at Nashville, Tennessee, found itself in dire financial straits and offered to turn over its plant and the income from its endowments to the Southern States jointly if they

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3. For the complete text of the compact, see the appendix at the close of this comment.
4. 94 Cong. Rec. 5407 (May 4, 1948).
5. 94 Cong. Rec. 4474 (April 13, 1948).
6. For a recent treatment of the subject see the comment entitled Constitutionality of the Proposed Regional Plan for Professional Education of the Southern Negro, 1 VANDERBILT L. REV. 403 (1948).
7. An exhaustive study of the regional approach to problems in the Southern States may be found in ODOM, SOUTHERN REGIONS (1936).
8. See 1 VANDERBILT L. REV. 403, 419, n. 88 where it is noted that the plan was suggested as early as 1934 by the then Governor-elect of South Carolina, now Senator, Olin D. Johnston. For an account of the development of the proposal see the statement by Governor Caldwell of Florida at the hearings before the Committee on the Judiciary of the United States Senate on S. J. Res. 191, 80th Cong., 2nd Sess., March 12, 1948.
would agree to finance and operate it. A definite agreement was reached on such a course of action by the Conference of Southern Governors in October, 1947. Then at a meeting of the Conference at Tallahassee, Florida, on February 7 and 8, 1948, a compact was approved and an agency known as the Board of Control for Southern Regional Education was created to submit plans and recommendations to the several states for appropriate regional action looking toward the establishment and maintenance of educational institutions within the regional area. A motion was also approved creating a Regional Council to be composed of the governor and two designees from each of the compacting states to make a thoroughgoing survey of higher education in the signatory states. The Council at a subsequent meeting directed the creation of a non-profit corporation known as the “Regional Council for Education” to carry out its work, and a corporate charter was issued under the laws of Florida.

The proposed compact makes no mention of segregation, and presumably will result in regional cooperation in the establishment of schools for both whites and negroes. However, its proposal at this time by a group of Southern states has led to an attack upon it by many groups which advocate the total abolition of segregation. They contend that it will act as a “crutch” for segregation in states which are now faced with the problem of establishing expensive professional and technical schools as a result of the decisions of the Supreme Court in the Gaines and Sipuel cases. They also contend that a compact dealing with a subject of this type does not need congressional sanction, and that, therefore, the resolution is an attempt to bolster the position of any regional school established by securing congressional approval of what is “obviously” a plan to perpetuate segregation.

This comment will not deal with the social and political aspects of the problem other than to present the foregoing background material. However, the

9. See the remarks of Representatives Herter and Priest before the House of Representatives. 94 Cong. Rec. 5400-5402 (May 4, 1948).
10. This account is taken from the statement of Governor Caldwell. See n. 8, supra.
11. Statements in opposition to the proposal were made to the Committee on the Judiciary of the Senate by the following: The Fair Practices and Anti-Discrimination Department of the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America; Mr. George L. P. Weaver, Director, CIO Committee to Abolish Discrimination; Mr. Thurgood Marshall, Special Counsel, National Association for the Advancement of Colored People; and the National Lawyers Guild.
12. These arguments were expounded at length by Representative Powell in his remarks to the House during debate on the proposal (94 Cong. Rec. 5401, May 4, 1948) and by Mr. Thurgood Marshall, Special Counsel, National Association for the Advancement of Colored People, in his statement to the Senate Committee. For the basis for the argument that “the consent of Congress is required only when the program of the compacting states impinges on interstate commerce or some other federal province, or alters the distribution of political power among the states,” see 2 Story, Commentaries on the Constitution (5th ed. 1891) §§ 1402, 1403; Virginia v. Tennessee, 148 U.S. 503, 518-520 (1892); Louisiana v. Texas, 176 U.S. 1, 17 (1900); Wharton v. Wise, 153 U.S. 155, 170 (1894); Rhode Island v. Massachusetts, 12 Pet. 657, 726 (U.S. 1838).
only school specifically mentioned in the proposed compact is Meharry Medical College, a Negro school. It is quite probable, therefore, that if the plan is carried out either with or without congressional approval, the first regional school will be a separate one for Negroes. The establishment of such a school would once again present the problem of the constitutionality of a classification on the basis of race, and an entirely new and novel question of equal protection. The remainder of this comment will be confined to these two aspects of the proposal.

**Is a Classification on the Basis of Race a Denial of Equal Educational Rights?**

The constitutionality of segregation, leaving for later consideration any question of actual equality of treatment, rests upon whether or not a classification on the basis of race is reasonable. Certainly classification, in itself, does not deny equal protection. That has been many times held by the Supreme Court in widely differing fields. But the classification to be valid must have a foundation in fact. It must be grounded in practical necessity, and reasonably calculated to achieve the desired end.  

A classification on the basis of race for purposes of education has been upheld by an unbroken line of decisions beginning shortly after the adoption of the Fourteenth Amendment and continuing to the present day. However, the great

13. Numerous cases so holding are collected in U. S. Sup. Ct. Digest, Constitutional Law, §§ 209 and 211.

14. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927); Wong Him v. Callahan, 119 Fed. 381 (C.C.N.D. Cal., 1902); United States v. Buntin, 10 Fed. 730 (C.C.S.D. Ohio, 1882); Bertonneau v. Board of Directors of City Schools, 3 Fed. Cas. 294, No. 1,361 (C.C.D. La., 1878); Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912); Ward v. Flood, 48 Cal. 36 (1874); Cory v. Carter, 48 Ind. 327 (1874); Lehew v. Brunnell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891); People ex rel. King v. Gallagher, 93 N.Y. 438 (1883); State ex rel. Garnes v. McCann, 21 Ohio St. 198 (1871). A complete classification and analysis of the court decisions down to 1935 may be found under the title The Present Status of the Negro as Defined by Court Decisions, by Gladys Tignor Peterson in 4 J. of Negro Ed. 351 (1935). At that time, where the question was solely one of constitutionality of segregation, and not one of equal facilities or action unauthorized by statute, the cases had unanimously (44) upheld the constitutionality of the separate school. A more recent article by the Dean and one of the Instructors in Law at Howard University containing a careful analysis primarily concerned with the decisions of the Supreme Court of the United States is Johnson and Lucas, The Present Legal Status of the Negro Separate School, 16 J. of Negro Ed. 280 (1947). The most recent Supreme Court decision in the case of Sipuel v. Board of Regents, 68 Sup. Ct. 299 (1948) adds nothing to this phase of the problem. However, the recent case of Mendez v. Westminster School Dist., 64 F. Supp. 544 (S.D. Cal. 1946) may be an exception. Three persons of Mexican or Latin descent were segregated purportedly because of a special linguistic problem. The district court held this was an arbitrary discrimination which violated the equal protection clause of the federal constitution as well as the state code and constitution. The court said: "Our conclusions in this action, however, do not rest solely upon what we conceive to be the utter irreconcilability of the segregation practices in the defendant school districts with the public educational system authorized and sanctioned by the laws of the State of California. We think such practices clearly and unmistakably disregard rights
majority of the decisions have been by state and lower federal courts. The problem has been rarely considered by the Supreme Court of the United States. Surprisingly enough, segregation in education formed a basis for the court's approval of segregation in other fields before it was ever considered in education itself. In 1896 the Supreme Court in the leading case of *Plessy v. Ferguson*

laid down the so-called "separate but equal" doctrine. The case involved the constitutionality of a Louisiana statute which required all railways carrying passengers in the state to maintain equal but separate facilities for whites and Negroes, and made it a misdemeanor for a member of one race to insist on going into a coach set aside for the other. In upholding the validity of the statute the court said:

"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, 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."

In two cases involving public schools the court has seemingly approved segregation: *Gong Lum v. Rice* and *Missouri ex rel. Gainès v. Canada*.

Each time, however, it did so rather summarily and without any discussion of the matter on its merits. In the *Gong Lum* case, Martha Lum, a Chinese girl, had been excluded from attending a certain public school solely on the ground that she was of Chinese descent, and not a member of the white race. Her father sought a writ of mandamus to compel her admission, contending that a refusal of admission was a denial of equal protection. The court said:

"Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state Legislature to settle, without intervention of the federal courts under the Federal Constitution."

secured by the supreme law of the land." However, when the decision was affirmed (Westminster School Dist. v. Mendez, 161 F. 2d 774 (C.C.A. 9th, 1947)), the court specifically refused to base its decision on the ground of segregation per se although urged to do so by various *amicus curiae*, and relied wholly on the legislation of the state.

16. 163 U.S. 537 (1896).
17. Id. at 544.
18. 275 U.S. 78 (1927).
20. 275 U.S. at 86.
Then in the celebrated *Gaines* case when the relator was seeking admission to the law school of the University of Missouri after being denied permission on account of his race, the court said:

"... the state court has fully recognized the obligation of the state to provide Negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. (Citing the case of *Gong Lum v. Rice*, supra, among others)."

These two rather laconic pronouncements constitute the extent of the pertinent language that can be found in the decisions of the Supreme Court.

It might be contended that whenever the court has dealt with the question of equality of facilities it has tacitly approved the "separate but equal" doctrine, since if the very basis of the classification was unsound there was no necessity to consider the rather difficult question of fact as to whether the facilities accorded one race were substantially equal to those accorded the other. On the other hand, it might just as reasonably be contended that the ultimate question of the validity of segregation need not be considered unless equal facilities are accorded; that no classification of any sort is justified unless equal facilities are accorded.

Although the Supreme Court has never discussed the matter at length, a number of the state decisions have done so. It is beyond the scope of this comment to repeat at any length the various reasons advanced justifying a classification in the field of education on the basis of race. The most frequent reason met with in the decisions is race prejudice. Other decisions emphasize the peculiar characteristics

21. 305 U.S. at 344.
22. See the cases cited in n. 14, *supra*.
23. The following are representative quotations: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded on a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon. . . ." Ward v. Flood, 48 Cal. 36, 56 (1874). "In the nature of things, there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result. . . . As to whether such intercourse shall ever occur must eventually depend upon the operation of natural laws and the merits of individuals, and can exist and be enjoyed only by the voluntary consent of the persons between whom such relations may arise, but this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon which they are designed to operate." People ex rel. King v. Gallagher, 93 N.Y. 438, 448 (1883). For a forceful exposition of this aspect of the problem by a prominent Negro educator see DuBois, *Does the Negro Need Separate Schools?* 4 J. OF NEGRO ED. 328 (1935).
and special needs of each race although these are not so common in recent years as formerly, and still others emphasize the furtherance of a public policy against miscegenation and destruction of racial identity. Most of the decisions emphatically state that the legislature must be given a large measure of discretion and that as long as any reasonable grounds for classification exist and substantial equality is maintained, its decision should not be disturbed. Against these arguments must be weighed the contentions that there is no basic difference between the races, that racism is alien to our entire philosophy of government, and, most frequently, that equality is impossible to attain in separate systems. This last argument takes two forms: (1) That eighty years of separate schools has proved to all but the most confirmed theorists that the dominant race will not provide equal facilities for the racial minority, and (2) that there is a psychological atmosphere created by "Jim-crowism" which produces an inferiority complex in the Negro and which prevents proper community evaluation of separate schools.

The declared position of the Supreme Court is still that evinced in the Gong Lum and Gaines cases. As such it is but a particular application of the "separate but equal" doctrine broadly laid down in the Plessy case. All the arguments

24. Note the following language by the Supreme Court of Missouri in Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 878 (1891): "But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations, recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage."

25. An example is Berea College v. Commonwealth of Kentucky, 123 Ky. 209, 94 S.W. 623 (1906).


27. See MONROE N. WORK, NEGRO YEAR BOOK, Tuskegee Institute, 1937-38, pp. 145-146.

28. Note the language of Mr. Justice Harlan dissenting in the Plessy Case (supra, n. 11, at p. 559): "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race." Quite recently in the case of Hirabayashi v. United States, 320 U.S. 81, 100 (1943), we find the following: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

mentioned in the preceding paragraph will be urged upon the court in cases involving separate schools in the future. Up to now the court has preferred to decide such cases on the basis of inferiority of facilities furnished, even though it has been urged to rule that a classification on the basis of race is improper. However, in recent years the court has been especially critical of racial distinctions. Some of the pronouncements indicate that individual justices at least are willing to rule out considerations of race in any type of legislation. One can only conjecture as to what will be the decision in the field of education involving as it does some of the most intimate of human relations.

The question of segregation will remain the same whether the separate school is a regional school or a state school. Admittedly both will fall if classification on the basis of race is found to be arbitrary and unreasonable. The regional school proposal is novel only insofar as it presents a new problem in equal protection, and the remainder of this comment will be devoted to a consideration of that problem.

DOES THE COMPACT SCHOOL PROVIDE THE NEGRO WITH EQUAL PROTECTION

If segregation by races in higher education is consistent with equal protection, there still remains the question of whether a state, which maintains a state university for white students, provides the Negro with equal protection of its laws with a regional university which is maintained by it and other states by the means of a compact. It would seem from both the cases on segregation and

30. Counsel for the petitioner so urged in argument in the Sipuel case. N. Y. Times, Jan. 8, 1948, p. 23, col. 5; St. Louis Post-Dispatch, Jan. 8, 1948, p. 7C, col. 3; Id., Jan. 13, 1948, p. SC, col. 1. The rather summary fashion in which the court dealt with the matter in the Gong Lum and Gaines cases discussed earlier in this comment is typical. This reluctance was also noted in Johnson and Lucas, supra, n. 14.

31. Pertinent instances are Smith v. Allwright, 321 U.S. 649 (1944) (primary elections); Morgan v. Virginia, 328 U.S. 373 (1946) and Bob-Lo Excursion Co. v. People, 68 Sup. Ct. 358 (1948) (both involving transportation); Oyama v. State of California, 68 Sup. Ct. 269 (1948) (California Alien Land Laws); Shelley et ux. v. Kraemer, et ux., 68 Sup. Ct. 836 (1948) (restrictive covenants against ownership or occupancy of property by Negroes). In every one of the foregoing cases alleged discriminations were struck down.

32. See n. 28, supra. Also note the following: "If there is any one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups." Mr. Justice Black, with whom Mr. Justice Douglas agreed, concurring in Oyama v. State of California, 68 Sup. Ct. 269, 276. "The Constitution of the United States, as I read it, embodies the highest political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs. It thus renders irrational, as a justification for discrimination, those factors which reflect racial animosity." Mr. Justice Murphy, with whom Mr. Justice Rutledge agreed, concurring in the Oyama case. (68 Sup. Ct. at 284.)

the cases in other fields where the Supreme Court has held classification consistent with equal protection, that the answer to this question would depend upon whether the state provides the Negro at the compact university with substantially the same thing as it provides for the white student at the state university. Classification necessarily results in some discrimination, and the most that can be obtained under a system of segregated education is substantial equality. In fact, with the present trend toward larger schools it might reasonably be thought by some that such university facilities for the two races is a discrimination against the white students. However, the problem will be dealt with here primarily from the standpoint of the Negro, on the assumption that it is most likely to be attacked from that angle.

Only the factors of discrimination that necessarily result from the fact that the Negro school is a compact university while the white school is a state university will be considered here. So, for this discussion it will be assumed that the regional school provides, as far as it is practical and at the same cost to the student, the same facilities and training as the various state universities. Perhaps, however, it is advisable and constitutional to offer, in some cases, a different training for the Negro from that provided for the white students.

It might be impractical to provide the same type of training in some fields of study at the regional school as at the various state universities. For example, most of the state law schools stress the law of that state, and since the regional school accommodates several states the same amount of emphasis on the law of the student's home state could not be given, and such a difference in the training provided might amount to a denial of equal protection. However this discrimination could be eliminated by each of the state schools making their program of study conform with that of the regional school.

The greater distance from the homes of the Negro citizens of a particular state to the regional school from that of the white citizens to the state university might be held to be unreasonable discrimination. But the state courts have consistently held that it is not unreasonable discrimination for the Negro students of the lower school levels to be required to travel a mile or two farther to school than the white students, and that such discrimination is a mere necessary incident of segregation. Although the difference in distance to the regional school is much greater, almost all college students live away from home, and with modern methods

34. Numerous cases are collected in U. S. Sup. Ct. Digest, Constitutional Law, § 211.
36. See note 24, supra; Du Bois, supra, note 23.
37. State ex rel. Garnes v. McCann, 21 Ohio St. 198 (1871); Cory v. Carter, 48 Ind. 327 (1874); People ex rel. King v. Gallagher, 93 N.Y. 438 (1883); Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891) (two miles for white children and 3½ miles for Negroes); Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912); Wright v. Board of Education, 129 Kan. 852, 284 Pac. 363 (1930); see United States v. Buntin, 10 Fed. 730 (C.C.S.D. Ohio 1882) (left to jury to determine if 5 miles for Negro children to travel to school was unreasonable, where white children traveled 3 miles.
of communication and transportation any difference in distance as long as the school is within the United States would seem not to be unreasonable and oppressive. It might be necessary, however, to provide the negro student with funds for the difference in transportation cost.

The two schools result in certain discriminations which, in view of the case of State of Missouri ex rel Gaines v. Canada\(^\text{38}\) the Supreme Court might hold is a denial of the Negro by his state of equal protection of its laws. As stated heretofore,\(^\text{39}\) whether or not these discriminations are a denial of equal protection should depend upon whether the discriminations are unreasonable and arbitrary, or in other words, whether the laws of the individual state are treating its Negro citizens substantially the same as its white citizens. With the exception of the Gaines case, the cases are in accord that once it is determined that a classification is reasonable and permissive, equal protection does not require equal treatment but merely substantially equal treatment. In the Gaines case, the State of Missouri maintained a law school at the University of Missouri, while providing none for Negroes at Lincoln University, the state Negro college. However, under a statute the Board of Curators of Lincoln University were authorized to arrange for Negro students to attend one of the state law schools of an adjacent state, with the State of Missouri paying their tuition. Gaines, a Negro, sought to compel the University of Missouri to admit him to the Law School on the grounds that the provision in the Missouri Statute did not provide him with equal protection of the laws. Some of the adjacent state universities were willing to admit him to their law schools. There was an attempt to show that these law schools did not provide the same type of education as did the Law School of the University of Missouri, that there were other disadvantages in attending school outside the state, and certain advantages in attending school at the University of Missouri. The United States Supreme Court, reversing the Missouri Supreme Court,\(^\text{40}\) held that the tuition plan did not provide Gaines with equal protection of the laws, stating that the relative advantages of the Missouri Law School and the law schools of the adjacent states were beside the point. As stated above,\(^\text{41}\) the Court reaffirmed the constitutionality of segregation, and just why Gaines was denied equal protection of the laws is not entirely clear from the opinion. The opinion rapidly shifts from one objection to another, without pointing out how any of the discriminations were material or substantial, and it is difficult to determine whether the Court was holding that these discriminations were unreasonable, substantial, and arbitrary or whether no differences at all between what the state provides for the Negroes and for the whites is permissible.\(^\text{42}\) If the holding was the latter, a regional school for Negroes,
where the state maintains a state university for white students, would not provide the Negro with equal protection of the laws. The Court pointed out the following discriminations: 1) Missouri was providing a legal education for white students while under the Missouri statute other states would provide it for the negroes; 2) the Missouri law did not assure the negro an education, but his right to attend school depended on "what another state may do or fail to do"; 3) "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"; and 4) "The white resident is afforded legal education within the State; the negro resident . . . must go outside the State to obtain it."

Even under the Missouri law the first two discriminations would seem to be of little importance, and perhaps with a compact university for the negro they do not exist at all. If Missouri was paying for the education of its negro citizens at a non-state owned institution, while providing the same education at a state institution there would appear to be no substantial or material discrimination. If from a practical standpoint the Court thought a school owned and operated by a state agency would provide a different education from that of a school over which the state or its citizens had no control, at least part of that defect would not be present with a compact or regional school. Each state in the compact would be represented on the Board of Regents, and through that representation the state would be active in managing, operating and determining the policies of the school. The property would be owned by the Board of Regents, which is a public agency deriving its powers and authority from the laws of each of the states of the compact. The school would in fact be a public institution of the state.

Furthermore, the negro citizen's right to attend the regional school will not depend upon the will of another state. Compacts are contracts of a quasi-international status, resting on the international law of treaties, and are statutory law of all the states to the compact. They cannot be repudiated by a single signa-


44. Even under the Missouri statute it would seem that Gaines would not have been denied equal protection until the adjacent state universities had refused to accept him. See People of the State of New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552 (1905).


tory,47 and are enforceable among the states by an action in the United States Supreme Court,48 although it has not been fully determined that a decree against a state can be effectively enforced.49 The citizen could maintain a mandamus suit against the Board of Regents in the state courts.50

It is not entirely clear just what the Court meant by saying that “the obligation of a state to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction.” Since it is closely followed with objections to the fact that Gaines’ education under the Missouri statute depended upon the conduct of another state, perhaps the court was dealing with that point—which has been considered heretofore. Perhaps the court was holding that if one school is in the jurisdiction the other one must also be there to be exactly equal, and that equal protection required equality. But certainly a state can hold property and provide facilities and opportunities for its citizens outside the state,51 although the state is a mere proprietor and its ownership is subject to any restrictions of the laws of the state where the property is located. And clearly state agencies can operate beyond the jurisdiction subject to the laws which created them. Where it is a matter of providing some facility for its citizens it would seem that a state could offer equal protection for its citizens outside the jurisdiction. It seems clear that if a state paid for the education of its white citizens at universities of other states, equal protection of the laws would require that Negroes at least be provided an education in a like manner, which indicates that equal protection of the laws in some cases can be given outside the jurisdiction. And more clearly the laws of a state can provide protection for its citizens beyond the jurisdiction by the means of a compact, which is statutory law of all the states to the compact52 and is enforceable against the other states and the citizens of all the compacting states.53

The other objection made by the Court, that it is a denial of equal protection for the Negro to be required to leave the state to get an education, while the white student is not, is perhaps a more real and substantial discrimination, and it also applies to the regional school. To be required to leave one's state to get an

47. Green v. Biddle, 8 Wheat. 1 (U.S. 1823); Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 (U.S. 1851); Id. 18 How. 421 (U.S 1855); Virginia v. West Virginia, 220 U.S. 1 (1910); Kentucky v. Indiana, 281 U.S. 163 (1930); See Rhode Island v. Massachusetts, 12 Pet. 657 (U.S. 1838).
51. Lester v. Jackson, 69 Miss. 887, 11 So. 114 (1892) (park); Haeussler v. St. Louis, 205 Mo. 656, 103 S.W. 1034 (1907) (bridge); McLaughlin v. City of Chattanooga, 180 Tenn. 638, 177 S.W. 2d 823 (1944) (airport); Mettet v. City of Yankton, 25 N.W. 2d 460 (S. Dak. 1946) (bridge).
52. See note 46, supra.
53. See notes 45, 47, 48, and 49, supra.
education, to be forced to live under a different sovereign and be protected by a
different government and laws—a government which the non-citizen Negro has no
part in selecting and controlling, and a set of laws which the Negro has not nor
cannot help make—might be such a discrimination as to deny equal protection of
the laws. But the courts have found no constitutional objection to two states by
compact placing a part of one state under the protection and government of the
laws of both states or even transferring a section of one state to the jurisdiction
of another state, and thereby requiring the citizens within that area to be gov-
erned by another sovereign. However, these concurrent jurisdictions or transfer
of jurisdiction were bodies of water and no citizen of a state was required to live
within another jurisdiction. But it would seem that requiring a citizen to live in
another jurisdiction, as long as it was one of the states of the Union, for the period
of time required to get a college education would not be such a substantial dis-

crimination as to deny him equal protection of the laws.

It has not been the purpose of the foregoing discussion to argue that the
compact-regional school is constitutional but rather to consider it in the light of
the equal protection provision of the Constitution and the decided cases. But if
segregation is permitted to continue the most that can be required is substantial
equality; and if a good faith attempt is made to provide the Negroes with a univer-
sity as good as that provided for the whites, the courts should not strike it down
due to discriminations that are immaterial. It is a well known fact that the
state colleges and universities now provided for the Negroes are not nearly so good
as provided for white students, and separate state universities are not solving
the problem. Of course if the regional university does not provide substantially
equal facilities and training as the state universities, the Negroes would be denied
equal protection of the laws. Perhaps the Negroes could more effectively force a
regional school to maintain a proper standard than they could a number of state
universities.

GEORGE E. ASHLEY
MURRY L. RANDALL

APPENDIX

TEXT OF THE PROPOSED COMPACT OF THE SOUTHERN STATES ON REGIONAL

EDUCATION

WHEREAS, The States who are parties hereto have during the past several
years conducted careful investigation looking toward the establishment and main-
tenance of jointly owned and operated regional educational institutions in the

54. Wedding v. Meyler, 192 U.S. 573 (1904); State v. Cunningham, 102
Miss. 237, 59 So. 76 (1912); See Wharton v. Wise, 153 U.S. 155 (1894).
55. People of New York v. Central R. R. Co. of New Jersey, 42 N.Y. 283
(1870), writ of error dismissed, 12 Wall. 455 (U.S. 1870); See Central R. R. Co.
56. The recent case of Sipuel v. Board of Regents of University of Oklahoma,
68 Sup. Ct. 299 (1948), adds nothing to the Gaines case.
57. See note 29, supra.

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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

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

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

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 purposes of this compact, shall constitute an area for regional education supported by public funds derived from taxation by the constituent States and derived from other sources 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.

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.

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.

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 United States.

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.

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.

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.

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.

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.

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.

By s/ ...........................................................

Governor

(Here follow signatures of the various compacting states by their respective governors.)
SEARCH AND SEIZURE AS INCIDENT OF LAWFUL ARREST

The vexing problem of unlawful search and seizure as an incident of arrest has again been raised by three recent decisions of the United States Supreme Court. The Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized." This, and the similar provisions of the constitutions of the several states, are the mandates against unreasonable searches and seizures. Search and seizure as incident to arrest are clearly unreasonable if the arrest is not lawful. And even though the arrest be lawful, the search or seizure or both may still be unreasonable because of the extent of the search or the nature of the article seized.

The background for the constitutional provisions is found in the history of English and Colonial searches. The Star Chamber in England originated the process of general warrants, issuable by the Secretary of State for searching private homes in order to discover and seize books and papers that might be used as evidence to convict the owners of libel, the chief political crime of the period. The American colonists suffered under equally odious legal processes called writs of assistance, whereby almost unlimited search and seizure was permitted in attempts to find evidence of smuggling. These writs of assistance were issued to revenue officers, empowering them, at their discretion, to search ships, warehouses, cellars, and homes for smuggled goods. The abuse to which these arbitrary warrants and writs were subject can be well imagined. James Otis, in 1761, referred to the writs of assistance as "the worst instrument of arbitrary power . . . ever was found in the English law book."

General warrants were finally abolished in England in 1766. The abolition was occasioned by two celebrated cases involving noted political figures of the time, the Wilkes case and Entick v. Carrington. In each of these cases there was a

4. Provided for in 13 & 14 Car. 2, c. 11 § 5.
6. As quoted in Cooley, Constitutional Limitations, 303 (1868).
7. 19 How St. Tr. 1405 (1765), discussed in Boyd v. United States, note 2 supra.
8. 19 How St. Tr. 1029 (1765), discussed in Boyd v. United States, note 2 supra.
general warrant issued for a search; and officers acting under the warrants searched the homes of Entick and Wilkes, seizing all books and papers. They brought civil actions for damages against the parties making the search and the Secretary of State who issued the warrants. Both were awarded large damages, and Lord Camden's forceful opinion in the Entick case hastened the abolition of the warrants. His opinion, the first to condemn the practice of unrestricted search and seizure, established the following propositions: (1) Indiscriminate search of a man's person or property is always illegal, (2) the search for, or the seizure of, a man's property which is merely evidence of crime or illegality is not proper, but (3) the search for and seizure of contrabrand or stolen goods, the possession of which is illegal, may be quite proper.

The abolition of general warrants was not followed by an elimination of the writs of assistance in the colonies, probably because they were used to find smuggled goods, the possession of which was illegal. But the colonists lost no time in declaring their dislike for the writ of assistance, against which the Fourth Amendment was aimed.

No search or seizure can be reasonable unless it be either in accordance with a valid search warrant or as an incident to lawful arrest; except that certain property may be searched on probable cause (as, during prohibition, the search of a vehicle by officers having probable cause to believe that the vehicle was being used in the transportation of liquor).9 Thus, where searches and seizures are attempted to be justified as an incident of lawful arrest, it is first necessary to determine whether the arrest was, in fact, lawful.10

Arrest under valid warrant for arrest is, of course, lawful. But for such warrant to be valid it must conform, insofar as federal law is concerned, to the portion of the Fourth Amendment which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing . . . the persons . . . to be seized." All states have substantially similar provisions. Probable cause does not require positive establishment of guilt, but only that there be sufficient facts in the oath or affirmation to satisfy the issuing officer that there has been a crime committed, and that the party against whom the warrant is issued probably committed the crime.11 In order for the warrant to be valid, and hence the arrest lawful; there are two additional requirements; the issuing officer must have the power to issue the warrant for the crime charged and to order the arrest of the person charged, and the warrant must be regular in

11. Ibid.
A satisfaction of all these requirements means that a search and seizure at the time of the arrest may be, but is not necessarily, lawful.

The more common situation is where the arrest is made without a warrant. This problem is raised in both the Di Re case and the Johnson case. The earliest federal law on the matter said that arrest for a federal offense must be "agreeably (sic) to the usual mode of process against offenders in such state" (i.e., state where the arrest was made). Though in certain specific instances the necessity of complying with the state law may be obviated, there has been no general federal rule for arrest without warrant for federal offenses. Thus, in most instances, we shall find ourselves looking to the law of the state where the arrest is made for a standard to determine the lawfulness of an arrest.

Any officer or private person could, under the common law, arrest without warrant for a felony committed in his presence. The statutory law of the various states has made no change in this. But as might be expected, the meaning of the rather artificial phrase "in his presence" is subject to varying interpretations. The usual limitation is to confine it to cases where the arresting party sees one or more of a series of acts which constitute a crime. Some, however, would extend it to situations where the crime is being committed "in the presence of" any of the senses. Definitely ruled out would seem to be arrests made without justification at the time, even though subsequent search uncovers proof that a crime was, in fact, being committed. Generally speaking, a police officer may arrest for any crime committed in his presence, whether it is such an offense as constitutes a breach of peace or not. Under the common law a private person could arrest for misdemeanors committed in his presence only if they were such as constituted a breach of the peace. The statutory law varies greatly. As for offenses committed other than in the presence of the arresting party, the common law rule seems to have been that an officer could arrest for a felony (but not a misdemeanor) if he had reasonable grounds to believe that the felony had been committed and that the person arrested committed it. A private person apparently could not act on the double suspicion, but could, if he knew the felony had been committed, arrest the party whom he reasonably suspected of the crime. Today we must look to the

21. Id. at 238.
22. Id. at 236, 239-40.
23. Ibid.
statutory law of the place where the arrest is made in order to determine under what circumstances arrest without warrant is allowed.

The most recent Supreme Court law on the problem of arrest without warrant is found in the cases of United States v. Di Re\textsuperscript{24} and Johnson v. United States.\textsuperscript{25}

Mr. Justice Jackson delivered the opinion in the Di Re case, with Mr. Chief Justice Vinson and Mr. Justice Black dissenting without opinion.

Informed by one Reed that he intended to buy counterfeit gasoline ration coupons from one Buttitta, an O.P.A. investigator (who had no power to make arrests) and a New York detective followed Reed to the designated meeting place, a parked motor car, and found Reed, Buttitta, and Di Re therein. Reed, sitting alone in the rear seat, and two counterfeit ration coupons in his hand. Buttitta and Di Re were arrested, cursorily searched, taken to the police station and booked. On further search at the police station, counterfeit coupons were found upon Di Re's person, concealed beneath his shirt. The arresting officers had no warrant for arrest and no search warrant. On the basis of the evidence found by the search, Di Re was indicted and convicted of possession of the forged coupons, a misdemeanor. His timely motion for suppression was denied. The court of appeals held the search and arrest invalid, and reversed,\textsuperscript{26} after which the Government was granted certiorari.\textsuperscript{27}

The Government contends that the search of Di Re was justified as an incident of his arrest, and Mr. Justice Jackson recognizes that if the arrest were justified then the right was conferred to search his person. But the warrant was not justified. Determination of the validity of the arrest without warrant depends upon the law of the state of New York, since Congress has enacted no rule to cover the type of case before the Court.\textsuperscript{28} Under New York law, arrest without warrant for a misdemeanor must be for one committed in the arresting officer's presence.\textsuperscript{29} The Government admits that Di Re was committing no misdemeanor in their presence at the time he was arrested. However, they now suggest that there was, at the time of the arrest, reasonable grounds to believe a felony had been committed by Di Re, thus justifying the arrest under the New York law.\textsuperscript{30} Examining the facts of the case, Mr. Justice Jackson finds no ground for saying that the arresting officer, at the time of the arrest, had probable cause for believing that Di Re had committed a felony. Reed, the informer, did not mention Di Re, but only Buttitta. The presence of Di Re in the car is not alone enough to say that the arresting officer reasonably believed, when he made the arrest, that Di Re possessed the coupons, knew of their counterfeit character, and intended to utter them as true; and these are the requisite elements of the felony which the Government suggested the Buffalo police officer had reasonable grounds to believe was being committed.

\begin{itemize}
\item 24. Supra, note 1.
\item 25. Supra, note 1.
\item 26. 159 F. 2d 818 (C.C.A. 2d 1947).
\item 28. See statutes, supra notes 15, 16.
\item 29. N.Y. CRIMINAL CODE § 177(2).
\item 30. \textit{Id.}, § 177(3).
\end{itemize}
The Johnson case found the court divided five to four, the dissent being without opinion. An officer of the Seattle police was informed that persons were smoking opium in a certain hotel. He and federal narcotic agents went to the hotel, and recognized the odor of burning opium coming from one of the rooms. They had no search warrant and no warrant for arrest. Admitted by the occupant after the Seattle officer had knocked and identified himself, they informed petitioner she was "to consider herself under arrest," and proceeded to search the room. The search uncovered opium, the possession of which is illegal, and pipes which were still warm. Petitioner was convicted of violation of the federal narcotics law, after an unsuccessful motion for the suppression of evidence, on the grounds that it was seized in contravention of the Fourth Amendment. After the conviction was affirmed by the circuit court of appeals, the Supreme Court granted certiorari.

The majority opinion was by Mr. Justice Jackson, and he overruled the Government's argument that the search and seizure was valid because the incident of lawful arrest. Being without a warrant for arrest, it is valid under Washington law only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty. The Government's unsuccessful argument was that, after they entered the room and found petitioner present, they then had probable cause for belief that she had been smoking opium and illegally possessed the opium. Admittedly, this claim is true. But the result of the reasoning is that the Government is attempting to justify the arrest by the search and the search by the arrest. Entry under color of office must have a valid basis at the time the entry is made. The Government admits that they did not have reasonable cause to believe the defendant guilty at the time they demanded entry to the room since they did not know who, if anyone, was in the room. There being no warrant for arrest or search, and there being no probable cause for believing petitioner guilty at the time of the entry, the entry was unlawful. This unlawful entry makes the arrest unlawful, hence the search and seizure had no justification and was unconstitutional. Mr. Justice Jackson points out that to rule otherwise would justify the arrest because of what was found, and justify the search that uncovered the narcotics because it was incident to the "lawful" arrest; and thus "reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

32. 162 F. 2d 562 (C.C.A. 9th 1947).
33. 68 Sup. Ct. 109 (1947).
34. State v. Symes, 20 Wash. 484, 55 Pac. 626 (1899). And see United States v. Die Re, supra note 1 for rule that law of state where arrest made without warrant determines validity of the arrest.
Certain conclusions are deducible from these two cases: (1) That except where there is a specific provision in the federal code, the arrest must be lawful according to the laws of the state where the arrest is made; 37 (2) that the phrase “in his presence” as applied to arrest without a warrant is confined to acts within the sense of sight and not within the sense of smell; 38 (3) that any search and seizure attempted to be justified as an incident of lawful arrest is unconstitutional if the arrest was not lawful, regardless of what the search uncovers; 39 (4) that any evidence so seized cannot be used after timely motion to suppress, even though it be something the possession of which is unlawful. 40

Once it is established that there is a lawful arrest, certain searches and seizures are undeniably proper as an incident to that lawful arrest. But the question remains as to the allowable scope of such search and seizure. Both the search and the seizure must be reasonable, since that is the requirement of the Fourth Amendment and the substance of the various state constitutions. And we are theoretically aided by the everpresent statement that the extent of the search and the propriety of the seizure must depend upon the peculiar facts of the case.

Though the law may have at one time been otherwise, it is now universally recognized that it is permissible to search the person of one lawfully arrested and seize all dangerous weapons, fruits and instrumentalities of crime, as well as evidence of the crime for which the arrest is made. 40a But the courts will not sanction purely exploratory searches of a person for evidence of a crime in general. 41 And materials discovered in such a search cannot justify an arrest solely on the strength of the evidence thus discovered. 42

The courts have also consistently recognized that a search contemporaneous with arrest may extend beyond the person to include the premises under his immediate control at the time of the arrest. 43 But once the search extends beyond this

37. Established in terms for the first time in United States v. Di Re, supra note 1.

38. The rule of the Johnson case, supra note 1 (somewhat weakened by the Government’s concession of this point without argument). The problem should soon be definitely disposed of by the Supreme Court in Trupiano v. United States, supra note 9 (where officers smelled mash cooking in a barn, arrested the persons therein, and seized the still). And see cases cited supra, note 19.


42. Note 39, supra.

43. Marron v. United States, supra note 41, as limited by Go-Bart Importing Company v. United States, supra note 41. (May seize those items which are “visible and accessible” and require no “rummaging of the place.”)
vague radius and becomes a general exploratory search, rather than the logical incident of the lawful arrest, the search becomes illegal. Even if the search remains within "the premises under his immediate control," the seizure may still be bad if the materials seized are not within the classes of things which may be seized on "the premises." The things which may be so seized include dangerous weapons, fruits and instrumentalities of crime, contrabrand and other items the possession of which is illegal, but do not include mere evidentiary material, even of the very crime for which the arrest is made.\textsuperscript{44} The justification for this holding is said to be that such items "could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were."\textsuperscript{45} That mere evidence of crime cannot be seized under a valid search warrant is verified by the provisions of Rule 41 of the Federal Code of Criminal Procedure, which Rule is said to be only a codification of existing law.\textsuperscript{46}

The dual problem of the extent of search and validity of seizure as incidents of lawful arrest was squarely presented to the Supreme Court in \textit{Harris v. United States}.\textsuperscript{47} The arrest of Harris was made in his three room apartment under valid warrants of arrest for forging and cashing a check. The arresting officers suspected that Harris had used genuine checks which had been stolen from an oil company for his model. For some five hours after the arrest, they thoroughly ransacked the apartment in search of these genuine checks. Toward the end of the search, the agents found an envelope marked "personal" secreted in the bedroom dresser drawer. The envelope contained certain draft registration and classification cards, the possession of which was unlawful. Petitioner Harris, upon being indicted for the possession, concealment, and alteration of these cards, promptly moved for suppression of the evidence. The motion was denied, and the Supreme Court granted certiorari. In a five to four decision, the action of the district court was affirmed. The majority opinion, delivered by Mr. Chief Justice Vinson, was that since the search was contemporaneous with the arrest, the search could extend beyond the petitioner's person to include the premises under his immediate control,\textsuperscript{48} which he interpreted as meaning the whole of the apartment.\textsuperscript{49} Since the articles which the agents sought (the oil company checks) were small and easily concealed, a very thorough search was permissible.\textsuperscript{50} And he justified the seizure of the cards on the

\textsuperscript{44} Boyd v. United States, \textit{supra} note 2; Entick v. Carrington, \textit{supra} note 8. cf. Marron v. United States, \textit{supra} note 41 (since the books and papers seized were classified as instruments of the crime).
\textsuperscript{47} \textit{Supra}, note 1.
\textsuperscript{48} This is certainly the law. \textit{See} cases footnote 41, \textit{supra}.
\textsuperscript{49} Hardly justifiable under the Go-Bart and Lefkowitz cases \textit{supra} note 41.
\textsuperscript{50} A rather novel approach, and highlighted by Mr. Justice Murphy's dissent when he says that because the objects sought were small and easily concealed, the "discovery of such objects requires an (great) invasion of privacy" so "the dangers inherent in such an invasion without a warrant far outweigh any policy underlying this method of crime detection." 331 U.S. 145, 189, 67 Sup. Ct. 1098, 1116 (1947).
theory that since the possession was unlawful and the United States was entitled to possession, such seizure was valid. Finally, Chief Justice Vinson adverts to the belief that the possession of the cards constituted an offense being committed in the presence of the officers, thus justifying an arrest for the possession of the cards, to which the seizure of the cards would be a justifiable incident.

The four dissenting justices wrote three separate opinions, and in the course of so doing rather thoroughly examined the reasoning of the majority. Mr. Justice Frankfurter's dissent (in which Mr. Justice Rutledge concurred) held the search unreasonable because it carries the fiction of "possession" by which searches are allowed as an incident of arrest too far. The test of possession in such instances, says Mr. Justice Frankfurter, is whether the articles are in "such open and immediate physical relation to him as to be, in a fair sense, a projection of his person." Most thoroughly condemned is the statement that since possession of cards was illegal, a seizure of them was a justifiable incident of the arrest. Said Mr. Justice Frankfurter: "Apparently, then, a search undertaken illegally may retrospectively, by a legal figment, gain legality from what happened four hours later. This is to defeat the prohibition against lawless search and seizure by the application of an inverted notion of trespass ab initio."

Mr. Justice Murphy's dissent concurs in the view of Mr. Justice Frankfurter, but lays greater stress on the fact that allowing a search and seizure of such a nature converts a warrant for arrest into a general search warrant, the very thing the constitutional provision was intended to prevent. He would limit seizure as an incident to arrest to articles on the person or which are visible and accessible.

The chain of thought running through the first two of the dissenting opinions that the intensity of the search determines whether the search and seizure was legal or illegal, does not meet with the approval of Mr. Justice Jackson, the fourth dissenter. Says he: "we cannot say that a search is illegal, or legal because of what it ends in. It is legal or illegal because of the conditions in which it starts." Apparently he would approve of a search of one's home only under a valid search warrant.

On a few things, adequately supported by previous United States Supreme Court cases, all the justices are in accord. They agree that a search as an incident

51. First suggested by dictum in Davis v. United States, 328 U.S. 582, 66 Sup. Ct. 1256 (1946) (upheld seizure of gasoline stamps by 4-3 decision, shortly after death of Mr. Chief Justice Stone, and while Mr. Justice Jackson was in Nuremberg) (decision based on defendant’s consent to the search).
52. This circuitous reasoning may well have been suggested by the language in Marron v. United States, supra note 41 (allowing seizure of books and papers used in liquor business while making valid arrest); and ignores the limitations on that case suggested in note 41, supra. Similar reasoning suggested by counsel in the Di Re and Johnson cases is flatly rejected by Mr. Justice Jackson.
54. Id. at 167, 67 Sup. Ct. at 1109.
55. Id. at 197, 67 Sup. Ct. at 1120.
56. Ibid., stating that "The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate."
of lawful arrest may extend beyond his person to include the premises under his control at the time of the arrest. Likewise, that general exploratory searches are illegal and to be condemned. And finally that a seizure of mere evidentiary materials from the premises legally searched as an incident to arrest is always bad. Beyond this, there is disagreement.

The majority say that since possession of the cards was illegal, their seizure was legal. The earlier case of *Davis v. United States* (thoroughly criticized in the Frankfurter dissent) lends some support to this view that the character of the property seized determines the propriety of the seizure. The dissent strongly denies this, on the very appealing theory that the character of the property found can never justify what was at the outset unjustified. The majority opinion in the *Di Re* case follows this reasoning of the dissenters in the *Harris* case. The judges also find themselves disagreeing on the extent of search allowable. The majority say that the nature of the goods sought makes a very thorough search permissible. But the minority reply, with the rather adequate support of the landmark case of *United States v. Lefkowitz* that to seize articles other than those on the person or which are visible and accessible is to indulge in the “general exploratory searches” which have been so roundly condemned. Mr. Justice Jackson’s separate dissent denies that the nature of the goods sought makes any difference in the allowable search, and also disagrees with the minority’s “visible and accessible” test as to the propriety of the seizure.

Precisely where the law of search and seizure has been left by *Harris v. United States* must remain, for a time at least, a matter for conjecture. If the majority opinion is not overruled, certain changes must be said to have been made in the federal law on search and seizure:

1. The extent of the allowable search may vary not only with the place where the arrest is made, but also with the nature, size and concealibility of the articles sought.

2. If, during the course of a valid search, materials are discovered the possession of which is illegal, they may be seized, even though they are totally disconnected from the crime for which the arrest was made.

3. Even though the search may have extended farther than justified under the facts of the case, the finding of a contrabrand somehow cures the defective search.

If these conclusions are the result of the *Harris* case, then not only does it overrule a long series of judicial decisions, but it also makes great inroads on the

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60. *Supra*, note 51.

61. The opinion in both the Di Re and Johnson cases was written by Mr. Justice Jackson (who dissented in *Harris v. United States*).


protection afforded by the Fourth Amendment, since it would allow searches incidental to arrest beyond that allowed under a search warrant; and would allow seizure of goods which could not be seized even under a valid search warrant. A logical extension of the case could well result in the striking of the Fourth Amendment by doing all searching “as in incident of lawful arrest.”

If the search and seizure is unlawful, the owner of the property may, of course, pursue his civil remedies against the party or parties seizing the goods. He should also be entitled to have the goods returned to him, if he is in fact entitled to the possession of the goods (which obviously is not the case if the goods belong to another or if they are contraband or other property the possession of which is illegal). However, the real interest of the one from whom the goods was taken is, almost invariably, to prevent their being used as evidence to convict him of a crime. Many states deny any motion of this nature, reasoning that violation of the law should be punished, no matter how the proof of this violation is obtained. Other states, and the United States, have refused to get this far. The rule for federal courts is that the application to suppress evidence should be made before trial except where the fact of seizure is not then known. However, the trial court may allow application for suppression to be made for the first time at the trial, despite previous knowledge. Such applications may be reviewed only after the applicant has been convicted if made after prosecution has begun. The failure to properly move for suppression of the evidence will, of course, constitute a waiver of the defendant’s right to suppression, and he cannot later complain that the evidence was obtained in contravention of the Fourth Amendment.

Since the Fourth Amendment has never been deemed incorporated in the due process clause of the Fourteenth Amendment, the only searches and seizures protected against are those made by the Federal Government. If the evidence was seized by a private person or by state officials, a move to suppress will be denied in the federal courts. However, even though the one doing the actual searching and seizing be not a federal officer, if the substance of the search is such that it is

64. Codified in Fed. R. Crim. P., Rule 41(e).
65. Ibid.
66. This seems to have been the rule of the common law. See Waite, Reasonable Search and Research, 86 U. of Pa. L. Rev. 623 (1938), and cases cited therein.
69. Cogen v. United States, 278 U.S. 221 (1929). Which means that the ruling on an application made after prosecution is begun cannot be appealed from by the Government; United States v. Rosenwasser, 145 F. 2d 1015 (C.C.A. 9th 1944).
really federal action, or a joint action of state and federal officers, the search and seizure is unlawful within the terms of the Fourth Amendment, and the evidence is inadmissible.

The individual may, of course, always consent to a search which would otherwise be illegal. But the application of the “consent” idea to a particular situation is by no means simple. In *Davis v. United States* the majority of the Supreme Court thought that petitioner’s agreement to search constituted consent, but the dissent felt the agents’ intimation that force would be used if necessary was “implied coercion” and obviated consent. Though the decision in the *Johnson* case denied consent, there was no discussion of the matter.—Since on the face of the opinion, the petitioner merely opened the door and let the police officer in, it is to be presumed that here, as in the *Davis* dissent, there was some feeling of “implied coercion.” Since the facts will not be reviewed on appeal, the trial court’s decision on the question of consent will seldom be reversed.

The conclusions of the author as to the effect of these three recent cases upon the law of search and seizure as an incident to arrest may be summarized as follows:

1. The arrest must be lawful, and the law of the state where the arrest is made will be used as the standard to determine the lawfulness of the arrest.
2. But once the standard is determined, the federal courts may determine from the facts whether or not the standard has been met.
3. Under federal law, in order for an offense to be committed “in the presence of” the arresting party, it must be committed within his sight. The *Trupiano* case should give us a square holding on this for the first time in the United States Supreme Court.
4. Dangerous weapons, fruits and instrumentalities of crime, and evidence of the crime charged may be seized from the person of the arrested party.
5. Evidentiary material, as distinguished from instrumentalities and fruits of crime can never be seized from the premises where the arrest is made.
6. Exploratory searches remain condemned, but the area which may be properly searched has been extended by the majority holding in the *Harris* case.
7. If the property seized is of a nature the possession of which is illegal, then under the *Harris* case it may be properly seized even though it otherwise could not. This could result, if the holding is not overruled, in a practical eradication of the Fourth Amendment. If a search, no matter how unlawful, finds contrabrand, then the search somehow retrospectively acquires legality. The effect of such a rule is to state that, if the search and seizure is incident to arrest, then the writ of assistance,
at which the Amendment was aimed, has been reinstated in all its essential aspects. Perhaps the finest available criticism of the reasoning in the *Harris* case is found in the decision of Judge Learned Hand in *United States v. Kirschenblatt,* where he says:

"After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. . . . Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

Mack Hency

77. 16 F. 2d 202, 203 (C.C.A. 2d 1926).

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